



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/007/
JAB/2007/058
Judgment No.: UNDT/2010/081
Date: 5 May 2010
Original: English

Before: Judge Adams
Registry: New York
Registrar: Hafida Lahiouel

KHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Salim Shaikh

Counsel for respondent:

Tamara Shockley, UNICEF

Case No.

7. The Head of Office did not agree with the APC's recommendation and selected the candidate recommended by the SAP. By letter of 9 December 2006 he gave the following reasons for his decision –

I choose not to agree with the APC recommendation in one case, IMIS No. 47111 (Sr. project assistant Islamabad) for the following reasons:

The minutes of the SAP meeting of 22 November suggest that while the APC's recommended candidate has commendable qualities; another candidate still scores far better on the tests and interviews. I agree with APC's consideration that it is important to promote female candidates for senior positions. This concern is traditionally factored into the point scores with an automatic ten point bonus to support gender balances in the workplace. But even so, the other candidate comes out with a significantly higher score at 158 to 120 (or 130).

In connection with this appointment and as a general frame of reference, the section 4.2 of the UN Staff Regulations states that:

“The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity”

I cannot see we would follow the above unless we select the recommended choice from the SAP for this position, [name of appointee]. He is clearly much better qualified for the position according to the minutes from the SAP meeting.

...

8. On 12 December 2006 the applicant was informed that another candidate had been selected.

Applicant's submissions

9. The questions asked at the interview were crafted to favour the successful applicant and disadvantage the applicant. The respondent did not give fair consideration to the applicant's almost eighteen years of UN experience and higher academic qualifications and unfairly favoured the less-experienced appointee. The appointee did not qualify for the mandatory requirements of seven years' experience and he was not even eligible for short-listing. The successful candidate had failed at

least four times between 2003 and 2006 to obtain appointment to other similar positions and this shows that he should not have been recommended for appointment.

10. The role of the Head of Office, as supervisor of two out of three members of the SAP, vitiates the fairness, honesty and impartiality of the decision by the respondent.

11. The SAP is not a statutory body and is considered subordinate to the APC. SAP recommendations cannot override those of the APC. The respondent therefore grossly erred in favouring the recommendations of the SAP. Furthermore, the APC is permanent, in contrast to the SAP, which is appointed on an *ad hoc* basis, whenever a vacancy arises. Its members are not as experienced and their assessment should not

21. The Manual provides –

Local Selection Advisory Panels (SAPs)

4.5.28 General

With a view to providing increased efficiency in the appointment process and ensure suitable selection, while at the same time preserving the safeguards inherent in the APC system, SAPs are used

3. No APC member may be called to participate in a SAP if:
 - a) the level of the post being reviewed is higher than that of the APC member;
 - b) he/she is the first or second reporting officer of the vacant post being reviewed; *and/or*
 - c) he/she is encumbering or has recently vacated the post being reviewed.

23. The Manual provides –

Local Appointment and Placement Committee (APC)

4.5.31 General

Local APCs are advisory bodies established by the Executive Director under the provision of the UN Staff Rule 104.14.

24. Annex 4.G to the Manual provides –

Terms of Reference

Local Appointment and Placement Committee (APC)

Composition

Number of Members

1. Depending on the size of the office, the Local APC should have from four to 12 members. Staff members under both the 100 and 200 Series of the UN Staff Rules are eligible for membership.

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3. All members are appointed by the Head of Office, after appropriate consultation with the Human Resources/Operations Officer and the Local Staff Association (LSA). Alternates may also be chosen to replace members. If the Local APC so decides, alternates may attend all meetings. However, they may vote only if they are representing an absent APC member.

Selection

4. Members appointed do not represent any entity outside the Local APC and serve in their own individual capacity.

resulted in a recommendation favouring the applicant. Upon this hypothesis, if no recommendation were made by the SAP except for re-advertisement, it is not clear whether the APC would even have been convened. Even if it were, is it not possible to predict with sufficient probability what the APC would have done with such a report. I would not be prepared to infer from the narrow majority in favour of the applicant that there would have been a similar outcome.

26. The applicant also relies on what appear to be previously unsuccessful applications of the successful candidate for somewhat similar positions as demonstrating that he could not have been qualified for the position in issue here. This is such an obvious *non sequitur* that it does not require detailed discussion. Overall, there can be no doubt that the members of the SAP and the APC were fully able to appraise the qualifications and experience of the successful candidate and there is nothing in the matters raised by the applicant that suggests that they did not do so with an adequate understanding both of what he had actually achieved in respect of these competencies and the requirements of the post. It is significant, I think, that the majority of the APC who favoured the applicant did not suggest that the successful candidate did not have the qualifications for appointment or was less qualified than the applicant in those respects. Indeed, their reliance on her sex and experience strongly suggests that they accepted the view of the SAP that the successful candidate was more qualified in respect of the specified competencies than the applicant. I am certainly not in a position, and the evidentiary material before me at all events is not adequate to permit me, to conclude that the conclusions the

imbalance can only be corrected by the appointment of otherwise qualified candidates: the rule could not justify appointment of an inadequately qualified person in light of the overreaching requirements of competence. If the opinions of the SAP and, ultimately, the Head of Office were conscientious, the applicant was not a candidate whose appointment could be used to correct a gender imbalance although it appears that this was a very real problem in the Islamabad operations of UNICEF.

30. It follows from the structure which I have described above that the recommendations of neither the APC nor the SAP have any primacy of importance or persuasion. The responsibility for making the appointment is entrusted to the Head of Office. He is not bound to accept the recommendation of one over the other, which is the logical consequence of accepting the applicant's contentions about the matter. He is bound to exercise his independent judgment after giving careful consideration to the recommendations made to him, explaining (as he did) why he preferred one rather than the other. Though brief, his reasons for accepting the recommendation of the SAP are adequate to justify his conclusion.

31. Finally, as to whether the eventual appointee should have been considered for the position because he was a staff member on a TFT contract, the respondent tendered without objection a statement from the Chief of Operations in UNICEF Pakistan which states –

[The appointee] was working on a Temporary Fixed-Term (TFT) contract at the time of interview. UNICEF Policy and Procedures Manual, *Chapter 6 clause 6.2.6(a)*, states:

“TFTs are considered UNICEF staff members and their conditions of service are governed by the UN Staff Regulations and Rules;”

TFT are considered as staff members and therefore by virtue of that status are considered for internal positions. [The appointee] did not need any special approval from the Representative or OIC. For the purpose of transparency in the recruitment process, approval may have been sought from the Representative or OIC.

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