
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/028
Judgment No.: UNDT/2018/065
Date: 12 June 2018
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THE HEARING

6. Given the time differences between Nairobi and New York, where most of the witnesses were based, a hearing took place from 21 to 25 May 2018. The Applicant was self-represented and the Respondent was represented by Ms. Nusrat Chagtai. The Applicant and the following witnesses gave evidence:

- a. Mr. Luke Mhlaba, UNAMID Mission Chief of Staff.
- b. Ms. Jan Beagle, Under-Secretary-General for Management.
- c. Ms. Yvette Blanco, Interview Panel Member and currently Chief Security Council Practices and Charter Research Branch.
- d. Ms. Bintou Keita, Hiring Manager and currently Assistant Secretary-General for Peacekeeping Operations.
- e. Mr. John Kamea, Senior Officer, Senior Leadership Appointments Team, EOSG.
- f. Ms. Alicia Barcena, Chairperson SRB and currently Executive Secretary of the United Nations Economic Commission for Latin America and the Caribbean.

FINDINGS OF FACT

7. The Applicant joined the Organization on 21 April 2007. Since May 2015, he served as Acting Chief of Service, Humanitarian Affairs on a temporary assignment at the D-1 level. On 28 October 2016, his fixed-term appointment was converted to a continuing appointment.

8. A job opening (JO) for the position of D-1 Chief of Service, Humanitarian Affairs in UNAMID (JO Number: 17-HRA-UNAMID-74843-B-EL FASHER) was advertised on 21 February 2017. The JO specifically mentioned that regard will be paid to the importance of recruiting staff on as wide a geographical basis as possible.

answer in the professionalism competency and that she was particularly effective in conveying her experience in humanitarian affairs.

14.

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20. On 27 December 2017, Mr. Luke Mhlaba, WPCO ~~F~~ "Ej kgh' qh' Uchi" informed the Applicant by telephone that the Secretary-General had not selected him for the position probably

job opening and may also include other oral test formats to further assess other evaluation criteria stipulated in the job opening.

7.6 Upon completion of the assessment process, the Office of Human Resources Management shall transmit the list of suitable candidates who have successfully passed the assessment process to the programme managers for their review, pursuant to section 10 below, prior to submitting them to the Global Central Review Board or the [SRB]. Pursuant to section 7.2 above, the names of previously rostered candidates will not be submitted to the Global Central Review Board or the [SRB].

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programme managers do not provide their written input and preferences within the established deadline, the Office of Human Resources Management shall deem all suitable candidates to be equally ranked by the programme managers.

27. Staff rule 4.15 (a) provides as follows regarding the role of the SRB:

11.3 Along with such lists, the Office of Human Resources Management shall prepare and submit to the [SRB] secretariat the following information:

- (a) A copy of the job opening associated with the vacant position;
- (b) The personal history profile of all candidates who applied;
- (c) In accordance with section 5.2 above, the performance evaluations reports of all candidates who applied;
- (d) A reasoned and objectively justifiable record on the application of the evaluation criteria stipulated in the job opening for the

11.8 The Office of Human Resources Management shall further indicate for due consideration by the [SRB] those suitable candidates who are:

(a) Internal candidates; [] _

11.9 Further to sections 11.7 and 11.8 above, the Office of Human Resources Management shall also indicate for due consideration by the [SRB] those suitable candidates who have had prior service or employment in the field for D-1 and D-2 positions for which relevant field experience is highly desirable.

11.10 The [SRB] shall present to the Secretary-General, in no ranking order, selection recommendations of three candidates, including at least one female and at least one male candidate, taking into account the provisions of staff regulation 4.2 and Secretary-I [] provided pursuant to sections 11.7, 11.8 and 11.9 above.

31. In relation to the selection decision, section 12.2 of ST/AI/2016/1 provides that the Secretary-I [] selection recommendations submitted by the [SRB] for the filling of vacant positions at the D-1 and D-4 []

32. In *Abassi* 2011-UNAT-110, the United Nations Appeals Tribunal (UNAT) held that:

In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

33. Regarding the discretion of the Secretary-General in matters of selection, UNAT held in *Bofill* 2013-UNAT-383 that:

The Appeals Tribunal has consistently held that the Secretary-General has a broad discretion in matters of promotion and it is not the function of this Tribunal, or the UNDT, in the absence of evidence of bias, discriminatory practices or mala fides to substitute its judgment for that of the competent decision-maker.

34. Similarly, UNAT ruled in *Toure* 2016-UNAT-660 as follows:

Y j gp" lwf i kpi " vj g" xcrkf kv{ " qh" vj g" Cf o kplutcvkqpau" gzgtekuq" qh" discretion in administrative matters, the Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate.

The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as well as their contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons.

Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

38. The Applicant, who is self represented, provided a detailed and well argued case identifying a series of what he considered to be errors of procedure which impugned the correctness of the final decision not to appoint him. A brief recitation of these errors included the following with the Tribunals findings in italics:

- a) That Mr. Mhlaba suggested that he was a strong candidate but that a female was selected probably in line with the strategy on gender parity. This was subsequently confirmed by the MEU letter of 26 February 2018 which stated at paragraph 5 "the 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, given that the Mission has one of the lowest percentages of female representation at senior levels of 21 per cent. It is noted that this was in breach of Staff regulation 4.2 and 4.3, which required appointments to be made without distinction as to race, sex or religion merited serious consideration by examining both the various stages of the selection process and particularly what was in the mind of the decision maker at the time the decision was made.

Mr Mhlaba stated that he took no part in the decision-making process. He was asked by DPKO, Headquarters, to convey the decision to the candidates. He was engaging in pure speculation when he expressed the

opinion that the successful candidate may have been appointed because of the policy on gender parity. The Tribunal accepts this explanation.

- b) That as a national of the Russian Federation, he is from an underrepresented country and that the decision maker did not take geographical diversity, an organizational priority, into account although it was specifically referred to in the JO Number: 17-HRA-UNAMID-74843-B-EL FASHER as of wq'tgi ctf "y km'dg"q {n

By email dated 28 September 2017, Ms. Marianne Haugaard, Senior officer, SLAT, EOSG, requested Mr. Marco Bianchini, Chief, Office of the USG/DPKO to obtain the advice of Mr. Lacroix, USG/DPKO on the candidate considered most suitable among the three recommended candidates. By email dated 20 December 2017,

42. The UNAT held in *Rolland v. [redacted]* the management is able to even minimally show that the [redacted] as given full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of