



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/059

Judgment No.: UNDT/2010/086

Date: 6 May 2010

Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

ABBASSI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Bart Willemsen, OSLA

Counsel for respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The applicant, a permanent staff member stationed in New York, contests the decision not to select her for the position of Arabic Reviser in the United Nations Office at Geneva (UNOG). Two 15-day candidates, including the applicant, applied for the post, but one of them withdrew and the applicant became the only 15-day candidate. Interviews of 30-day candidates took place on the day following the applicant's interview. The applicant was not successful; instead, a 30-day candidate was appointed. The applicant submits that the Administration failed to follow the selection procedures applicable to 15-day candidates under ST/AI/2006/3 and to properly assess her suitability prior to considering other candidates.

Facts

2. The applicant joined the Organization in 1998 and currently works in the Department for General Assembly and Conference Management as an Arabic Reviser at the P-4 level. The applicant's electronic performance appraisal system (e-PAS) ratings for 2007–2008 and 2008–2009 were “frequently exceeds performance expectations”. With respect to communication and teamwork the applicant was marked as “fully competent” in both e-PAS reports.

3. On 10 June 2009 UNOG advertised a vacancy for a P-4 Arabic Reviser in the Arabic Translation Section, Division of Conference Management. The vacancy announcement specified among the required competencies teamwork and communication skills. The applicant applied on 22 June 2009 and, at the time of the interviews, was the only 15-day candidate within the meaning of secs 5.4 and 7.1 of ST/AI/2006/3. The applicant's interview was scheduled for 1 September 2009, to be followed next day by interviews of six 30-day candidates. The applicant was interviewed by telephone by a four-member interview panel which included the Chief of the Arabic Translation Section (who was also the programme manager overseeing the selection exercise), the Chief of the Spanish Translation Section, and two senior

revisers. The panel found that the applicant demonstrated a number of weaknesses and evaluated the applicant as follows (emphasis added) –

The Applicant's PHP [personal history profile], PAS reports and performance during the interview confirm that she meets the requirements of the post in terms of education level, experience and languages.

Professionalism: The applicant's 2 years of experience as a UN reviser (she started her training as a new reviser in 2008) and documented good performance demonstrate that she meets the requirement. However, the interview revealed weaknesses on the planning and organizing side, especially the ability to set priorities when faced with competing demands.

Teamwork: While the PAS reports state that the applicant works collaboratively with her colleagues, her responses during the interview were not convincing and the example she provided was irrelevant. Her answer to the question on how she would deal with a translator challenging her revision if selected was also judged unsatisfactory.

Communication: Throughout the interview she was poised, expressed herself in an articulate and concise manner but her answers were not always comprehensive, to the point or substantiated with relevant examples. She partially meets the requirement.

Technological awareness: the applicant uses all available tools which she considers time consuming at times but useful. She meets the requirement.

4. The programme manager gave evidence at the hearing. She testified that the suitability of the applicant was discussed by the panel immediately following her interview. The members were agreed that the applicant was not suitable. The narrative of the interview panel's assessment of the applicant quoted above was drafted by the programme manager immediately after the interview. It was later reviewed and approved by the panel. I accept her evidence that the narrative accurately reflected the consensus reached. The respondent also tendered handwritten interview notes made by the individual members of the panel and the scores each gave to the applicant, which are generally in line with the overall assessment and the narrative. The programme manager's evidence was that the scoring scale ranged from five to one, with five denoting completely suitable, four denoting adequate but needing some improvement, and three less than sufficiently

competent. For lateral transfers – where the candidates should already have been performing the required duties to an appropriate standard – a score of five would be expected, although four would have sufficed for a candidate seeking promotion, providing the panel were reasonably confident that such a candidate had the potential to perform at the higher level. Of the three panel members whose handwritten notes were tendered, two rated the applicant’s competency in teamwork at two-and-a-half on a five-point scale and one rated it at three points. Although the applicant was given the score of four by the panel members with respect to the communication competency, they concluded that the applicant’s answers “were not always comprehensive, to the point or substantiated” and that “she partially meets the requirement”. On these scores, it is evident that the applicant’s demonstrated competencies fell short by a significant margin of what was necessary.

5. The programme manager testified that, although she found (with the other panel members) that the applicant was unsuitable for the post, she was open to the possibility of revisiting the applicant’s candidacy later, depending on the outcome of the interviews of 30-day candidates. The programme manager’s evidence, in substance, was that if the other candidates were found to be unsuitable, she would have needed to consider either re-advertising the position or re-interviewing the applicant to see whether, after all, she might be acceptable if some allowances were made and, though presently not qualified, might have improved on the job. This possibility was alive because of the urgent needs of the section in Geneva. The programme manager testified that, in her opinion, the Geneva translation service at the relevant time had more pressure of work than the translation section in New York and it was in the applicant’s dealing with issues raised by work pressure that her weaknesses became most evident. The programme manager thought it was also very important to appoint a person who “could hit the ground running”, thus one for whom no allowances needed to be made.

6. After the hearing, counsel for the applicant filed a submission that, contrary to the evidence given by the programme manager, there was no particular distinction in the pressure of work between the New York and Geneva translation sections, and

requested the Tribunal to receive in evidence an email from the Director of the Documentation Division of DGACM in New York which stated that “it is not readily apparent nor is it correct to conclude that HQ [translation] staff members face a lesser level of pressure [than Geneva staff members]” but that “[t]here is increasing evidence that recent changes in workload at Geneva ... has operated to substantially heighten the pressure and sense of stress felt by the [T]ranslation Section at UNOG, as there has not been a commensurate increase in their permanent capacity”. I determined that the evidence lacked probative value and rejected the application to re-open the proceedings. I do not doubt the sincerity of the programme manager’s belief concerning the workload in Geneva and her views, as it happens, are indirectly, though weakly, supported by the proffered email. In any case, nothing turns upon this. The proposed new evidence amounts to nothing more than an opinion differing from that of the programme manager who, after all, was in the best position to know the situation in her unit. Moreover, she was entitled to rely on her own knowledge providing it was reasonably reliable and the mere existence of a different view reasonably held by another, though interesting, is immaterial.

7. On 2 September 2009 the panel interviewed six other candidates. The applicant was not recommended for the post. Instead, two 30-day candidates were found suitable and recommended. On 29 September 2009 the Central Review Committee met and approved the panel’s recommendation and on 1 October 2009 the Chief of the Language Service sent the final recommendation to the Director-General of UNOG. The successful candidate was informed of the selection on 30 October 2009.

8. As it happened, on 2 November 2009 the applicant found out that the subject post had been filled by checking Galaxy, the Organization’s website for job vacancies. On the same day, the applicant wrote to the programme manager (Chief of the Arabic Translation Section) expressing frustration that she had not been personally informed of the outcome of the process and had learnt of her non-selection through Galaxy. The applicant was officially informed of her non-selection on 11 November 2009.

9. On 3 November 2009, the applicant requested a management evaluation of the contested decision. By memorandum dated 3 December 2009, the Under-Secretary-General for Management informed the applicant that the Management Evaluation Unit of the Department of Management had recommended that the contested decision be upheld and that the Secretary-General had decided to endorse that recommendation.

Applicable law

10. Administrative instruction ST/AI/2006/3 provided as follows –

5.4 The following staff members shall be eligible to be considered for a lateral move at the 15-day mark:

(a) Internal candidates whose appointment is not limited to service with a particular office may be considered for any vacancy at their level. Staff whose appointment is limited to service with a particular office may be considered for vacancies at their level in that office only. Staff in the Professional category and above who do not have geographic status may be considered for vacancies at their level at the 15-day mark in respect of posts that are not subject to geographical distribution;

...

7.1 In considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark under section 5.4. If no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark under section 5.5 shall be considered. Other candidates shall be considered at the 60-day mark, where applicable.

...

9.5 All interviewed candidates who are not selected or placed on the roster shall be so informed by the programme managers.

Applicant's submissions

11. ST/AI/2006/3 does not permit consideration of 30- and 60-day candidates prior to consideration of eligible 15-day candidates (*Kasyanov* UNDT/2009/022). Although the panel interviewed 30-day candidates on the day after the applicant's

interview, at that time the applicant's suitability had not been finally assessed by the programme manager and she was thus denied full and fair consideration in accordance with the applicable law.

12. Suitability must be considered by examining both the past performance and presentation on interview. Greater weight should have been accorded to the applicant's performance evaluation reports and, because the presentation on interview panel deviated significantly from the reported performance appraisal, it was necessary to obtain further information from the applicant's present supervisor. The failure to do so demonstrates that the decision to select a particular staff member, already part of the Office in Geneva, had already been made and consideration of the applicant's claim was merely a matter of form.

13. A candidate for a lateral move is either suitable or unsuitable. The evidence given at the hearing shows that the programme manager made only an initial determination on the applicant's suitability after her interview and that the final determination was made after the 30-day candidates were interviewed. Therefore, the applicant was not determined to be unsuitable and art 7.1 of the administrative instruction prohibited the interview panel or the programme manager to consider the 30-day candidates. The fact that the interviews of 30-day candidates had been scheduled the next day following the applicant's interview confirms that the management had already decided that the applicant, as an "outside" candidate, would not be recommended.

14. The evidence adduced at trial also demonstrates that the applicant was held to a higher standard than the other candidates, which was in violation of the obligation to evaluate all candidates against objective criteria.

15. The applicant wishes the contested decision to be declared unlawful as based on improper motives and tainted with procedural irregularities and requests commensurate compensation, including for humiliation.

Respondent's submissions

16. The applicant is not entitled to expect to be appointed, regardless of her performance history, but the consideration of her candidacy must be full, proper and fair (*Sefraoui* UNDT/2009/095). The decision-maker has a broad discretion in selection decisions and it is not for the Tribunal to substitute its own judgment for that of the decision-maker (*Krioutchkov* UNDT/2010/065). The burden of proof that no full and fair consideration had been provided is on the applicant, and she failed to meet it. Whether or not the applicant disagrees with the actual merits of the decision is not relevant; she must demonstrate that the decision was improper at law. The programme manager's reliance on the personal history profile and e-PAS, together with the results of the competency-based interview, were sufficient to assess the applicant's suitability. This consideration was given after the applicant's interview and prior to the interviews and consideration of the 30-day candidates.

17. The applicant failed to demonstrate that she met the teamwork and communication skills requirements for this post and was therefore found unsuitable. The weight to be accorded to the applicant's e-PAS and whether or not her former supervisor should have been contacted were matters within the discretion of the panel and the programme manager and did not result in a failure to fully and fairly consider the applicant's candidacy. The interview panel assessed the applicant's teamwork competency on the basis of all criteria available to it, including e-PAS reports (which included the supervisor's evaluation of the applicant), personal history profile and her interview. The applicant had the opportunity in her interview to confirm the impression that the interview panel had gathered from the e-PAS report, but she did not do so. The interview panel did not hold the applicant to a higher standard. The panel was entitled to expect that someone with many years working at the same level as the subject post would be able to convey that experience and familiarity in an interview.

18. The notice of non-selection given on 11 November 2009 was sufficiently timely. The applicant was informed as soon as practicable in accordance with the ordinary procedures followed by UNOG for the notification of candidates.

Discussion

Non-selection of the applicant

19. Fifteen-day candidates who apply by the 15-day mark must be considered in a separate pool and, if found suitable, no further consideration of 30- and 60-day candidates is allowed (*Kasyanov*, para 24). Although two 15-day candidates applied, one of them withdrew, leaving the applicant the sole 15-day candidate. Although she was not considered at the 15-day mark she was entitled to priority consideration separately from 30- and 60-day candidates.

20. The question that the Tribunal must resolve is whether the applicant was indeed considered and found unsuitable before consideration of the 30-day candidates took place. The suitability of the applicants is determined by the programme manager (para 1(f)–(g) of Annex II, ST/AI/2006/3). If the applicant had been assessed as suitable, no 30-day candidates could have been considered. The applicant cannot be said to not have been given priority consideration just because she was interviewed first. The order of interviews is not relevant as long as the applicant was *considered* first, and, if found suitable (provided she was the only 15-day candidate), selected (*Kasyanov*, paras 23–24). However, in this particular case the programme manager was also a member of the interview panel. I considered her evidence to be credible, cogent and persuasive and therefore conclude that, indeed, the suitability of the applicant was considered immediately after her interview and her narrative accurately reflected the consensus reached by the panel. This conclusion is supported by the handwritten interview notes made by the individual members of the panel. There is no basis for doubting the accuracy of the panel's assessment (see *Antaki* UNDT/2010/059, discussing scores and evaluation narrative). Overall, the notes demonstrate that careful consideration was given to the competencies of the

21. As a point of clarification it is perhaps worth interpolating the following. For obvious reasons it is desirable, as a general rule, that candidates given priority consideration as members of a separate pool should be assessed on their own merits immediately after interview. If all candidates in, say, two pools, are assessed after all interviews are completed, even if the 15-day candidates are assessed first and (if considered suitable) put forward for appointment in accordance with sec 7.1 of ST/AI/2006/3, common sense suggests that the assessment of the 15-day candidates is likely to have been inappropriately complicated by the knowledge of the panel members (and the programme manager) of the competing suitability of the other candidates who were interviewed. This would be inconsistent both with transparency and the important, if not strictly essential, requirement that compliance with the legally ordained procedures should not only occur, but be manifestly seen to occur. In this hypothetical situation it would be difficult to persuade the Tribunal that, as a matter of practical reality, the requirements of sec 7.1 were complied with.

22. I do not consider that the conclusions of the panel about the applicant's competencies are thrown into serious doubt by their apparent inconsistency with her performance appraisals or that this inconsistency required the panel to make enquiry of the applicant's supervisor in an attempt to resolve it. The purpose of interviewing the applicant was to form an independent objective opinion of the applicant's candidacy and to factor it into the decision on her suitability. The applicant is certainly entitled to have the panel consider her e-PAS evaluations as part of the material and there is no reason to suppose that they did not. It is possible that, in a particular case, the presentation of the applicant on interview differed so markedly from what would have been expected from a perusal of her e-PAS reports as to have led the panel to doubt their own conclusions or suggest to them that further information should be obtained. Sometimes the difference might be such as to lead

them to ask whether, for some unexplained reason, the candidate had not done him or herself justice and conclude that both fairness and the importance (in the Organization's interest) of identifying who was indeed the best candidate rendered it desirable to obtain further information. But these matters are very much questions of fact and degree well within the purview of the panel to determine and depend greatly on the confidence of the panel in the sufficiency of its interview and its capacity to make a fair assessment of the candidate without further enquiry. In any case, I think it was reasonable for the interview panel to expect that the applicant, a 15-day candidate for a lateral move, would be particularly well-placed to demonstrate her suitability in the interview and, if there were an inconsistency between their judgment of what was required for the new post and the opinion of the applicant's supervisors of her work in her present post, to prefer its own views. It is necessary to bear in mind that, in the end, it is the conscientious opinion of the panel members that is the essential element of the process, not the opinion of any candidate's supervisor.

23. It should also be borne in mind that the programme manager's view about the pressure of work in Geneva would have reasonably justified giving less weight to the applicant's e-PAS appraisal which, of course, concerned her performance in New York, adjudged by the programme manager as less stressful. The question was, at all events, not so much how the workload in Geneva differed from that in New York but whether the applicant was adequately qualified to perform the work in Geneva. Even if the programme manager were mistaken about the *comparative* workload, there is no reason to doubt the reliability of her knowledge of the *actual* workload in Geneva, regardless how it compared to New York and the need to bring that factor into account when considering the applicant's suitability for appointment to the post in question.

24. The interview panel here comprised four appropriately qualified interlocutors who had the benefit of the interview and the applicant's e-PAS reports and her personal history profile. The information before the interview panel was adequate to enable it to decide whether they were sufficiently well informed to give appropriate consideration to the applicant's candidacy without making further enquiry and, if so,

to come to a judgment about it. In the end, there is nothing in the evidence that suggests that not making further enquiry was a mistake, let alone unfair to the applicant.

25. Nor do I accept the contention of counsel for the applicant that the applicant had not been found unsuitable for the post since the programme manager left open the possibility of re-interviewing her if the other candidates proved unsuitable. In effect, this submission is that sec 7.1 provides that the other non 15-day candidates must not be considered until the 15-day candidates are put out of contention and a *provisional* finding of unsuitability is insufficient. My view of the programme manager's evidence was that she had concluded the applicant was not suitable for appointment but that she nevertheless might have given further consideration to the applicant's candidacy *despite* her unsuitability because of the urgent need and it was possible, perhaps, to compensate for the shortfall. In the result, as it happened, it was not necessary to revisit this issue.

26. The distinction pointed to by counsel for the applicant is nevertheless an important one: a 15-day candidate will qualify for priority under sec 7.1 even if he or she is only just suitable. As long as the required competencies are, as a matter of practical reality, truly present, more is not required. I am persuaded that the only fair interpretation of the effect of the programme manager's evidence is that the applicant was found not to have satisfied the actual requirements of the post and that mere contemplation of the possibility that she might nevertheless be appointed did not derogate from this conclusion or render it provisional. It was simply a candid disclosure of the possible solutions the programme manager had in mind if it were decided that it was necessary to appoint an unsuitable candidate rather than suffer the delay that would follow from re-advertising.

27. As I have stated in other words above, the requirement of priority in sec 7.1 applies only to truly suitable candidates. It is not intended and would not be reasonable to oblige the Organization to appoint a person who was not completely satisfactory in preference to possibly better qualified candidates. Of course, this

assessment must be realistic and fair: some doubt about one or other competency will not be sufficient to exclude priority unless it were truly and not inconsequentially significant. Suitability must always be measured against reasonable and practical standards, not against some ideal. Programme managers must abide by the spirit as well as the language of sec 7.1. In this case, I am satisfied that the requirements of the post, as specified by the programme manager in her evidence, were reasonable and that the conclusion of the panel, including the programme manager, that the qualifications of the applicant fell substantially short of what was needed was a fairly arrived at judgment.

28. Lastly, I should mention the contention that the applicant was tested against a higher level than the other candidates by reason of the programme manager's expectation that she should have demonstrated competency at the top of the five point scale. The relevant facts have been set out above. I accept the programme manager's evidence about the significance of the scale and the differentiation she made between someone in the applicant's position, seeking a lateral transfer and a candidate who was seeking promotion, both as to its truthfulness and its reasonableness. In substance, the applicant was treated differently because she was indeed a different candidate. This is not to be treated unequally. Both kinds of candidate were measured against the same standard: to what extent did they satisfy the performance requirements. The distinction was that the applicant, as a lateral transferee, should have been able to show that she *did* and the promotion candidates needed to show that they *would*.

29. The applicant was entitled to be assessed fairly and adequately, and this entitlement was satisfied. Because she was not found suitable, there was no error in not selecting her and in interviewing candidates from the 30-day pool. The decision not to select the applicant was therefore valid and lawful.

Notification

30. The programme manager was required under sec 9.5 and Annex II of ST/AI/2006/3 to inform unsuccessful candidates within a reasonable time of their non-selection (*Krioutchkov* UNDT/2010/065). I think it is reasonable that this step should await the decision of the Director-General on the appointment. The actual date of this decision does not appear in the evidence. In the result, the applicant was officially informed of her non-selection twelve days after the appointee was informed of his selection. Although arguably the applicant could have been informed on or immediately after 30 October 2009, I do not think that the delay was excessive or unreasonable and, certainly, had no adverse legal consequences for the applicant.

Conclusion

31. The application is dismissed.

(Signed)

Judge Michael Adams

Dated this 6th day of May 2010

Entered in the Register on this 6th day of May 2010

(Signed)

Hafida Lahiouel, Registrar, New York