



IN THE MATTER OF:

S.M., Applicant

v.

Chairperson of the African Union Commission, Respondent

FOR APPLICANT: *Pro se*

FOR RESPONDENT: Namira NEGM, Legal Counsel, African Union Commission

BEFORE: S. MAINGA, President, J. SEDQI, and P. COMOANE

HEARD ON: 11 November 2021; 14 March 2022

JUDGMENT

Procedural and Factual History

1. On 24 July 2020, Applicant, a Travel Assistant within the Travel Unit of Administration and Human Resources Management Directorate (AHRMD), filed an application challenging the decision not to select her for the post of Travel Clerk (GSA5).
2. Counsel for Respondent filed a timely Answer. Applicant did not submit written Observations on Applicant's Answer.
3. Applicant, a national of Ethiopia, joined the Organization in 2007 as a regular appointee Travel Assistant. At the time she filed her application, Applicant maintained a salary grade of GSA4/Step 9. In September 2017, the Organization advertised the post of Travel Clerk, a regular appointment post at the salary grade of GSA5.
4. Applicant submitted her application and was, on 8 February 2019, invited for an interview followed by a written assessment. The aggregated outcome of the interview and written assessment demonstrated that Applicant was the top scoring candidate followed by a Nigerian male, external candidate.
5. The Appointment, Promotion and Recruitment Board (APROB) presented Applicant and the second top candidate to the Chairperson for final selection. The transmittal form underscored that Applicant was a female, internal candidate. The Chairperson selected the second top candidate for appointment.
6. On 30 April 2020, Applicant received an electronic mail from the Human Resources Management (HRM) informing her of the appointment of another candidate as Travel Clerk and her placement in a roster of candidates for future consideration. Similar information was relayed by her supervisor who allegedly told Applicant that "she was trying to get the decision reversed."
7. On 6 May 2020, Applicant wrote to HRM seeking feedback but received no response. However, when she met with the Head of HRM, she claims he expressed surprise that Applicant had not been appointed as Travel Clerk despite her years of experience and African Union's policy on promoting gender equality. Applicant also claims that she received similar reaction from the acting director of AHRMD. During both meetings, Applicant recounts she was told "there will be consultations with the Bureau of Chairperson to have the decision reversed."
8. On 11 May 2020, Applicant met with the Deputy Chief of Staff who allegedly explained to her that the decision to appoint another candidate was made because the successful candidate was younger and because there was a need to maintain "diversity of region as there were many East African [staff] within AHRM." Neither rationale was recorded anywhere in the recruitment report.

9. On 1 June 2020, Applicant petitioned the Chairperson to reconsider his decision. The Chairperson did not respond to her request. She then filed her application with the Tribunal on 24 July 2020.
10. Respondent asks the Tribunal to dismiss the application claiming that the Chairperson properly exercised his appointment powers under Staff reg. 6.4(c) because “applicant’s country quota is already very high in [AHRMD] and the Chairperson must take executive decisions in balancing country quotas ...”
11. Following a preliminary review of the application in November 2021, Applicant was asked to better articulate her pleas for relief. On 29 November 2021, Applicant clarified that she is asking the Tribunal to: (a) set aside the successful candidate’s appointment and to order her appointment in his stead; or (b) order the upgrade of her salary to GSA5/Step 7 effective 26 September 2019, when Respondent selected the successful candidate; (c) alternatively, order payment of three years’ salary in material damages less the salary she had received in her current position and salary grade; (d) order for payment of two years’ salary in moral damages; and (e) order a 10% interest on all awards due to her.
12. Respondent replied on 27 December 2021 generally asking the Tribunal to dismiss the application or alternatively to order Respondent “to consider the Applicant for promotion in line with AU Staff Rules and Regulations [sic].” Respondent did not specifically comment on the remedies sought by Applicant.
13. Upon review of the documentary record, the Tribunal is satisfied that the facts and issues have been presented adequately in the pleadings and determines this matter without the need to invite the parties for an oral hearing.

Discussion

14. The power of appointment of staff members is vested on the Chairperson or a competent authority of any other organ of the African Union.¹ In exercising this authority, the Chairperson or the competent authority is advised by the [APROB].²
15. In a staff selection process, the paramount consideration is the need to guarantee the highest standards of competence, efficiency and integrity.³ Additional considerations include the principles of equitable geographical representation, gender parity, and considerations for candidates already in the service of the Organization.⁴
16. The Tribunal’s role in reviewing an appointment decision is not to substitute its own decision for that of the administration but rather to examine: (a) whether the procedures 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.⁵
17. Applicant challenges the lawfulness of Respondent’s decision to appoint a Travel Clerk. She complains that her candidacy for the post did not receive full and fair consideration because Respondent ignored that she was the top candidate, and female staff member of the Union. She argues that Respondent violated the principles set forth in the Staff Regulations and Rules and the Union’s general policy on gender parity.
18. Applicant’s contentions are persuasive. From reviewing the recruitment report, the Tribunal finds that Applicant was the top candidate, and under the law, she was entitled to preferential consideration as a female, internal candidate. These special factors were presented to Respondent by APROB. Under Staff reg. 6.4(d) the Chairperson was obligated to give due consideration to these twin factors in Applicant’s favor, but no indication of such consideration has been presented to the Tribunal. Further, no contemporaneous rationale was offered for the contested decision.
19. The Tribunal has consistently held that Respondent’s appointment powers are not unfettered. Respondent, as the appointing official, is at all times bound by and cannot disregard the parameters for appointment established under the art. 18 of the Statute of the Commission and Staff reg. 6.4. Unfortunately, based on the record before it, the Tribunal is not persuaded that Respondent fully and fairly considered Applicant’s candidacy within these established parameters.
20. Counsel for Respondent argues that the Chairperson did not appoint Applicant because “the applicant’s country quota was already very high in AHRMD.” This argument is counter-factual and patently contradicted by APROB’s own transmittal correspondence that contested post, being in the General Service category, was not subject to national quota restrictions under Staff reg. 6.4(c).

¹ Staff regulation 6.1.

² Staff regulation 6.1(c); Staff rule 55.6 (a); Statute of the Commission art. 18(2).

³ Statute of the Commission art. 18(7).

⁴ Staff regulation 6.4(d).

⁵ *M.Y. v. Chairperson*, AUAT/2019/001 para. 26; *A.N. v. Chairperson*, AUAT/2020/002 para. 16.

21. The Tribunal poses here to point out an important principle of judicial review: discretionary decisions are reviewed based on the original explanation offered at the time the decision was made as opposed to after-the-fact rationalizations put together and supplied by the decisionmaker's lawyers. On this record, there is no proof that Respondent offered any contemporaneous rationale when he appointed the successful candidate. As such, it is not necessary to test any further the validity of the post hoc rationale presented by Counsel for Respondent.
22. For the above reasons, the Tribunal concludes that Respondent abused his discretion and the ensuing appointment was unlawful. As Applicant succeeds in her claim of unlawful selection, she is entitled to appropriate relief subject to the principle that remedies ordered here may not affect the status and rights of the successful candidate who accepted the appointment in good faith.
23. Applicant seeks an order for a salary upgrade to the level she would have acquired had she been appointed as a Travel Clerk on 26 September 2019. She submitted persuasive proof that had she been appointed then she would have achieved a salary grade of GSA5/Step 7 based on information obtained from HRM, which has not been contradicted by Respondent. Considering the breach and taking note of Respondent's alternative prayer asking for an order "to consider [Applicant] for promotion," the Tribunal concludes a retroacting upgrade to GSA5/Step 7 is an appropriate redress.
24. In granting Applicant's plea for salary upgrade effective 26 September 2019, the Tribunal orders no further award of material damages.
25. The Tribunal further holds that Applicant was subjected to moral harm due to the selection decision taken in violation of established recruitment framework and breach of the requirement to rationalize the exercise of discretionary authority, which the Tribunal believes can be adequately redressed by an award of three months' gross salary.

Orders

26. Consequently, the following ORDERS are made:
 - a. Respondent to upgrade Applicant's salary to GSA5/Step 7 effective 26 September 2019;
 - b. Respondent to pay Applicant the salary, allowances, entitlements and benefits she would have received as of 26 September 2019 at the GSA5/Step 7 level less by the salary, allowances, entitlements and benefits Applicant has already received in her current salary grade. This amount shall bear annual interest of 5% calculated effective 26 September 2019 until full payment; and
 - c. Respondent to pay Applicant three months' gross salary in moral damages.
 - d. Both sums are payable within 30 days from the date of this judgment, failing which an additional 5% annual interest shall accrue and escalate to 10% if the sums are not paid in full beyond 60 days after the date of this judgment.
 - e. All other prayers are rejected.

Date: 20 April 2022

/signed/

SYLVESTER MAINGA, PRESIDENT
JAMILA B. SEDQI
PAULO D. COMOANE

Secretary: _____

