



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/079

Judgment No.: UNDT/2012/020

Date: 10 February 2012

Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

CHARLES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member at the P-3 level in the Procurement Division (“PD”), Office of Central Support Service (“OCSS”), Department of Management (“DM”) of the United Nations in New York, contests the decision conveyed to him on 23 February 2010 not to select him for two posts of Procurement Officer (“the Post(s)”) which he had applied for. The Applicant alleges, in essence, that the procedure to fill these Posts was flawed by a series of procedural errors, in particular by the fact that he, as an internal candidate (or 30-day mark candidate), was evaluated together with external candidates (or 60-day mark candidates). The Applicant requests compensation of two years’ salary for each Post for which he was not selected.

2. In a joint submission to the Tribunal dated 24 May 2011, the parties agreed that an oral hearing of the case was not necessary as the facts, evidence and applicable rules of law were identified and documented in the pleadings. The parties provided the Tribunal with a statement of agreed and disputed facts and agreed and disputed legal issues. The parties submitted all documents required to be considered. The Tribunal finds that this case is suitable for a hearing on the papers.

3. On 23 January 2012, the Applicant filed an *ex parte* motion for leave to file his medical records and asked that these medical records be kept confidential. In that motion, he stated that “[i]n light of the increasingly negative impact of the on-going litigation and the resulting consequences, I hereby temporarily suspend my participation in all activities relating to the subject case until the end of February 2012”.

4. As this judgment was close to completion at the time the motion was received no further requirement for participation by either party is required by the Tribunal before the judgment is rendered and published. In order to respect the confidentiality of the Applicant’s medical records, they will neither be taken into account nor referred to in this judgment.

Issues

5. The numerous issues raised by the Applicant in his application to the Tribunal were narrowed down in the joint submission of the parties dated 24 May 2011 in which the parties agreed that the issues for determination are as follows:

- a. Can a programme manager combine two selection exercises?
- b. Was the failure to give the Applicant priority consideration as a 30-day candidate before the 60-day candidates in breach of the rules and did it detrimentally affect the Applicant's candidature?
- c. Did the interview panel conduct the interview in a fair and reasonable manner without bias and prejudice to the Applicant?
- d. Did the interview panel act *ultra vires* in determining that the Applicant lacked the necessary number of years of experience for the posts?
- e. Did the Respondent properly advise the Applicant of the outcome of the selection process?
- f. If there were breaches of the selection process, is the Applicant entitled to compensation as a result?

Facts

6. By email dated 14 January 2009, the Executive Office in DM ("EO/DM") advertised to all DM staff at the P-4 and P-3 levels, a single temporary vacancy announcement for two P-4 level positions of "Procurement Officers, Team Leaders" located in the work unit of the Applicant. EO/DM indicated that the positions were being advertised to fill the posts pending the forthcoming recruitment process for these posts in Galaxy (the former United Nations online jobsite). The temporary vacancy combined the two positions entitled "Team Leader of Movements Team" and "Team Leader of Long Term Air Charter Team", respectively. Both positions shared the same

competencies, education, work experience, languages and other desirable skills. The work experience requirement was described as “[a] minimum of seven years of progressively responsible experience in high volume procurement operations, contract administration or related field”. The Applicant did not apply for these positions. In an email dated 21 January 2009 to the programme manager, who was also his supervisor, he stated that he may not be qualified for the positions and that “for personal/family reasons, [he is] unable to focus on the functions of Team Leader at present”.

7. On 17 February 2009, the Posts were advertised in Galaxy with a deadline of 18 April 2009 as 09-PRO-DM-OCSS-420350-R-New York and 09-PRO-DM-OCSS-420351-R-New York (G). The vacancy announcements were almost identical to the temporary vacancy issued on 14 January 2009 referred to above in para. 6. It was clear from the vacancies that the Posts were situated in the work unit of the Applicant and that the programme manager was the Applicant’s supervisor. The vacancy announcements for the Posts stated that the work experience requirement was “[a] minimum of seven years of progressively responsible experience in high volume procurement operations, of which at least three years at the international level”.

8. The Applicant applied for the Posts in Galaxy (the former United Nations online jobsite). No 15-day candidates were identified for either vacancy announcements. Following a screening of all applicants for the two Posts, from which it was determined that almost all candidates had applied for both Posts, the selection processes for the Posts were combined.

9. The Applicant undertook the written “Examination for P4 Post - Team Leader (Procurement Officer, [Logistics & Transportation Section, “LTS”]/PD) on August 5 2009” scoring 30 out of 40 points. Six other candidates obtained the same score, and nine candidates obtained a higher score.

10. On 20 October 2009, after enquiring about the date of the interview, the Applicant received an email entitled “LTS Team Leader Post” which advised him to provide his contact details while on leave so he could be informed of the date of the

interview. By email dated 21 October 2009, the Applicant enquired about the discrepancy between the title of the Posts in Galaxy (Procurement Officer) and the title of the email of 20 October 2009 (LTS Team Leader Post).

11. On 21 October 2009, the Applicant and 17 other short-listed candidates, comprising both 30 and 60-day mark candidates, were invited to participate in interviews for the Posts. The Applicant enquired whether the invitation for the interview was for both Posts and PD responded in the affirmative. He made no further comments on this matter. He was interviewed on 5 November 2009.

12. The interview panel prepared reasoned and detailed assessment notes of the interview of the Applicant. The panel was not satisfied by some of the Applicant's responses and deemed him unsuitable for the Posts. His score of 11.7 out of 20 for his interview was the fourth lowest score. In its assessment notes, the Panel observed that the Applicant did not meet the minimum requirement of seven years work experience in high volume procurement.

13. By email dated 23 February 2010 addressed to all staff members in PD, the PD Director announced that the decision to fill the two Posts had been taken and provided the identity of the successful candidates. The Applicant was informed he was not successful. By email dated the next day addressed to the PD Director, the Applicant stated that he took "note of his advice to staff at the last general staff meeting" and asked two questions regarding whether he should "assume that [he does] not meet the minimum requirements for filling a P4 post in PD" and whether he should "desist from submitting applications for consideration until such time that [he] satisfy the requirements".

14. On 20 April 2010, the Applicant requested a management evaluation of the decision not to select him for the post. On 21 May 2011, the management evaluation report was conveyed to the Applicant. He was informed that the decision he contested was proper and that PD had advised that:

[The Applicant] was not recommended for selection as other candidates' performance at written test and interviews obtained better scores. In addition, although he was interviewed and scored, PD has noted, *a posteriori*, that he does not meet the experience requirements for the post.

Applicant's submissions

15. The Applicant's voluminous submissions to the Tribunal, both in the application and in other submissions, criticise the procedure undertaken by the Respondent. Much of this criticism is of a general nature and does not address the prejudicial effect on him. The following is a summary of the Applicant's specific contentions:

- a. There are no provisions under the relevant rules for the combined evaluation of candidates for two posts;
- b. Internal candidates must be considered before external or 60-day candidates. As a 30-day mark candidate, the Applicant should have received priority consideration;
- c. The vacancy announcements for the Posts were misleading both in contents and title. They contained no managerial competencies;
- d. The members of the interview panel, who had not updated their training in competency-based interviewing techniques as mandated by the Secretary-General, failed to conduct the said interview in accordance with established policy and procedures. The nature of the questions asked was inappropriate as they were of a technical nature, specific to procurement operations and not competency-based;
- e. His qualifications were assessed *a posteriori*. Not only did the interview panel improperly consider his vast and broad career experience, but the panel acted *ultra vires* by assessing his number of years of experience, which was not the responsibility of a competency-based interview panel;

f. He should be compensated in the amount of two years' salary "for each post" for the cumulative errors of the Respondent in failing to adhere to the applicable regulations, rules, policies and procedures for filling the posts;

g. The Respondent did not specifically advise him of the outcome of the selection process and final selection decision as an interviewed candidate nor did the Respondent publish the results of the selection process on the Office of Human Resources Management's ("OHRM") website.

Respondent's submissions

16. The Respondent's principal contentions may be summarised as follows:

a. The legal test of full and fair consideration was articulated by the United Nations Appeals Tribunal in its judgment *Rolland* 2011-UNAT-122 and the record shows that the Applicant's candidatures were appropriately assessed;

b. There was nothing misleading regarding the titles of the Posts;

c. The Applicant was a 30-day candidate and was entitled to priority consideration with the other 30-day candidates, but his suitability was not assessed at the 30-day mark and, instead, he was invited to participate in the selection process together with both 30 and 60-day mark candidates. However, this had no impact on the outcome of the selection exercise. If his suitability had been assessed at that earlier stage it would have been noticed that he was not eligible and he would have been excluded from the selection exercise by then;

d. The interview panel was entitled or required to evaluate whether the Applicant's experience met the requirements of the posts. The Applicant was neither a qualified nor suitable candidate and he could not be recommended. Even if he had been recommended, he could not have been approved by a central review body, nor selected for the post. His inclusion in the interview process does not change the obligations on the interview panel, the programme

manager, the Central Review Board and, ultimately, the head of department, to assess his candidacy, including his qualifications and suitability for the post;

e. There are no mandatory interviewing trainings for interviewers. The interview was conducted properly;

f. The Applicant was informed of the outcome of the selection process.

Production of documents

17. The Applicant made a request for an order for the *ex parte* production of the written test and the response of the selected candidates so that the Tribunal could make its own observations with regard to the response of the Applicant to the test. The Applicant asserts that this can be done without the Tribunal substituting its judgment for that of the Respondent.

18. In response to this request, the Respondent argued that it had already produced the redacted scores of the candidates and that, in any event, the issue to be determined is whether the Applicant can demonstrate that the evaluation of his candidacy was affected by illegality. According to the Respondent, the Applicant made no allegation that the assessments of the other candidates were improper. As such, there is no live issue as to whether or not the interview panel properly assessed the other candidates; accordingly, the substantive evaluations of the other candidates are irrelevant.

19. The Tribunal accepts the submission of the Respondent on this point, finds that the documents requested by the Applicant are not relevant to the agreed issues, and therefore dismisses the Applicant's request.

Law

20. The policy governing staff selection exercises at the time of the contested selection process was set out in the administrative instruction ST/AI/2006/3 (Staff

selection system). This Administrative Instruction included a provision for the priority consideration of candidates at the 30-day mark in section 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.

21. The test for whether a candidate was treated in a “fair and reasonable manner” as contended by the Applicant has been set out by the United Nations Appeals Tribunal in *Rolland* as follows:

4. We hold that the selection process conducted by an interview panel can be rescinded under rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the selection shall be upheld.

5. We also hold that there is always a presumption that official acts have been regularly performed. This is called the presumption of regularity, but it is a rebuttable presumption. If the management is able to even minimally show that the appellant’s candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the appellant who must be able to show through clear and convincing evidence that she was denied a fair chance of promotion.

22. The consistent jurisprudence of the Dispute and the Appeals Tribunals is that an applicant who alleges bias and prejudice bears the burden of proving it. For instance, the Appeals Tribunal in *Parker* 2010-UNAT-012 stated that an applicant must “discharge the onus to provide sufficient evidence of harassment, prejudice or any kind of improper motivation against him”.

23. On the issue of compensation, the Appeals Tribunal in *Antaki* 2010-UNAT-095 stated:

Not every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damages.

24. Similarly, in *Sina* 2010-UNAT-094, the Appeals Tribunal found that “[t]his Court will not approve the award of compensation when absolutely no harm has been suffered”.

Considerations

Can a programme manager combine two selection exercises?

25. ST/AI/2006/3 is silent as to whether two selection exercises for similar posts can be combined. The procedure is not prohibited and therefore it is a matter of discretion in each selection process whether it is appropriate. In the present case, the two vacancies were of the same level, they were word by word the same, and almost all candidates applied for both posts. It was therefore a pragmatic and efficient method of proceeding.

26. The remaining question is whether the adoption of this practice impacted the fair consideration of the Applicant’s selection process. It is difficult to imagine what prejudice could arise in the following circumstances:

- a. the Posts were located in his work unit;
- b. the programme manager was his supervisor;
- c. the single temporary vacancy announcement issued on 14 January 2009 to fill in the Posts pending the Galaxy recruitment combined the two positions and clearly stated that they were Team Leader positions;
- d. the written test for the posts clearly indicated that the Posts were of “Procurement Officer, Team Leader”;
- e. the Applicant obtained clarification about this issue before he was interviewed for the posts and made no protest at that stage.

27. The Tribunal finds that the Applicant has not identified any detrimental effects on him caused by the combination of the selection processes established or that he was

misled by the combined process. In the circumstances of this case, it was therefore proper for the Respondent to combine the two selections processes and the vacancy announcements were not misleading.

Was it appropriate for the programme manager to simultaneously evaluate the 30 and 60-day marks candidates and, if so, was the Applicant detrimentally affected by this?

28. The Respondent acknowledges that there was an error in the order in which the Applicant was considered. In accordance with section 7 of ST/AI/2006/3, and based on the reasoning in *Kasyanov* UNDT/2009/022, the Respondent agrees that, as a 30-day candidate, the Applicant should have been considered before the 60-day mark candidates. The responsibility for transmitting the list of candidates eligible to be considered at the 15, 30 or 60-day marks lies with OHRM, and the programme manager is required to ensure that appropriate evaluation mechanisms are conducted at the 15, 30 and 60-day marks. This did not occur in this case and the Tribunal finds that it constituted a procedural breach of the Respondent's obligations to the Applicant.

29. However, the vacancy announcements for the Posts stated that the work experience requirement was a minimum of seven years of progressively responsible experience in high volume procurement. The Applicant did not meet at least one of the mandatory requirements for the Posts and could not have had any expectation of a successful outcome to his applications for the Posts. The Applicant knew he did not possess seven years of experience in high volume procurement, contract administration or related field. He said as much in his email of 21 January 2009 to his supervisor in which he himself referred to his lack of experience. The Applicant also implicitly accepted in his 24 February 2010 email to the PD Director, following the notification of the selection decision, that he should assume he had not been selected because he did not meet all the temporary posts' requirements.

30. In the absence of any prospect of being selected for the Posts, the Tribunal finds that the Applicant has not established that, as a 30-day candidate, he suffered any harm from being considered along with the 60-day candidates.

Did the interview panel conduct the interview in a fair and reasonable manner without bias and prejudice to the Applicant?

31. The record of the evaluation by the interview panel reveals a comprehensive evaluation of the strengths and weaknesses of the Applicant in relation to the posts for which he had applied. The panel took into consideration “team leader” skills through the “Planning and Organizing” competency, which required “an ability to coordinate the work of others”.

32. The marks accorded to the Applicant by each interviewer were consistent. The records show that the Respondent has demonstrated more than the minimal standard required by the ruling in *Rolland* that the Applicant’s candidature was treated in a fair and reasonable manner. The Applicant has not provided any clear and convincing evidence that he was denied a fair chance of promotion because of the way in which the interview was conducted. Nor has the Applicant provided any evidence to substantiate this contention that the interview panel was biased and prejudiced against him. Thus, he has not satisfied the burden of proof. Nothing on the record suggests that any of the questions that the panel asked him were inappropriate for a competency-based interview.

Did the interview panel act ultra vires in determining that the Applicant lacked the necessary number of years of experience?

33. The programme manager is accountable for the manner in which the selection process is conducted. The selection process is subject to review by the relevant central review bodies which assess whether the evaluation criteria have been properly applied and the procedures followed. There is no prescription in ST/AI/2006/3 about who is responsible for the determination of relevant years of experience.

34. The Tribunal finds that there was nothing illegal in the interview panel recording in their assessment notes that the Applicant did not meet the work experience requirement for the posts. On the contrary, it is desirable that mistakes made during the selection process are corrected as early as possible and that a clear record is kept.

Did the Respondent properly advise the Applicant of the outcome of the selection process?

35. The Applicant alleges that he was not advised about the outcome of the selection processes for the Posts. However, he attached to his application to the Tribunal a copy of the 23 February 2010 email from the PD Director, addressed to all staff in PD which advised him of the selection decision. The Applicant also attached to his application a copy of his email dated 24 February 2010, addressed to the PD Director, in which he acknowledges the non-selection decision and seeks an answer to two questions regarding whether he should assume he is not eligible for the Posts and whether he should desist from applying for other P-4 level posts of Procurement Officer until such time he meets the requirements for such posts.

36. The Tribunal finds that by 23 February 2010 the Applicant had been advised of and was aware of the outcome of the selection process as on that date he learned of the identity of the selected candidates and he was not the one selected.

If there were a breach of the selection process, is the Applicant entitled to compensation as a result?

37. This is a case in which the Respondent agrees that a breach of procedure occurred: the failure to consider the Applicant as a 30-day mark candidate before consideration of the 60-day mark candidates. However, the Applicant was not eligible to be considered as a 30-day mark candidate because he did not meet the work experience requirement.

38. In accordance with the legal principles referred to above, a procedural irregularity in a selection process does not in and of itself entitle an applicant to compensation. He or she must demonstrate the harm suffered as a consequence of the breach.

39. In the present case, the Tribunal finds that the breach did not result in denial of a loss of chance of promotion because the Applicant was not eligible nor was he qualified

for the Posts. This is not a case where, but for the breach, the Applicant would have had a fair chance of promotion.

40. In any event, the Applicant does not specify or provide any evidence of harm which has been caused to him as a result of alleged breach. He has no entitlement to any compensation in this case.

Conclusion

41. There was a breach of procedure in the failure of the Respondent to separately consider the Applicant as a 30-day candidate; however, as he was not eligible to be considered for the posts, he was not denied a fair chance of promotion as a result of this breach.

42. All other claims and allegations by the Applicant are rejected. The application is dismissed.

(Signed)

Judge Coral Shaw

Dated this 10th day of February 2012

Entered in the Register on this 10th day of February 2012

(Signed)

Hafida Lahiouel, Registrar, New York