



M. Y.

v.

Chairperson of the African Union Commission

FOR APPLICANT : *Pro se*

FOR RESPONDENT: Office of the Legal Counsel, African Union Commission

BEFORE : Hon. Andrew K.C. NYIRENDA, Hon. Shaheda PEEROO and Hon. Salufu S. MAINGA¹

JUDGMENT

Procedural and Factual History

1. On 20 December 2016, the Applicant, head of the Information Society Division (P-5) within the Directorate of Infrastructure and Energy, filed an application contesting the decision not to select him for the post of Director of Infrastructure and Energy.
2. The Respondent was served with the application on 20 December 2016. His Answer was due no later than 21 January 2017. The Respondent did not file an Answer.
3. On 9 March 2017, upon request by Applicant, the Tribunal directed the Respondent to file the recruitment report generated in the course of recruiting for the post in question.
4. On 12 July 2017, the Respondent filed the "APROB Report;" APROB being the Appointment, Promotion and Recruitment Board (APROB), an advisory board tasked with all matters relating to recruitment, appointment, promotion, review, appraisal, staff re-employment as well as staff development.²
5. On 4 June 2018, the Applicant moved to have his application decided by way of summary judgment. The motion was transmitted to the Respondent. The Respondent did not file a reply to the motion.
6. On 21 March 2019, the Applicant requested a status update and apprised the Tribunal on: (1) his election as chairman of the African Union Credit Union; and (2) the ongoing administrative efforts by the Organization to upgrade him to the D-1 salary grade; as well as the urgency of this matter given his projected mandatory retirement in 2021.³

¹ Judge Sylvester Salufu Mainga was sworn in as African Union Administrative Tribunal Judge on 10 July 2019. He joins Judges Nyirenda and Peeroo in this judgment to permit disposition of this matter under Article 4(i) of the Tribunal's Statute.

² Staff Rule 27.

³ Applicant's Request for Status Update.

Summary of Facts

7. The Applicant first joined the Organization in September 2007 and currently serves as the Head of the Information Society Division (P-5) within the Directorate of Infrastructure and Energy.
8. In late 2015, the Organization advertised a vacancy for the post of Director of Infrastructure and Energy. On 28 October 2015, the Applicant submitted his application for the advertised post and went through the required selection process, which included a written assessment and an in-person interview.⁴
9. When the selection process was completed, the overall results indicated that the Applicant scored the highest mark of 77.66%, followed by a female external candidate who scored 76.69%. The third top candidate was a male external candidate (63.64%), and the record reveals that that candidate is the Applicant's compatriot from Mauritania.⁵
10. Following APROB deliberations conducted on 5 April 2016, the Chairperson was presented with a list of the three candidates for final appointment selection. The Chairperson subsequently selected the female external candidate for appointment.⁶ The female candidate declined the appointment offer.⁷
11. By a memorandum dated 5 July 2016, APROB transmitted a second recommendation for the post listing the Applicant and the third top candidate for selection by the Chairperson.⁸ The Chairperson selected the third top candidate and appointed him as Director of Infrastructure and Energy.
12. When the Applicant became aware that he had not been selected for appointment, he petitioned and met with the Chairperson in October 2016, during which he was promised administrative resolution. When nothing came of it, he filed his Application with the Tribunal contesting the Chairperson decision not to select him.
13. The Applicant represented that during his meeting with the Chairperson that the Chairperson told him that *"the reason she did not appoint me for the position of the Director is simply because she wouldn't imagine me leaving the ICT Division which I am managing very well."*⁹
14. The Applicant's subsequently requested the Tribunal to exercise its authority under Article 14(v) and 17 of the Tribunal's Statute and determine the case by way of summary judgment. He submitted, there being no Answer from the Respondent and because the *APROB Report* bears out his factual claims, his Application was appropriate for determination on the documentary record.
15. In his motion, the Applicant posits that the appointment of the third top candidate violated Article 18 of the Statute of the Commission, which provides that in recruiting senior administrative, professional and technical staff, paramount consideration shall be given to competence. He further submits that gender and geographic considerations are already addressed by the recruitment practices of the Organization, which affirmatively mandate extra points for female candidates and candidates from least represented member states.
16. The Applicant also argues that the Chairperson's decision not to select him is not in accordance with Staff Regulations 2.1(b) and 3.4(b), which require preference to be given to the highest standards of efficiency, competence and integrity alongside the need to promote gender balance and equality. In addition, he argues that Staff Regulation 6.4(a-d) requires due consideration to be given to persons already in the service of the African Union.

⁴ Applicant's Annex 1; APROB Report.

⁵ *Id.*

⁶ APROB Report.

⁷ APROB Report.

⁸ *Id.*

⁹ Application p. 6.

17. In the Applicant's view, while the Chairperson is vested with discretionary authority to appoint staff members, this authority must be exercised reasonably and legally. He submits that the Chairperson exercised her discretion unreasonably because her decision fell outside the boundaries of the areas of decisional freedom generally accepted within the African Union recruitment framework.
18. The Applicant argues that the Chairperson's conduct does not favor the Organization; it sends the wrong message to those who perform well. Within the recruitment process, the Applicant maintains, the assessment of a candidate's competence is a technical task entrusted to APROB not the Chairperson. According to the Applicant, the Chairperson is provided with discretionary authority to factor in non-technical considerations such as gender parity and balanced geographic representation.
19. In the absence of any reasonable explanation from the Organization, the Applicant asks the Tribunal to: (a) declare the contested decision unlawful, legally unreasonable, not in the best interest of the organization which inhibits goodwill of staff members; (b) order his upgrade to D-1 salary grade effective 5 July 2016 with adequate steps; and (c) order compensation in the form of two years' salary at the D-1 level for the moral and financial damages he has suffered.

Legal Standards

20. The power of appointment of staff members is vested on the Chairperson or a competent authority of any other organ of the African Union.¹⁰ In exercising this appointing authority, the Chairperson or the competent authority is advised by the Appointment, Promotion and Recruitment Board (APROB).¹¹
21. Both the Statute of the Commission and the Staff Regulations and Rules set out a staff selection framework as well as guiding principles, which the appointing official may not disregard when making an appointment decision.
22. Under the Statute of the Commission, the Chairperson is required to appoint staff in accordance with the provisions of Article 18 of the Statute,¹² which mandates that all recruitments be conducted in accordance with recruitment procedures contained in the Staff Regulations and Rules.¹³
23. In the staff selection process, the paramount consideration is the need to guarantee the highest standards of competence, efficiency and integrity.¹⁴ Additional considerations include the principle of equitable geographical representation, gender parity, and considerations for candidates already in the service of the Organization.¹⁵
24. The decision to appoint or not to appoint a staff member is an administrative decision within the meaning of Article 2(i) of the Statute of the Administrative Tribunal and properly within the scope of the Tribunal's review authority.
25. Because the Respondent failed to file an Answer and subsequently did not oppose the Applicant's Motion for Summary Judgment, the Tribunal is satisfied that it can proceed to give a judgment on the basis of the Applicant's documentary evidence placed before it.¹⁶

¹⁰ Staff Regulation 6.1.

¹¹ Staff Regulation 6.1(c); Staff Rule 55.6 (a); Statute of the Commission Art. 18(2).

¹² Statute of the Commission Art. 8(1)(r).

¹³ Statute of the Commission Art. 18.

¹⁴ Statute of the Commission Art. 18(7).

¹⁵ Staff Regulation 6.4(d).

¹⁶ Statute of the Administrative Tribunal Art. 14(v).

Discussion

26. Our review of the contested staff selection decision is without prejudice to the broad appointment authority of the Chairperson and the presumptive deference we will afford to his or her appointment decisions.¹⁷ Our role in reviewing the appointment decision is not to substitute the Tribunal's decision for that of the administration but rather to examine: (a) whether the procedure set out in the Staff Regulations and Rules as well as other laws of the Organization were properly applied; and (b) whether the staff member's candidacy received proper consideration.¹⁸
27. Where the Tribunal's scrutiny uncovers unfairness, unreasonableness, illegality, unlawfulness, irrationality, procedural irregularity, bias, capriciousness, arbitrariness or other administrative improprieties in the appointment process or decision,¹⁹ which is not an exhaustive list, it may rescind the contested appointment.²⁰
28. It is undisputed that the Applicant was already in the service of the Organization and scored the highest mark during the recruitment process. An external female candidate came second, followed in the third position by a male external candidate, a compatriot of the Applicant who scored 14.02 points less than the Applicant. The Chairperson first selected the female candidate who declined and the Chairperson subsequently selected the third top candidate.
29. We find it very problematic that no reasons have been brought by the Respondent to explain why the Applicant was not selected for the post of Director of Infrastructure and Energy, given that Article 18 of the Statute of the Commission puts greater emphasis on competence when recruiting senior administrative, professional and technical staff, coupled with the Staff Regulations²¹ which also flag efficiency and competence at the top. Our puzzlement is only heightened by the fact that the Applicant is an internal candidate, which was an additional factor that had to be taken into consideration in his favor.
30. On this record, we are unclear as to the rationale for the Chairperson's appointment decision, which appears to run counter to the Statute of the Commission and Staff Regulation 6.4. Furthermore, the averments of the Applicant that the other considerations, namely, gender and geographical representation had already been addressed by the recruitment practices of the Organization have also remained unrebutted.
31. In the instant matter, we expected that the Organization would state the reasons behind the Chairperson exercise of her discretionary appointment authority. In the absence of some form of explanation for the contested decision, either when the decision was made or during proceedings before the Tribunal, our review of the contested decision has been a rather difficult process.²²
32. The real issue for us is whether the Chairperson exercised her discretion reasonably while respecting the principles set forth in the Statute of the African Union Commission as well as the Staff Regulations and Rules. The reason for the Applicant's non-selection, which came from the Applicant and has not been controverted by the Respondent, was that the Chairperson had told him that he was managing his Division very well. Even if that was the case, the Organization cannot put its administrative convenience before the rights of a candidate to be given full and fair consideration during a staff selection process. We find this purported rationale unfair, unreasonable and not in accordance with the laws and policies of the Organization as well as general principles of sound management.

¹⁷ *Roland*, 2011-UNAT-122 para 26, *ILOAT Judgment* No. 2060, para. 4, *ILOAT Judgment* No. 2457, para 6.

¹⁸ *Abbasi*, 2011-UNAT-110; para. 23 & 24; *ILOAT Judgment* No. 2060, para. 4; *ILOAT Judgment* No. 2457, para. 6; *In re Rene Michel Bauman*, WBAT Decision No. 532 (2016).

¹⁹ *Sanwidi*, 2010/UNAT/084; para. 39.

²⁰ *Id.*

²¹ Staff Regulation 6.4.

²² *Obdejin*, 2012-UNAT-201 para. 35 & 36.

33. We are also unable to say that the Chairperson, in the exercise of her appointment authority, has given due regard to the paramount consideration of competence and efficiency as she is enjoined to do by Article 18 of the Statute of the Commission and the Staff Regulations.
34. Accordingly, we declare the decision not to appoint the Applicant irrational, unfair, unreasonable and contrary to the Statute of the Commission as well as the Staff Regulations and Rules. However, our findings here shall not be interpreted to affect the rights of the candidate who accepted appointment as Director of Energy and Infrastructure in good faith.
35. In reviewing the facts of this case and from the Applicant's various submissions, we are able to discern the level of distress, frustration and disheartenment the Applicant has experienced as a result of his inexplicable non-selection. We are also very mindful of the dispiriting effect of such decision particularly for a candidate with the highest score in the recruitment exercise. Finally, we note that despite our findings here, our decision leaves the Applicant in the same post he occupies now with the same professional title and the same supervisory lines as exist now. We do not doubt that all these factors do pronounce the Applicant's distress as he looks at his mandatory retirement in 2021. For these reasons, the Tribunal finds it appropriate to award damages.
36. The Applicant's unsubstantiated prayer for compensation for financial harms is refused.

Orders

37. Consequently, the Tribunal ORDERS:

- a. the Applicant's upgrade to the D-1 salary grade effective 5 July 2016 giving due consideration to Staff Rules 12.2 and 12.3.
- b. the Respondent to pay the Applicant the salary, allowances, entitlements, grants and benefits he would have received as of 5 July 2016 at the D-1 salary grade, reduced by the salary, allowances, entitlements, grants and benefits the Applicant has already received in his current salary grade. This amount shall bear annual interest of 15% calculated from 5 July 2016 until full payment.
- c. the Respondent to pay damages to the Applicant in the form of twelve (12) months gross salary together with annual interest of 15% calculated from the date of this judgment until full payment.

Date: 10 September 2019

/signed/

Hon. Andrew K. C. NYIRENDA, President
Hon. Shaheda PEEROO
Hon. Sylvester S. MAINGA

Secretary: _____

