



JUDGE DEBORAH THOMAS -FELIX , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/065, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 12 June 2018, in the case of Elzarov v. Secretary-General of the United Nations. Mr. Zurab Elzarov filed the appeal on 30 July 2018, and the Secretary-General filed his answer on 28 September 2018.

THE UNITED NATIONS APPEALS TRIBUNAL

including a summary of the SRB review of candidates and recommendations, the UNAMID's gender target score and the names, gender, nationalities and geographical representation of the candidates. Mr. Kamea also testified that SLAT/EOSG requested Mr. [Jean-Pierre] Lacroix, Under-Secretary-General for the Department of Peacekeeping Operations (USG/DPKO) to advise on the candidate considered most suitable among the three candidates. However, when questioned on the legal basis for such a request to the USG/DPKO, Mr. Kamea agreed that there was no such provision in ST/AI/2016/1. However, it was [allegedly] in accordance with standard operating practice within the EOSG and the wide discretion of the Secretary-General in selection decisions. Mr. Lacroix, USG/DPKO recommended the appointment of the female candidate from France simply by appending a signature next to her name but with no explanation as to why she was preferred amongst three equally appointable candidates.

... The Note to the [Chef] de Cabinet included the three top candidates recommended by the SRB, in alphabetical order, and a note mentioning the candidate

Gender Parity (Gender Strategy) [was] not supported by the facts. Indeed, the successful candidate met the required criteria for the Post, and also the desirable criterion of knowledge of Arabic". Ms. Beagle confirmed that gender parity was one of the factors taken into consideration but was not a decisive factor in the selection process. She also testified that [...] there was nothing in the SRB memorandum to the EOSG indicating that gender parity was the main issue in the selection process.

3. On 29 December 2017, Mr. Elzarov filed an application with the UNDT contesting the decision not to select him for the position of D-1 Chief of Service, Humanitarian Affairs in UNAMID. An oral hearing was held from 21 to 25 May 2018.

4. On 12 June 2018, the UNDT issued Judgment No. UNDT/2018/065, dismissing Mr. Elzarov's application. The UNDT considered that the evidence presented was clear and unequivocal in that all top three candidates were equally appointable and SLAT/EOSG, who were responsible for preparing the submission to the Chef de Cabinet, did not confer any

Submissions

Mr. Elzarov's Appeal

8. Mr. Elzarov submits that the UNDT unjustifiably held that he had “failed to show that he was denied a fair chance of promotion”. In particular, the UNDT unlawfully ignored and/or failed to consider the following facts.

9. According to the principles of the United Nations Charter and Staff Regulation 4.3, selection of staff members shall be made “without distinction as to race, sex or religion” and, “[s]o far as practicable, selection shall be made on a competitive basis”. Whereas the Secretary-General claimed before the UNDT that gender was not considered over merit, the USG/DM's letter upholding the contested decision referred to the comments from the Administration, noting that “[t]he decision to ultimately select a female candidate was made to ensure equal distribution of female representation at senior positions (P-5 and above) at UNAMID”.

10. Mr. Elzarov scored the highest in both the written assessment and the competency-based interview. The Hiring Manager did not take the results of the written test and competency-based interviews into consideration in ranking the candidates, with the intention of downplaying the results of the selection process. Moreover, the Hiring Manager manipulated the selection process and violated section 7.4 of Administrative Instruction ST/AI/2016/1 (Staff selection and managed mobility system) by setting, without the involvement of the assessment panel members, a low passing score of 40 out of 100 for the written assessment, which allowed the unlawfully selected candidate to pass with the score of 42 out of 100.

11. The Secretary-General, in his response submitted to the UNDT, misrepresented the facts by stating that “[t]he selected candidate scored the highest in the competency of professionalism”. The selected candidate did score the highest in the “competency of professionalism”, but only as compared with her responses to questions on other competencies. As testified by a member of the interview panel, the panel did not compare the answers of the interviewed candidates and did not rank them.

² Section 7.4 provides that the assessment panels shall establish passing thresholds for the written assessments in order to determine which candidates may be invited for interviews.

12. The interview panel had assessed Mr. Elzarov as having “highly desirable experience on protection of civilians” and “desirable experience of giving policy advice to senior officials” as well as experience working on “protection issues in multiple jobs and with multiple actors”. None of the other candidates received such comments. The Hiring Manager deliberately dismissed and ignored Mr. Elzarov’s highly desirable skills to ensure the selection of her preferred candidate.

13. The selected candidate’s competency in Arabic was taken into consideration even though the knowledge of Arabic was only “desirable” for the position of D-1 Chief of Service. Moreover, the Hiring Manager was unable to substantiate the selected candidate’s knowledge of Arabic. In addition, the Hiring Manager violated the provisions of ST/AI/2016/1 by ranking the candidates based on their language proficiencies. According to section 6.1³ of ST/AI/2016/1, language proficiency is one of the criteria used at the initial application stage to pre-screen candidates. As such, eligible candidates should be ranked on the basis of the results of the written assessment and competency-based interviews following the completion of the eligibility screening.

14. The SRB deliberately and unlawfully placed the preferred candidate at the top of the document entitled “Manager Preference of Recommended Candidates” in a successful attempt to influence the Secretary-General’s selection decision. Moreover, the document did not contain any reference to Mr. Elzarov’s years of work experience. In fact, Mr. Elzarov was the only one, among all 11 recommended candidates, whose years of work experience was intentionally omitted. By omitting Mr. Elzarov’s years of work experience, the Hiring Manager misled the Secretary-General in an effort to justify the selection of her preferred candidate.

15. Section 4.7 of Secretary-General’s bulletin ST/SGB/2016/3 (Senior Review Board) requires the SRB to submit its selection recommendations for candidates to fill vacant positions at the D-1 and D-2 levels to the Secretary-General for his selection decision. In the present case, SLAT/EOSG requested the USG/DPKO to advise on the candidate considered most suitable among the top three candidates recommended by the SRB and the USG/DPKO recommended the selected candidate. However, there is no provision authorizing the

³ Section 6.1 provides that candidates are pre-screened on the basis of the information provided in their applications in order to determine whether they meet the eligibility requirements, including the minimum educational, work experience and language proficiencies required, as stipulated in the job opening.

USG/DPKO to provide his selection recommendation. In addition, the SRB proposed the ranking of the three recommended candidates, in violation of section 11.10 of ST/AI/2016/1, which requires the SRB to present to the Secretary-General, in no ranking order, selection recommendations of three candidates.

16. Mr. Elzarov was discriminated against on th

The Secretary-General's Answer

20. The Secretary-General submits that the UNDT was correct in finding that the

Accordingly, the Programme Manager was permitted to consider the candidates' PHPs in developing her ranking of the candidates and, following the assessment, she ranked 11 suitable candidates, listing Mr. Elzarov third; factors that weighed in favour of her ranking two candidates ahead of Mr. Elzarov included years of experience, mix and diversity of headquarters and field experience, and language proficiencies.

24. Contrary to Mr. Elzarov's assertion that his years of work experience were intentionally omitted, the Manager Preference of Recommended Candidates list stated that Mr. Elzarov met the "requirement of [15 years of] work experience". As for the selected candidate's knowledge of Arabic, the Programme Manager had considered her PHP, which stated that she was "fully fluent" in Arabic.

25. In making its recommendation to the Secretary-General, the SRB appropriately took into account the Programme Manager's ranking, UNAT/2018/15.4(3).

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34. As noted above, Mr. Elzarov filed his Third Motion seeking leave to file comments on the Secretary-General's answer. However, neither the Rules nor the Statute provide for an appellant to file an additional pleading after the respondent has filed his or her answer. Nonetheless, Article 31(1) of the Rules and Section II.A.3 of Practice Direction No. 1 of the Appeals Tribunal allow the Appeals Tribunal to grant a party's motion to file additional pleadings if there are exceptional circumstances justifying the motion. Mr. Elzarov has not demonstrated any exceptional circumstances. Accordingly, the Third Motion must also be denied.

35. The primary issue for determination in this appeal is whether the UNDT erred in finding that, from the evidence, Mr. Elzarov had "failed to show that he was denied a fair chance of promotion".

36. The Staff Regulations and Rules (ST/SGB/2017/1) set out the rules related to transfer, promotion and appointment of staff, and also provide that "as stated in Article 101 of the Charter, the power of appointment of staff members rests with the Secretary-General". Mr. Elzarov ranked third of a list of suitable candidates and a Note was sent forward for the final phase for the selection of a candidate. The UNDT, in its findings of fact, stated the following:

... The Note to the [Chef] de Cabinet included the three top candidates recommended by the SRB, in alphabetical order, and a note mentioning the candidate recommended by the USG/DPKO. Mr. Kamea's evidence was that all three candidates were equally appointable and that any one of the three candidates could have been selected and the final selection decision was at the discretion of the Chef de Cabinet under delegated authority from the Secretary-General.

The SRB also recommended that two non-recommended candidates be placed on the relevant roster.

37. As we examine this ground of appeal to determine whether Mr. Elzarov's application received full and fair consideration, we remind the parties that it is settled jurisprudence that the Secretary-General is vested with a wide discretion when making a decision on staff selection/promotion. In this case, the Secretary-General had the list of potential candidates for final selection and Mr. Elzarov was included in that list. The Secretary-General could have selected any one of the three candidates, when he exercised his discretion and made a selection.

we accept the Secretary-General's submission that Mr. Elzarov is unable to show through clear and convincing evidence that he was denied a fair chance of promotion.

43. For those reasons, we uphold the decision of the UNDT.

44. We have examined the other grounds of appeal and find them to be without merit.

Judgment

45. The appeal is dismissed and Judgment No. UNDT/2018/065 is hereby affirmed.

Original and Authoritative Version: English

Dated this 28th day of October 2018 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Murphy

(Signed)

Judge Raikos

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar