



Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

KRIOUTCHKOV

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, a Russian Translator (P-3) at the Economic and Social Commission for Asia and the Pacific (“ESCAP”), contests the decision not to select him for the post of Russian Reviser (P-4), Russian Translation Unit (“RTU”), with the United Nations Office at Nairobi (“UNON”), advertised under Job Opening (“JO”) 13-LAN-UNON-29492-R-NAIROBI (R).

Facts

2. The JO in question was advertised in Inspira from 14 August to 13 October 2013. The Applicant applied on 6 September 2013.

3. Four candidates, including the Applicant, were screened as being eligible and released to the Hiring Manager, Mr. Oganian, the Chief, Russian Translation Section (“RTS”), UNON. After further assessment by the Hiring Manager, the Applicant and the candidate who was subsequently selected, were shortlisted to undergo a substantive written test and a competency-based interview.

4. The written test was administered in November 2013. The tests results were anonymised and transmitted to two revisers of the United Nations Office at Geneva for grading according to five different criteria. Out of a maximum score of five points, the Applicant obtained a rating of 3.8 and the other candidate 4.8.

5. The two shortlisted candidates were interviewed on 19 November 2013. The assessment panel comprised the Chief of the Printshop, DCS, UNON (P-5), a Reviser, Arabic Language Unit, UNON (P-4) and the Chief, Spanish Language Unit, UNON (P-5). The panel concluded that the Applicant fully met the requirements of the post in the competencies of Communication and Teamwork, but only partially in those concerning Professionalism and Planning and Organizing, whereas the other candidate was found to fully meet all four competencies.

6. The assessment panel recommended both candidates for selection. However, on reviewing the report, the Central Review Committee (“CRC”)

pointed out discrepancies between the panel's recorded assessment of the candidates' competencies and its recommendations. Specifically, it noted, by email dated 2 February 2014, that the panel's comments on the Applicant's answers regarding two competencies were clearly negative and could "never lead to the recommendation of th[at] particular candidate".

7. Upon receipt of the CRC's feedback, the panel agreed to maintain its comments and to change its recommendation. Accordingly, the panel submitted an amended report dated 17 February 2014, in which only the candidate who was eventually selected was recommended for selection.

8. The assessment panel's final conclusions were also recorded in the standardised Inspira "Comparative Analysis Report". The ratings and the narrative of the Comparative Analysis Report are consistent with those of the assessment panel's report of 17 February 2014.

9. On 21 February 2014, the Secretary of the CRC transmitted its recommendation to the Director, Division of Conference Services, UNON, for final selection, which took place in late March 2014.

10. By automated email of 2 April 2014, the Applicant was notified of his non-selection for the post.

11. After requesting management evaluation of the contested decision on 16 May 2014, the Applicant received an email dated 10 July 2014 from a Legal Officer of the Management Evaluation Unit ("MEU") suggesting that they discuss his case informally. The Applicant agreed to participate in efforts to reach an amicable alternative resolution to the dispute.

12. On 23 August 2016, the Applicant was informed that the Legal Officer who had conduct of his case within MEU had been replaced. After reviewing the file, the newly assigned Legal Officer advised the Applicant, on 9 September 2014, that "MEU [would] provide the Under-Secretary General with its recommendation by the end of th[at] week". At the Applicant's insistence, she clarified, on 11 September 2014, that the option of pursuing a resolution had been

abandoned, and that she had decided to correct the course of action in the case and produce a management evaluation letter.

13. The application to the Tribunal was filed on 25 September 2014. MEU transmitted its management evaluation letter on 21 October 2014. The Respondent filed his reply on 31 October 2014.

14. In June 2015, this case, together with a number of other cases filed by the Applicant, was referred to mediation and the proceedings before the Tribunal were suspended for that purpose. However, mediation efforts were unsuccessful and the proceedings before the Tribunal resumed on 2 November 2015.

15. The Tribunal had initially considered that the case could be decided on the papers, and, by Order No. 53 (GVA/2016) of 17 March 2016, invited comments from the parties.

16. On 22 March 2016, the Applicant requested a hearing so that the Hiring Manager could be called as a witness, and, on 4 April 2016, he filed additional comments. Given the issues in contention and, in particular, the allegations of improper motivation, a hearing was convened on 24 May 2016, at which the following witnesses gave evidence:

- a. Mr. Edmond Oganian, Chief, RTU, UNON, and Hiring Manager for the post;
- b. Ms. Laura Mahler, former Chief of the Spanish Language Unit, UNON, and member of the assessment panel; and
- c. Ms. So-Young Yang, Chief *ad interim*, Unit B, Headquarters Staffing Section, Strategic Planning and Staffing Division, Office of Human Resources Management (“OHRM”), as an expert in the staff selection system.

17. In addition to these witnesses, a member of the CRC was to appear in order to explain and clarify the role of the CRC. However, since the parties indicated

that they were not seeking to ask the witness any questions, the Tribunal decided that it would not be necessary to call this witness.

18. On 1 June 2016, the Applicant made an unsolicited additional filing. Having reviewed it, the Tribunal was of the view that this submission did not make any difference to the determination of the issues in this case and the Tribunal's factual findings.

Parties' submissions

19. The Applicant's principal contentions are:

a. The post became vacant in December 2011 and was advertised more than 19 months later, when the Hiring Manager was selected as Chief, RTU, UNON. Under General Assembly resolution 51/226, the Vacancy Announcement ("VA") should have been issued within three months (by end March 2012). Had the vacancy been advertised in time, the successful candidate would not have qualified to apply, as he had served as a P-3 Russian Translator with the UN for less than three months and he could not even produce two UN performance evaluation reports. In total, it took 850 days to fill the post, in disregard of the 120-day benchmark established in General Assembly resolution 65/247;

b. The reason for delaying the advertisement of the post was to allow sufficient time for the staff member eventually selected, who had been recently joined RTU, to gain the requisite experience to be eligible for the post. Pending this eventuality, Mr. Oganian granted temporary contracts to personal friends and blocked the Applicant's candidacy. This was to the detriment of the Organization's interest to fill vacancies expeditiously and to achieve the highest standards of efficiency, competence and integrity in recruitment;

c. The wording of the JO in relation to experience was changed to request preferably "some" years of service within the Organization, instead of *three* years, as per the Generic Job Description for similar posts. All

subsequent Russian Reviser vacancies advertised in the UN after the one at issue stated a preference for *three* years of service in the Organization;

d. Para. 5 of the Inspira Hiring Manager's Manual ("Manual") provides that "the Hiring Manager ... is usually the chair" of the assessment panel. Yet, Mr. Oganian did not sit as a member of it although the selection related to the future number two of his unit. This suggests that the selection decision was already made in advance;

e. Since the Hiring Manager was, at the time of the recruitment, Officer-in-Charge ("O-i-C") of the Translation and Editorial Services ("TES"), all panel members were under his supervision and could have been influenced against the Applicant;

f. The panel did not include a professional in Russian translation/self-revision, or even a native speaker of Russian. The panel should have included at least two subject matter experts. In the circumstances, the panel members were not qualified to assess essential skills indicated in the VA, such as good writing skills, ability to maintain high standards of accuracy, consistency and faithfulness to the spirit, style and nuances of the original text with a good grasp of the subject matter;

g. The Applicant was not informed of the composition of the panel. Had he been, he would have contested it, in particular regarding the lack of two subject matter experts;

h. The Hiring Manager failed to make a final recommendation to the decision-maker;

i. The Manual states that recruiters will prioritise the release of eligible roster candidates. Although the Applicant was on the roster, his release was not prioritised;

j. Despite the mobility requirement in General Assembly resolution 53/221, over the last 25 years, all P-3 and P-4 promotions for Russian translators were done strictly within the same services/units at all five duty

stations where Russian translation services/units exist. Notwithstanding his professional experience of over 30 years as a Russian translator (24 within the UN system) with excellent performance records, and his inclusion in the roster for promotion to the P-4 level since 2008, which created a legitimate expectation of promotion, the Applicant has no real chance of promotion. For the past ten years, he has been unsuccessfully applying for various language posts in Nairobi. He believes that he is a victim of duty station-based discrimination, as well as of personal retribution. Since he serves at ESCAP, where the Russian Language Unit is not part of the Department for General Assembly and Conference Management (“DGACM”), he is adversely affected by the practice of promoting translators strictly within the same services/units at all duty stations; and

k. Sec. 2.5 of Administrative Instruction ST/AI/2010/3 (Staff selection system) allows Heads of departments/offices to transfer staff members at the same level within their departments or offices without advertising the vacancy or any review by a central review body. This provision, coupled with the system-wide practice of promoting to P-3 and P-4 posts staff within each unit, dramatically curtailed the Applicant’s chances of career development and mobility.

20. The Respondent’s principal contentions are:

a. The Organization enjoys wide discretion in selection matters and there is a presumption of regularity with respect to such decisions. Staff members have no right to promotion, but to full and fair consideration. The Applicant received full and fair consideration in accordance with the staff selection system. The assessment panel concluded that he did not fully satisfy two of the competencies required. While it initially recommended him for selection, along with the selected candidate, after the CRC’s pointed out the inconsistency between the panel’s substantive assessment and its recommendation, the Applicant’s recommendation could not be maintained;

b. The timing of the JO’s advertisement is irrelevant and falls within the Administration’s discretion. The Applicant has no right to demand that a

vacancy be advertised within any specific timeframe. In any case, the position became vacant on 1 May 2013 and was advertised on 14 August 2013. Prior to that, it was temporarily vacant from January to June 2013, and covered through contractors, in line with DGACM's practice;

c. The work experience criterion in the JO fell within the Organization's discretion and was approved by OHRM before posting, pursuant to sec. 4.6 of ST/AI/2010/3. The JO merely indicated a preference for candidates having served for a certain time with the UN. The selected candidate had worked for about ten years as a consultant with a UN specialised agency;

d. The claim of lack of objectivity of the selection exercise is unsubstantiated. It is based on the Applicant's personal opinion of the Hiring Manager;

e. The Hiring Manager is not required to sit on the panel. Two of its members were subject matters experts in translation/revision. The applicable rules do not bind the Administration to inform candidates of the identity of the panel members. The Manual mentions that as a mere courtesy;

f. The Applicant does not enjoy any preference because of the fact that he worked in different duty stations. The mobility policy is not an element that the panel is required to look at for P-4 positions. The applicable legal framework provides for the best-suited candidate to be selected; and

g. The Applicant's other claims are beyond the scope of this application.

Consideration

21. The Applicant raises a series of issues regarding the impugned decision. Some relate to the alleged bias of the Hiring Manager, who, according to the Applicant had a favourite candidate for the post. Others concern the procedural propriety of the selection process.

Bias by the Hiring Manager

22. The Applicant submits that the delay in advertising the post and the formulation of the experience requirements were to his detriment and were calculated to confer an advantage upon the selected candidate. He contends that but for the delay and the reduction of the experience criterion, the successful candidate would not even have qualified to apply for the vacancy.

23. It is settled law that the burden of proving any allegation of ulterior motivation and bias rests with the applicant (*Beqai* 2014-UNAT-434). The evidence adduced at the hearing does not support the allegations of bias.

24. Regarding the delay in advertising the vacancy, there is, first of all, a difference of view between the parties as to whether or not there was a delay. The Respondent denies that the delay was extensive, and states that the post became vacant only in May 2013, three months prior to its advertisement, and adds that the post had been “temporarily vacant” from January to June 2012. Mr. Oganian testified that he occupied the post until he was selected for his current functions as Chief, RTU, in December 2011. After his appointment, the position of Chief, RTU, was reclassified from the P-4 to the P-5 level, which entailed a new selection process. Hence, the P-4 Russian Reviser post he formerly held could not be filled as long as the selection process for the P-5 post was pending. Mr. Oganian wanted to keep open the possibility of returning to the P-4 post in the event that he did not succeed in being selected for the P-5 position. Accordingly, the P-4 reviser post was advertised once the recruitment exercise for the P-5 post was concluded, with the selection of Mr. Oganian.

25. It is clear from the evidence that the Russian Reviser post had been unencumbered since December 2011, and the fact that its functions had temporarily been covered by consultants does not change this fact. The Tribunal finds that the post in question had been vacant for a period of 19 months before it was advertised and over 28 months before it was filled. Whilst Mr. Oganian’s evidence rebuts the allegation that the delay in filling the P-4 post was intended to confer an advantage on the successful candidate, it shows that he deliberately delayed the selection process pending his own appointment as Chief, RTU. It

would appear that the decision to delay was not subject to any oversight by OHRM or by the hierarchy within the department.

26. The Tribunal finds that the delay in advertising the vacancy was not contrived to allow the selected candidate to gain more experience with the Organization, but motivated by the Hiring Manager's desire to protect his own position in the event that he did not secure the P-5 post of Chief, RTU.

27. In delaying the advertisement, the RTU failed to uphold the goal of filling vacant posts within 120 days, as requested by the General-Assembly in its resolution 65/247, as well as para. 4.2.3 of the Manual:

The Secretariat-wide benchmark of 120 days as the average selection time for all positions advertised (the average selection time is the average number of days between the date of issuance of a job opening and the date of the selection decision) must be adhered to.

28. Further, the Hiring Manager would appear not to have complied with the clear guidance in the same Manual to the effect that he/she is to ensure "that the process for filling a vacant position is initiated in a timely manner and, to expedite [it], [he/she is to conduct] as many steps as possible quickly and simultaneously" (para. 2.1.1), and that he/she is "advised to start the job opening process immediately for positions becoming vacant unexpectedly, such as when the incumbent is selected for other functions or separates from service or when a position is newly created" (para. 4.1.4).

29. That being said, a review of General Assembly resolution 65/247 and other related instruments indicates that the 120-day benchmark for the advertisement of vacancies is a programmatic standard for good administration, and not a binding enforceable rule. To this extent, failure to achieve it, although inconsistent with the pronouncements on reducing delays in recruitment, does not amount to a violation of the Applicant's terms of appointment.

30. As to the experience requirements in the JO, the Applicant submits that the JO for the post sets out a less demanding requirement on experience than the usual language used for similar posts. He submits that the Generic Job Description for

positions of a similar nature and grade require “[a] minimum of five years of experience in translation, précis-writing, self-revision ... of which three preferably should have been with the United Nations”, while the JO at issue stipulated that “some” of the minimum five years of experience should preferably have been in the United Nations.

31. The Tribunal is satisfied that the usual wording is “three” years of service with the Organization and, to this extent, there has been a deviation from the standard criterion. However, a modification of a JO wording falls within the Organization’s discretion, provided that this change is carried out in conformity with the established procedures, and in this case, the evidence before the Tribunal is that the JO was approved by the Office of Human Resources Management, in conformity with sec. 4.6 of ST/AI/2010/3.

32. The Hiring Manager’s testimony was that the change in the standard language was not made at his initiative, but originated in the human resources office involved in creating the JO. Furthermore, the Applicant is mistaken in his understanding that the wording was unprecedented, since at least three JOs for translator/reviser posts had previously been issued using the expression “some years” instead of “three”, including one in 2008 within the RTU, UNON, although it was later cancelled for reasons not known to the Tribunal.

33. The Respondent submits that, even under the standard wording, the successful candidate would have been eligible, as he worked for ten years as a consultant for a UN specialized agency. Although, it is not entirely clear whether this work would have been counted as working experience with the United Nations, this matter is of limited relevance, since both the JO in question and the Generic Job Description simply express a *preference* that at least three/some years of the candidate’s professional experience should have been within the Organization. As this was not a firm requirement, even if a candidate was found not to have completed three full years of service with the United Nations, this would not have resulted in his/her automatic exclusion from the selection process. Accordingly, the Applicant’s submission that the Hiring Manager lowered the

experience requirements to render the successful candidate eligible to compete for the post is not well founded.

34. The Tribunal does not attach any weight to the Applicant's submission that the Hiring Manager abstained from evaluating the written tests and sitting on the interview panel because he was aware that he had of a conflict of interest with respect to the Applicant.

35. The Tribunal finds that the allegations of bias in the selection process are not substantiated.

Composition of the panel

36. The Applicant submits that the panel did not include any expert in Russian translation/self-revision, in breach of sec. 1(c) of ST/AI/2010/3, which defines "assessment panel" as:

[A] panel normally comprised of at least three members, with *two being subject matter experts* at the same or higher level of the job opening, at least one being female and one being from outside the work unit where the job opening is located, who will undertake the assessment of applicants for a job opening. (emphasis added)

37. ST/AI/2010/3 does not define "subject matter experts".

38. In *Aliko* 2015-UNAT-540, the Appeals Tribunal affirmed *Aliko* UNDT/2014/042, which held that "[t]he Administration disposes of considerable discretion in determining who is an "expert". In *Tiwathia* UNDT/2015/021, upheld in *Tiwathia* 2016-UNAT-616, this Tribunal deemed that an expert sitting on a panel to recruit the senior head of a medical unit did not necessarily need to be a doctor, and that an expert in management could be considered as a subject matter expert in that context, given that an essential part of the duties involved in discharging the post were managerial.

39. Based on this guidance, the Tribunal determined in *Krioutchkov* UNDT/2016/052, which concerned a selection procedure for a comparable post, that it was not mandatory that the panel include a Russian translator and/or

reviser, emphasising that sec. 1(c) of ST/AI/2010/3 did not impose such a narrow interpretation of the expertise relevant for a certain post.

40. It is the Tribunal's understanding that assessment panels set up in the context of the selection of translators/revisers include, in the overwhelming majority of cases, linguists specialised in the language that is central to the post in question. However, it cannot be held in the absence of clear words to the contrary that this amounts to a legal obligation under the applicable regulatory framework.

41. Two professional linguists with experience in translation and revision sat on the panel. This appears sufficient to fulfil the obligation that two subject matter experts be part of the panel. This approach seems reasonable in this case, since two senior Russian translators/self-revisers graded the written test, which was administered in order to assess, specifically, the technical knowledge and mastery of the Russian language, whereas the panel had the task of evaluating the competencies required for the post and not the technical language competence.

42. Additionally, the Tribunal finds that the Applicant's submission that the impartiality of the panel members was compromised by the fact that they were under the supervision of Mr. Oganian, since he then acted as O-i-C, TES, is without merit.

Failure to disclose the composition of the panel

43. While ST/AI/2010/3 does not stipulate a duty on the Administration to inform candidates of the identity of the assessment panel members set up to evaluate them, sec. 9.6 of the Manual, adopted in furtherance of sec. 2.6 of the instruction reads:

Applicants convoked for interviews are normally notified at least five working days in advance. The invitation includes the date, time and means of the interview ... and also *informs the applicant of the names of the assessors*. (emphasis added).

44. The Appeals Tribunal ruled in *Asariotis* 2015-UNAT-496 that the Manual does not have binding force, stressing that “[r]ules, policies or procedures

intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative issuances." It further stated:

At most, the Manual in this appeal provides "guidance" on the "responsibilities" of the Hiring Manager, as envisaged by Section 2.6 of ST/AI/2010/3; it does not purport to vest a staff member with an entitlement to be apprised in advance of an interview of the names of the panel members.

45. Although both the Inspira Applicant's Manual and the Inspira Recruiter's Manual also provide that invitations convoking candidates to an interview inform them of the names of the panel members, they do not have the binding force of properly promulgated Secretary-General's bulletins and administrative issuances. Accordingly, they do not confer on candidates a legal right to be informed of the panel's composition in advance of their interviews.

46. The Tribunal finds, following *Asariotis*, that the omission to inform the Applicant of the assessors' names in advance of his interview was not in breach of the Applicant's rights.

Final recommendation to the decision-maker

47. The memorandum of 21 February 2014 requesting the Director, DCS, to proceed with the selection shows that the CRC Secretary, and not the Hiring Manager, forwarded the record of the procedure to the competent head of office for decision. This departed from the clear terms of sec. 9.2 of ST/AI/2010/3 that "[t]he selection decision for positions up to and including at the D-1 level shall be made by the head of department/office on the basis of *proposals made by the responsible hiring managers*" (emphasis added) (see also sec. 9.3).

48. As a matter of principle, the careful distribution of roles and responsibilities at different stages of the selection procedure must be respected, since it constitutes a major safeguard. Nonetheless, "not every violation of due process rights will necessarily lead to an award of compensation" (*Wu* 2010-UNAT-042). Insofar as the selected candidate alone had been recommended for selection, there is no doubt as to whom the Hiring Manager would have wished to appoint. At that point in the selection exercise, the Applicant could not legally have been selected

because the panel had not recommended him. Consequently, the Hiring Manager's failure to submit his final recommendation had no impact on the Applicant's chances of success.

Other allegations

49. The Applicant makes a number of submissions relating to other selection procedures, including the previous hiring of the successful candidate on a P-3 position with RTU, UNON, and the temporary recruitment of retirees while the post remained vacant, as well as to certain system-wide practices that might raise systemic issues.

50. The scope of the Tribunal's review in these proceedings is limited to the administrative decision being appealed, namely the Applicant's non-selection for this post. Consequently, the Tribunal shall refrain from making findings on other issues.

51. For the same reason, the Tribunal will not rule upon MEU's handling of the request for management evaluation. The latter was not part of the decision-making process leading to the contested decision and whatever criticism could be made of MEU's action, it has no bearing on the lawfulness of the impugned decision.

52. That being said, the email exchanges on file support the Applicant's account that, after he had agreed to MEU's proposal to seek an informal resolution, MEU withdrew from this endeavour barely two weeks before the expiration of the mandatory time limit to file this application. This change of approach occurred without any forewarning or subsequent explanation and placed the Applicant in a difficult position which could have compromised further litigation. In addition, MEU rendered its management evaluation letter well past the prescribed 45-day deadline.

53. Given its crucial role in the formal system of justice, it is important that the MEU conducts itself in a manner that does not undermine the credibility of the system as a whole and the staff's trust in it. The General Assembly has consistently emphasised the importance of promoting the amicable resolution of

disputes. Accordingly, all components of the internal justice system are obliged to have regard to this commitment, as well as to the importance of exhibiting the appropriate degree of understanding and sensitivity in dealing with staff members who are willing to engage positively in *bona fide* attempts at reaching an amicable alternative resolution to the dispute.

Conclusion

54. The burden of proof of impropriety in the selection process is on the applicant. The Applicant's allegations of bias and procedural flaws are not supported by the extensive examination of the documents and the assessment of the oral evidence.

Judgment

The application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 2nd day of June 2016

Entered in the Register on this 2nd day of June 2016

(Signed)

René M. Vargas M., Registrar, Geneva