



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/089

Judgment No.: UNDT/2013/003

Date: 14 January 2013

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

ZHOUK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests his non-selection for the P-3 level post (“the Post”) of Information Systems Officer in the Office for Disarmament Affairs (“ODA”) in New York.

Relevant Facts

2. On 10 December 2009, within three days of the Post opening on the United Nations post vacancy website (“Galaxy”), the Applicant submitted his candidacy for the Post.

3. On 22 December 2009, the Office of Human Resources Management (“OHRM”) released the list of 15-day candidates that met the requirements for the Post. This list contained the names of four candidates, though not that of the Applicant.

4. On 4 February 2010, after exhausting the pool of 15-day candidates, the Alternate Programme Case Officer (“PCO”) for this vacancy announcement requested that OHRM release the list of available 30-day candidates. This list was provided to him on the following day. The PCO identified four candidates from this list that met the requirements for the Post.

5. On 9 February 2010, interview invitations were sent out to three 30-day candidates that met the requirements for the Post. The first two interviews were conducted on 17 February 2010 and the final one on 8 March 2010.

6. During his review of the list of 30-day candidates, the PCO noticed that the list released by OHRM also contained the name of a 15-day candidate, namely that of the Applicant. The PCO contacted OHRM to obtain further information as to why the Applicant had not been included as part of the list of 15-day candidates, however, no explanation was forthcoming.

7. During this period, four additional 30-day candidates were identified as meeting the requirements for the Post, all of whom were subsequently invited for an interview. Due to the Applicant's status as a 15-day candidate, the PCO was advised that the Applicant should be interviewed prior to any additional 30-day candidate. The Applicant participated in an interview for the Post on 9 March 2010.

8. On 20 April 2010, the Applicant was informed by the ODA that the selection process for the Post had been completed and that he had not been selected. The Applicant requested management evaluation of the administrative decision not to select him on 11 May 2010. On 8 June 2010, the Management Evaluation Unit ("MEU") informed the Applicant that the Secretary-General had decided to endorse the findings and recommendations of the MEU that the selection process for the Post was proper.

9. On 3 September 2010, the Applicant filed an application with the Dispute Tribunal contesting his non-selection for the Post and, on 6 October 2010, the Respondent submitted his reply to the application.

10. On 10 January 2012, the Respondent, in response to Order No. 277 (NY/2011), submitted a Statement of Evidence by Witness, for the purpose of providing the Tribunal with further particulars regarding the manner in which the Applicant was given appropriate priority consideration as a 15-day candidate.

11. On 4 June 2012, the undersigned Judge was assigned to the present case. The parties agreed to have the present case disposed of on the papers.

Issues

12. The issues to be considered in this case are as follows:

- a. Was the correct procedure followed in considering the Applicant's application for the Post in view of his classification as a 15-day candidate?

- b. Did the failure to consider the Applicant's performance appraisal report affect the fair consideration of his application?

Applicant's submissions

13. The Applicant's principal contentions may be summarised as follows:
 - a. The Applicant possessed the necessary qualifications for the Post and, as a 15-day candidate, he should have been considered for the vacancy prior to any 30-day candidate being even considered;
 - b. Although eligible, the Applicant's name was not included in OHRM's list of the 15-day candidates resulting in a breach of the applicable post selection rules and procedures, including ST/AI/2006/3 (Staff selection system). Furthermore, his performance evaluation ("e-PAS") reports were not made available to the officer conducting the evaluation of the candidates;
 - c. The members of the interview panel did not possess relevant expertise and qualifications in the field of the Post for the purpose of conducting the interview;
 - d. The breach of the applicable procedures resulted in the Applicant not receiving a full and fair consideration for the Post and affected his rights to assume new responsibilities as well as his capacity to develop his career;
 - e. As a result of the breach of his rights, the Applicant seeks one-year net base salary in damages.

Respondent's submissions

14. The Respondent's principal contentions may be summarised as follows:
- a. According to *Krioutchkov* UNDT/2010/065, the Secretary-General has a wide discretion when appointing or promoting staff members and the Tribunal will not replace his judgment with its own;
 - b. The Applicant's application for the post was carefully reviewed by the PCO who then invited him for a competency-based interview. All the candidates, including the Applicant, were given the same pre-approved questions. The panel determined that the Applicant met the requirements for all of the competency requirements for the Post except teamwork. Upon completing the Applicant's interview, the panel's assessment was entered into Galaxy, disproving the Applicant's claim of not receiving fair and full consideration;
 - c. Upon being identified as a priority candidate, the Applicant was afforded priority consideration for the Post resulting in the Administration conforming with all the relevant rules and regulations. There is no evidence that the error in not originally considering the Applicant with the other 15-day candidates was caused by any *mala fides* on the part of the Administration. The imputed delay did not breach the Applicant's rights, nor did it amount to violation of due process or vitiate the selection process. In *Liarski* UNDT/2010/134, the Tribunal held that a procedural lapse does not establish a breach of rights unless evidence establishes that but for the procedural failure the applicant would have been appointed;
 - d. There is no basis to the claims that the interview panel was not competent. Competency in teamwork is required for most positions in the United Nations and interview panel members from outside the Applicant's technical field would be qualified to objectively assess his competencies. Similarly, the absence of the Applicant's e-PAS did not deprive him of full

and fair consideration as the panel's final determination on suitability was solely based on the interview itself;

e. There is no basis to compensate the Applicant since he has failed to establish that he has suffered any injury or damages warranting compensation. In *James* 2010-UNAT-009, the Appeals Tribunal held that an award of damages is not appropriate when there is no evidence of damage or injury.

Consideration

Applicable law

15. The relevant legal provisions as contained in ST/AI/2006/3 (Staff selection system), applicable at the time, are as follows:

Section 6

Applications

...

6.2 Applications of candidates eligible to be considered at the 15-day mark but received before the 30-day mark shall nevertheless be transmitted for consideration to the department/office, provided that the head of department/office has not submitted to the central review body a proposal for one or more candidates eligible to be considered at the 15-day mark. Applications for a vacancy posted with a 60-day deadline from candidates eligible to be considered at the 30-day mark but received afterwards shall be transmitted with all the other applications received before the deadline.

...

6.6 At the time of application, staff members shall submit a copy of their last two performance appraisals. If there is a gap of six months or longer in the record of performance, or if no appraisal was completed within six months of the end of the preceding performance year, the staff member shall be deemed to have fully met performance expectations during the period for which there is no performance record or appraisal.

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. Other candidates shall be considered at the 60-day mark, where applicable.

...

7.5 For candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required. Competency-based interviews must be conducted in all cases of recruitment or promotion. Programme managers must prepare a reasoned and documented record of the evaluation of those candidates against the requirements and competencies set out in the vacancy announcement.

Receivability

16. The present case meets all of the receivability requirements identified by art. 8 of the Tribunal's Statute.

Selection of 15-day candidates

17. Article 7.1 of ST/AI/2006/3 specifically states that as part of the staff selection process for a post vacancy, "first priority [must be given] to lateral moves of candidates eligible to be considered at the 15-day mark". However, if "no suitable candidate can be identified at this first stage, candidates eligible at the 30-day mark" will then be taken into consideration.

18. In *Kasyanov* UNDT/2009/022, the Dispute Tribunal provided a clear analysis regarding the interpretation to be given to the post selection process with regard to 15-day and 30-day candidates. More specifically, in para. 24, the Dispute Tribunal stated that:

What is the nature of the “first priority” to be accorded to these moves? This is made clear in the following sentence. It is only if “no suitable candidate can be identified at this stage”, namely the stage of considering the 15-day mark candidates, that the 30-day mark candidates are to be considered. The section clearly and unambiguously requires two stages in which the candidates are considered, the second stage of which will only arise if the specified prerequisite occurs – the nonidentification of a suitable candidate at the first stage. ... [15-day mark candidates] must be considered first, so that if one or more is found to be suitable, the 30-day candidates are no longer to be considered.

19. Furthermore, in *Abbassi* UNDT/2010/086, which was affirmed by the Appeals Tribunal in *Abbassi* 2011-UNAT-110, the Dispute Tribunal further stated that the “order of interviews is not relevant as long as the [15-day] applicant was considered first”.

20. The facts in the present case do not suffer from any ambiguity. Indeed, even though it should have been, the Applicant’s name was not included on the list of 15-day candidates to be interviewed for the Post. This omission resulted in one 15-day candidate being considered as part of the first stage, and three 30-day candidates being considered as part of the second stage, of the selection process for the Post. It is only during this second stage that the Applicant was identified as a 15-day candidate who should have been considered prior to the selection process being opened up to, and then taking into consideration, three 30-day candidates.

21. While the Applicant was considered as quickly as possible once it was determined that he met all the applicable criteria, his interview occurred after that of (a) one 15-day candidate, (b) three 30-day candidates and (c) on the same day as, though prior to, the final four 30-day candidates.

22. Consequently, the Applicant’s application for the Post was not provided “first priority” consideration prior to the PCO engaging in the second stage of the selection process, nor could the Respondent provide any evidence to support why such a procedural error occurred.

23. The Applicant's rights to be evaluated and considered as a 15-day candidate for the Post, prior to any 30-day candidates being considered, were violated.

Interview panel

24. It is the Applicant's submission that he was not afforded full and fair consideration by the interview panel due to the fact that they did not receive and review his most recent e-PAS which he submitted under separate cover, though on the same day, and to the same email address to which he had submitted his application for the Post. The Applicant also adds that his rights were also breached by the fact that the interview panel consisted of staff members that were unqualified to conduct an interview in the specific technical field of the Post. Nevertheless, the Applicant goes on to add as part of his application that "[t]his case is not about the findings or non-findings of the Interview Panel".

Panel members

25. The record of the case indicates that the interview panel determined that the Applicant met the competency criteria related to the question of "Technological awareness". Rather, it is with regard to the core competency of "Teamwork", a competency that can be objectively assessed by any interview panel member, regardless of their technical background, where the Applicant was found wanting and therefore not meeting the requirements for that core competency.

26. Consequently, it cannot be said that any potential qualification, or lack thereof, of members of the panel with regard to the specific technical field of the Post negatively impacted the evaluation of the Applicant.

Performance appraisals

27. Article 6.6 of ST/AI/2006/3 states that "[a]t the time of application, staff members shall submit a copy of their last two performance appraisals". However, that same article goes on to add that if the performance appraisals are not available

the Applicant “shall be deemed to have fully met performance expectations”. The purpose of the later being that an interview panel should not draw any negative inference from the absence of an applicant’s performance appraisal.

28. In the present case, the format of the interview was the same for each of the candidates, namely each candidate was evaluated solely on his or her performance during the interview without regard to external documentation. Similarly, in *Abbassi*, the Dispute Tribunal stated that “[t]he 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 [his] suitability”.

29. In *Rolland* UNDT/2010/095, the Dispute Tribunal held that “the mere fact that the applicant’s [e-]PAS would have led to the reasonable expectation that the panel would have evaluated [his] competencies more favourably does not justify the conclusion that its evaluation was mistaken or unreasonable”. Furthermore, in *Abbassi*, the Dispute Tribunal also stated that it was “well within the purview of the panel to determine and depend greatly on ... its interview and its capacity to make a fair assessment of the candidate without further enquiry”.

30. Consequently, the Tribunal does not consider that the absence of the Applicant’s performance appraisal impacted the interview panel’s evaluation of his competencies especially with regard to, as stated above, his lacking in the core competency of “Teamwork”.

Damages

31. As previously determined by the Tribunal, the Applicant was not interviewed as a priority candidate resulting in a breach of ST/AI/2006/3. However, it is also apparent from the record of the case that, had he actually been interviewed as a priority 15-day candidate, and as stated above, he would have been found not to meet one of the core competency criteria resulting in him being deemed, similarly to the only original 15-day candidate that was interviewed, not suitable for the Post. Such a

determination would have then resulted in the PCO having to move on to the second stage of the selection process, namely taking into consideration 30-day candidates.

32. While the Applicant's rights were breached by the fact that the post selection process was not appropriately followed, the end result would have been the same with regard to the Applicant, namely his non-selection.

33. Nevertheless, the Applicant submits that his non-selection and the breach of his rights caused him to suffer unnecessary stress and affected his professional career. However, the Applicant does not provide any evidence to support these additional assertions.

34. As stated by the Appeals Tribunal in *Antaki* 2010-UNAT-095, "[n]ot 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".

35. The Applicant has not put forward any evidence that the vitiated selection process with regard to the Post resulted in him suffering damages of any kind. Consequently, an award of compensation is not warranted.

Conclusion

36. The application is granted in part with regard to the breach of ST/AI/2006/3. As a 15-day candidate, he should have been considered for the post prior to any 30-day candidate being considered.

37. The request for damages is dismissed

(Signed)

Judge Alessandra Greceanu

Dated this 14th day of January 2013

Entered in the Register on this 14th day of January 2013

(Signed)

Hafida Lahiouel, Registrar, New York