



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

XU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Myriam Foucher, UNOG

Introduction

1. By application filed with the United Nations Dispute Tribunal on 11 June 2010, the Applicant contests the decision not to select him for a P-4 post of Terminologist (Chinese).

2. As a remedy, the Applicant seeks compensation for loss of chance, damage to career prospects and moral injury.

Facts

3. In 2001, the Applicant successfully passed the United Nations Examination for Chinese Translators, Editors and Verbatim Reporters. He joined the Organization in February 2001 on a short-term appointment as Translator, at the T-2 level, in the Conference Services Division, United Nations Office at Geneva (“UNOG”). In March 2003, he was granted a probationary appointment as Editor (Chinese) at the P-3 level. Effective 1 March 2005, he was granted a permanent appointment. He was promoted to the P-4 level as Reviser, Chinese Translation Section, Conference Services Division, UNOG, on 1 March 2008.

4. In September 2009, the Applicant applied for a post of Terminologist (Chinese), at the P-4 level, within the Chinese Translation Service, Department for General Assembly and Conference Management, at Headquarters, announced on 31 August 2009 under vacancy announcement No. 09-CON-DGACM-421774-R-New York.

5. On 24 September 2009, three 15-day candidates within the meaning of administrative instruction ST/AI/2006/3 (Staff selection system), including the Applicant, were invited to take a written test, which took place on 29 September 2009.

6. The two other 15-day candidates were interviewed on 1 October 2009, whereas the Applicant underwent an interview on 2 October 2009. On that same day, a member of the interview panel, a Training Officer in the Chinese Translation Service, and the Deputy Chief, Terminology and Reference Section,

completed the marking of the test papers of the three 15-day candidates. According to this marking, the Applicant did not pass the exam.

7. Also on 1 October 2009, the programme manager had received a list of four 30-day candidates. On the same day, she had invited all four candidates to take a written test, which took place on 5 October 2009. The 30-day candidates were interviewed between 6 and 14 October 2009.

8. The programme manager transmitted the evaluation of both the 15-day and the 30-day candidates to the Under-Secretary-General for General Assembly and Conference Management on 19 October 2009.

9. On 21 December 2009, the Under-Secretary-General for General Assembly and Conference Management announced the successful candidate for the post, a 30-day candidate. On the same day, the Applicant was informed that his application had not been successful.

10. On 27 January 2010, the Applicant submitted a request for management evaluation to the Management Evaluation Unit (“MEU”), at Headquarters, which acknowledged receipt of it on 17 March 2010 and responded thereto on 16 April 2010.

11. The application under review was filed on 11 June 2010. Having sought and obtained an extension of the applicable time limit, the Respondent filed his reply thereon on 28 July 2010.

12. On 18 October 2010, Counsel for the Applicant submitted a request for the Respondent to provide clarification on the procedures and methods of the interview panel with respect to the post in question versus those applied to other posts and on whether all the four panel members took interview notes in the case at hand. He also requested the production of the notes, if any, of two panel members which had not been previously shared and the marked test paper of the Applicant.

13. By Order No. 83 (GVA/2010) dated 25 October 2010, the Tribunal instructed the Respondent to provide the above-mentioned documents and clarifications, which he did on 8 November 2010.

14. The Applicant submitted his observations on the Respondent's reply on 18 November 2010.

15. A hearing on the merits of the case took place on 2 September 2011, to which the Applicant and Counsel for the Respondent participated in person.

Parties' contentions

16. The Applicant's principal contentions are:

a. The Applicant was not given full and fair consideration for the post. As a 15-day candidate, he should have been considered before any of the 30-day candidates. Instead, as recognized by MEU, "the Administration did not conclude its consideration of the 15-day candidates before it commenced consideration of the 30-day candidates ... [B]y scheduling the interviews and the written test for the 30-day candidates while interviews for the 15-days were ongoing, the Administration had already reviewed the 30-day candidates and had determined that some of them met all or most of the requirements of the post ...";

b. The above shows that full and fair consideration of the Applicant's candidacy could not have taken place and that there was a clear breach of section 7.1 of ST/AI/2006/3. MEU conclusion that such breach did not entail any damageable consequence fails to adequately take account of the potential effect that the review of the 30-day candidates had on the assessment of the Applicant's suitability for the post;

c. The facts submitted by the Respondent, despite several inconsistencies and contradictions, indicate that before evaluating the Applicant, a 15-day candidate, the programme manager invited 30-day candidates to a written test. This clearly establishes that the Applicant was considered unsuitable for the post before the evaluation was made;

d. The refutation by the Respondent that the Applicant's candidacy was not fully and fairly considered is not substantiated by facts. The Respondent's contention that the Applicant did not pass the written examination is of no material value, because the procedure for the evaluation of candidates for the post did not include a requirement of scoring certain marks in the written examination. In addition, comparison of scores given by the two examiners reveals that they had totally different concepts of right or wrong answers, which leads to the conclusion that the Applicant was evaluated arbitrarily and unfairly;

e. While holding that the Applicant's score for several competencies fell short by a significant margin of what was necessary to be considered suitable, the Respondent did not clarify the overall score requirement during the competency-based interview necessary to be deemed suitable. Hence, the programme manager used her discretion arbitrarily to define the "necessary score". It appears from the notes of the four interviewers that two evaluated the Applicant as "acceptable" while two others gave him grades close to "acceptable". Moreover, the scores of the other candidates, including the successful one, were not revealed. The selection procedure was biased, subjective and discriminatory.

17. The Respondent's principal contentions are:

a. The Administration has broad discretion in selection decisions and it is not for the Tribunal to substitute its own judgment for that of the decision-maker. The Applicant carries the burden of proving that his candidature had not been fully and fairly considered, which he failed to discharge; the records show that he did not meet the standards for two competencies, nor did he pass the written test;

b. Section 7.1 of administrative instruction ST/AI/2006/3 precludes the Administration from considering 30-day candidates in case there is a suitable 15-day candidate. Hence, there must be a conclusion regarding the suitability of the 15-day candidates before considering 30-day candidates. However, since ST/AI/2006/3 does not specify "which formal

requirements this conclusion has to fulfil”; as long as the Administration ensures the priority consideration of 15-day candidates and concludes on their suitability before considering the 30-day candidates, the requirements set forth in ST/AI/2006/3 are satisfied;

c. The programme manager simply received the list of 30-day candidates before the Applicant’s interview took place, but did not start assessing their suitability before 5 October 2009, that is, after the Applicant had been found unsuitable for the post. In fact, when the 30-day candidates underwent the test and the interview, the initial decision on the Applicant’s suitability had already been taken, even though there was no final assessment yet. According to notes and scores of the panel members, the Applicant’s competencies fell short by a significant margin of what was necessary to be considered suitable, in particular as regards technological awareness and teamwork. Moreover, the Applicant failed the test. Therefore, he was deemed unsuitable for the post immediately after the interview.

Consideration

18. Administrative instruction ST/AI/2006/3, which governed the staff selection procedure at the relevant time, stipulates in section 7 (Consideration and selection):

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 ...

19. This provision, as consistently interpreted by the Dispute and the Appeals Tribunals, requires that 15-day and 30-day candidates be considered separately; 15-day candidates must be considered first and, if one of them is found suitable, he or she must be selected. Only if no suitable 15-day candidate is identified can the 30-day mark candidates be considered (see for example *Abbassi* 2011-UNAT-110, *Kasyanov* UNDT/2009/022, *Wu* UNDT/2009/084, *Abbassi* UNDT/2010/086).

20. It is undisputed that in the instant case 30-day candidates were invited to take a written test on 1 October 2009, that is, one day before the Applicant was interviewed. This fact alone, nevertheless, does not suffice to conclude that the priority consideration requirement was not observed.

21. Contrary to the view held by the Applicant as well as by MEU, consideration of 30-day candidates cannot be said to have started on 1 October 2009. On that date, the four candidates released at the 30-day mark were merely convened for a written test, whereas “consideration” of a candidate, for the purpose of ST/AI/2006/3, means assessing his or her qualifications and skills against the requirements and competencies set out in the relevant vacancy announcement with a view to determining his or her suitability to successfully perform the functions of the post.

22. Even if, as the Applicant contends, an invitation for the written test presupposes a minimal review of the 30-day candidates’ personal history profiles, such minimal review may not be equated to “consideration” within the meaning of ST/AI/2006/3. Indeed, any meaningful consideration cannot begin until the relevant assessment tools—in this case, a written test and an interview—have been administered to the candidates. As a matter of fact, the 30-day candidates took the written test on 5 October 2009 only, that is, three days after the Applicant had been found unsuitable.

23. In *Abbassi* UNDT/2010/086 (affirmed in *Abbassi* 2011-UNAT-110) the Applicant, a 15-day candidate, had been deemed unsuitable after both 15-day candidates and 30-day candidates had been interviewed. Despite this fact, the Tribunal concluded that section 7.1 of ST/AI/2006/3 had been observed, for the appraisal of the Applicant’s competencies had been conducted prior to that of any 30-day candidate. In reaching this conclusion, the Tribunal held that “[t]he order of interviews is not relevant as long as the applicant was *considered* first” (emphasis in the original). *A fortiori* this reasoning applies to the instant case, where tests and interviews of the two pools of candidates took place separately and no 30-day candidate took even the first part of the appraisal process, i.e., the written test, until interviews of all the 15-day candidates had been completed.

24. Hence, it is established that 15-day candidates were considered first, in compliance with the above-referred section 7.1.

25. Having said that, 15-day candidates were only entitled to be granted precedence under ST/AI/2006/3 provided that they were “suitable” for the position. A 15-day mark candidate who, after consideration for a position, appears not to be fit to undertake the duties of the post may not claim any further right to priority consideration. As the Tribunal put it in *Krioutchkov* UNDT/2010/065, “suitability ... is the key notion for determining the right to the priority given to 15-day candidates and not mere satisfaction of the mandatory or formal prerequisites for appointment”.

26. Against this background, the question arises of whether the determination that the Applicant was not suitable for the litigious post was reached properly, especially since he claimed at the oral hearing that there was a consistent pattern in the service in question to pre-designate candidates to be selected, systematically excluding others, like himself, and suggested that selection procedures were routinely manipulated to this end.

27. In this connection, as a matter of principle, it is for the Organization to determine the suitability of each candidate and the Tribunal should not substitute its assessment thereon for that of the Secretary-General (see for example *Abbassi* 2011-UNAT-110). Only in rare circumstances, such as failure to give fair consideration to a candidate, discrimination or bias, departure from proper procedures and failure to consider relevant material, may the Tribunal rescind a decision (*Rolland* 2011-UNAT-122).

28. According to ST/AI/2006/3, in force at the time of the facts, the programme managers were entrusted with the responsibility of determining the suitability of candidates (paragraphs 1(f)-(g), Annex II, ST/AI/2006/3). As per the records of the selection procedure made available to the Tribunal, the programme officer in the present case concluded, after a written test and a competency-based interview, that the Applicant did not satisfy the required standards regarding teamwork and technological awareness and that he was therefore unsuitable for the post.

29. After careful examination of the file, the Tribunal finds no cogent reason to call into question the accuracy of this appraisal. The programme manager's assessment appears reasoned and properly documented. The evaluation methods used to assess the Applicant's qualifications are in conformity with the Organization's rules and practices; in fact, section 7.5 of the administrative instruction requires competency-based interviews to be carried in every selection procedure and cites written tests as an example of appropriate evaluation mechanism. Moreover, these appraisal tools have been applied to all candidates, whatever the pool they belonged.

30. While the Applicant alleges that the test ratings were biased and unfair, the Tribunal can only note that the tests were corrected by two different highly qualified persons and that the two correctors gave consistent ratings. The inconsistencies pointed out by the Applicant are few and limited and seem nothing more than usual—even unavoidable—subjective appreciations of a piece of work in a non-exact discipline. Considering that the Applicant scored way less than 50% of the points in this test, the rating 'failed' does not appear as unfair.

31. Regarding the interview, it appears from the interviewers' notes that none of the four interviewers considered the Applicant's competence in the field of technological awareness as acceptable. Only one interviewer rated the Applicant's skills regarding teamwork as "acceptable" whereas the majority did not find them "acceptable". These are two major competencies, both required by the vacancy announcement and thus to be tested as part of the pre-determined evaluation criteria. However, according to the records of the interview, the Applicant did not demonstrate sufficient skills in these two areas.

32. Based on the Applicant's failure at the written test as well as his insufficient performance during the interview, he was rightfully considered as not suitable for the post in question. To be assessed as suitable, a candidate must meet, at least at a minimum level, all requirements of the post. It is the purpose of the selection process to check whether candidates fulfil all substantive criteria of the job description. No priority is to be given to candidates who fail to do so.

33. Therefore, the Tribunal considers that the contested non-selection decision does not constitute a breach of the Applicant's terms of appointment.

Conclusion

34. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 5th day of October 2011

Entered in the Register on this 5th day of October 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry