



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2016/005
Judgment No.: UNDT/2016/091
Date: 27 June 2016
Original: English

Before: Judge Thomas Laker

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 his non-selection for a vacancy of Russian Reviser (P-4), Russian Translation Section (“RTS”), Languages Service (“LS”), Division of Conference Management (“DCM”), United Nations Office at Geneva (“UNOG”), advertised under Job Opening (“JO”) 14-LAN-UNOG-38908-R-GENEVA (L).

2. As remedies, he requests to be “afforded the UN obligations of good faith and due process in the full and fair consideration of [his] case”, as well “as any relief customary in such instances at the discretion of the Tribunal”.

Facts

3. The JO at issue was advertised in Inspira from 12 December 2014 to 10 February 2015. The Applicant applied on 30 December 2014.

4. By email of 18 February 2015, the Chief, RTS, in his capacity as Hiring Manager, informed the Applicant that he had been shortlisted and convoked him to a written test, specifying that it would consist of approximately one standard page of English text to be translated into Russian.

5. The Applicant replied on 20 February 2015, raising concern about the expectation of him having to type in Russian in the test and about the impartiality of the Hiring Manager. The latter responded on 25 February 2015 that he would recuse himself and that another Hiring Manager would be appointed. The administration of the written test was postponed for that purpose.

6. On 23 March 2015, the Applicant was contacted by LS, DCM, to schedule his written test between 29 and 31 March 2015. On the following day, the Applicant asked if the test involved typing in Russian and requested clarifications about the role in the procedure of one of the recipients of the 23 March 2015 email. In response, he was advised that the staff member he had referred to was

the “official Hiring Manager” (new). The Applicant wrote back on 26 March 2015 stating that said Hiring Manager and another member of the assessment panel were “parties to [his] Tribunal and [Management Evaluation Unit (“MEU”)] cases”, which might create a conflict of interests.

7. On 27 March 2015, the Executive Officer, DCM, confirmed that typing was required at the test, and reassured the Applicant that his concerns about potential conflict of interests had been duly noted and that his candidacy would receive full and fair consideration.

8. By email of 28 March 2015 to the Executive Officer, DCM, the Applicant informed her that no typing was done in Bangkok (by translators) “because [it] is not a formal requirement of [his] job and [he is] not even provided with Russian keyboards”. He, therefore, asked the Executive Officer to “consider [it] and advise”.

9. By email of 30 March 2015, LS, DCM, informed the candidates that they would be permitted to translate manually—instead of typing the translation—at the written test. On the following day, the Applicant requested a one-day extension of the deadline to take the test given that, *inter alia*, he had received the authorisation to handwrite his answers only the day before the last possible day to take the written test.

10. The requested extension was granted and the Applicant sat the written test on 1 April 2015.

11. On 14 April 2015, the Applicant was invited to a competency-based interview. In the context of the exchanges that followed to set the interview date, on 24 April 2015, the Applicant raised anew his concerns about the objectivity of some members of the assessment panel and requested their replacement. On the same day, the Applicant was informed that an *ex officio* member from the Human Resources Management Service (“HRMS”), UNOG, had been added to the panel to ensure that proper procedures were followed.

12. The Applicant was interviewed by videoconference on 29 March 2015.

13. By memorandum dated 18 May 2015, the Hiring Manager recommended four candidates, including the Applicant, to the Central Review Committee. The latter endorsed this recommendation on 24 June 2015.

14. By memorandum dated 30 June 2015, the Hiring Manager recommended another candidate for selection. Said candidate was selected on 4 September 2015.

15. By email dated 5 September 2015, the Hiring Manager informed the Applicant of his non-selection for the post.

16. On 2 November 2015, the Applicant requested management evaluation of the contested decision, which was upheld by letter of 4 December 2015.

17. The instant application was filed on 1 March 2016, and the Respondent filed his reply on 1 April 2016.

18. By Order No. 111 (GVA/2016) of 27 May 2016, the parties were invited to file comments, if any, with respect to the Tribunal's view that a judgment could be rendered without holding a hearing. The Respondent made no comments. The Applicant filed additional substantive submissions on 5 June 2016, without addressing the need or appropriateness of a hearing.

Parties' submissions

19. The Applicant's principal contentions are:

a. Due to how the Chief, RTS, handled selections in the past, he was forced to completely remove himself from the official selection process. Nonetheless, before he recused himself as Hiring Manager in this case, he already had made the key decision not to select the Applicant directly from the roster. The Chief, RTS, failed to prioritise roster candidates, as directed by the Inspira Hiring Manager's Manual;

b. The written test was based on a skill not required by the JO, namely typing in Russian. That almost prevented the Applicant from taking the test. The Administration initially stated that the Applicant was required to type

the test and changed its position to allow handwriting only at the Applicant's request and shortly before the scheduled date of the test. This uncertainty during more than 40 days caused the Applicant stress and anxiety. It is uncertain what was the role of the Executive Officer, DCM, in the process, as well as her reasons to finally change her mind;

c. While appreciating the authorization to handwrite in this process, given that the Applicant was denied such possibility in two previous recruitments, this illustrates the lack of consistency and uncertainty in the Administration's practices;

d. The decision to conduct the written test in two formats had the effect of undermining the uniformity of the process. The replacing Hiring Manager, who was a party in several of the Applicant's cases before the Tribunal, was one of the recipients of the email exchanges on typing that preceded the test; therefore, he was aware that the Applicant would not type, which resulted in compromising anonymity, hence, objectivity as the Hiring Manager already knew to whom the handwritten copy belonged to;

e. Typing was not a requirement under the JO and the Organization's standard working procedures for translators consist of dictating or handwriting. Despite this, the Respondent made typing a disqualifier for selection without providing training, certification and keyboards;

f. Tests were only introduced for P-4 Russian Reviser posts, and not for P-3 and P-5 Russian translators and revisers;

g. Even though the Applicant expressed concern before the written test about the presence of the Hiring Manager and of another member in the panel, as they had sat in panels set up for previous recruitments that the Applicant had formally contested, they were kept in the panel. The Applicant requested their substitution again prior to the interview, to no avail. These individuals' presence and involvement clearly did not allow for the Applicant's full and fair consideration;

h. The Administration imposed upon the Applicant the task of setting up a videoconference, implying that it was his responsibility. He conveyed his view that this was not part of his duties and, in addition, it is very distracting and time-consuming for candidates. Although, in a spirit of good will, the Applicant finally managed to set up the requested videoconference, he spent almost two days and engaged help from some ten other staff members. By imposing on him such non-duties as typing and arranging video conferences, the Administration prevented him from properly preparing for the test and the interview, and created additional stress and anxiety for him, undermining the uniformity of the process and equality of the candidates;

i. For the past 26 years, all P-3 and P-4 promotions for Russian translators were done strictly within the same services/units at all duty stations where Russian translation services exist. The Applicant is a victim of duty station-based discrimination. He is penalized for serving in a regional commission, which is not part of a DGACM system;

j. The Applicant has been repeatedly rostered for promotion to the P-4 level since 2008. This created a legitimate expectation of being promoted within a reasonable average period on a par with other rostered Russian Translators. Intentionally non-selecting roster candidates like the Applicant defies the purpose and spirit of the roster facility and amounts to an abuse of the Organization's good will and resources. The pre-screened roster system established in sec. 9.4 of ST/AI/2010/3 (Staff selection system) was introduced further to an express request by the General Assembly and the Secretary-General has referred to it as a tool expected to become the primary means of filling vacancies;

k. Other candidates included in the roster at the same time that the Applicant have since then been promoted and even non-rostered candidates have been selected over him. Subjecting some roster candidates to repeated testing, while others receive promotions without additional tests, is a sign of bias and prejudice. In addition, the selected candidate's roster membership had expired in the past; and

1. For the seven past years, the Applicant has been translating and self-revising his work, which by the Organization's own standards corresponds to tasks at the P-4 level, without granting him in return any practical recognition or real chance of promotion.

20. The Respondent's principal contentions are:

a. The Secretary-General enjoys broad discretion in selection matters. The Tribunal must conduct a limited review of such decisions, respecting their presumption of regularity, and not substitute its own judgment to that of the Administration. Only in extremely rare circumstances will the Tribunal rescind a selection exercise;

b. The Applicant was fully and fairly considered. He underwent a written test, which he passed, and an interview. The Applicant was considered to meet all the competencies of the post, and he was thus recommended along with other three candidates;

c. Another candidate was recommended for selection to the Director-General, UNOG, as he was deemed to be best suited for the functions. The Director-General determined that said candidate was indeed best suited based on his longer experience in translation in the United Nations as well as his superior performance on the written test and at the interview;

d. The procedures prescribed in ST/AI/2010/3 were followed;

e. The written test was properly conducted. All candidates were treated equally in that they were given the option of typing or handwriting their answers. Furthermore, handwriting was permitted as an accommodation to the Applicant; he cannot argue that such accommodation rendered the test unfair;

f. The claim that the Applicant's prior inclusion on the roster gave rise to a legitimate expectation of selection is unfounded. The Hiring Manager was entitled to consider both rostered and non-rostered candidates. Moreover, the selected candidate was also on the roster;

g. The Applicant adduces no evidence of the alleged geographical bias; and

h. The Applicant's claims of conflict of interest with regard to some of the panel's members have no merit. The Panel's assessment led to the Applicant being recommended and he failed to meet the burden of proving any bias on the part of any of its members. The Administration addressed any actual or perceived conflict of interest: the Chief, RTS, recused himself as Hiring Manager and an *ex officio* member from HRMS was present during the Applicant's interview.

Consideration

Bias by the initial Hiring Manager and the Applicant's inclusion in the roster

21. The Applicant asserts that the initial Hiring Manager—i.e., the Chief, RTS—had a conflict of interests that rendered the latter inapt to objectively consider his candidacy. The Tribunal is satisfied that this person recused himself and that a different staff member from UNOG was assigned to the Hiring Manager's role.

22. However, the Applicant holds that by the time of his replacement, the Chief, RTS, had already harmed the Applicant by making the decision not to select him directly from the roster. This assertion is misplaced.

23. The staff selection system sets out different procedural options and no candidate is entitled to have the recruitment process conducted according to one or another of them. Candidates simply have the right to be fully and fairly considered. The inclusion of a staff member in the pre-screened roster does not create a right to be selected for a given post or within a certain timeframe.

Likewise, when evaluation of candidates is undertaken, the status of rostered member does not confer any preference or priority to the rostered candidates over the non-rostered ones.

24. Since the Applicant was given a chance to compete for the post and he indeed underwent preliminary screening, written test and competency-based interview in the same manner as the other candidates, the Tribunal finds no breach of his right to full and fair consideration.

Administration of the written test

25. As it has already been ruled in *Krioutchkov* UNDT/2016/041 and *Krioutchkov* UNDT/2016/042, it is not unfair or unreasonable to request candidates to a position as a specialist in Russian language to type in Russian. It is irrelevant whether or not the standard working procedures for translators in the United Nations involve typing because a written test conditions do not need to replicate internal workflows. Since the same conditions were applied to all candidates and none of them was particularly disadvantaged, it was within the Administration's discretion to require candidates to type.

26. However, the Applicant was even exonerated from this requirement, since all candidates were allowed to handwrite their answers. Considering that, he cannot complain, after a departure from the initial approach had been accepted for his sake and at his insistence, that the Administration has acted in an inconsistent manner and that uniformity of the procedure was eroded. The Applicant cannot have it both ways.

27. The Applicant also avers that the anonymity of the tests was compromised because he became recognisable as the one candidate submitting his answers handwritten. In this respect, the Tribunal recalls that all candidates were offered the same options, and it was the Applicant's choice to handwrite his test. Even assuming that those who graded the test could identify the Applicant's answers, it is misplaced to blame the Administration for the consequence of the Applicant's

choice. In any case, the Tribunal notes that the Applicant passed the test and went to the next round of assessment, i.e., the competency-based interview.

28. Lastly, the Tribunal cannot entertain the Applicant's claim that he was subjected to accrued stress and anxiety and prevented from adequately preparing for the test as he had to wait for 40 days until the Administration communicated to him that he was allowed to handwrite his answers. It should be recalled that part of this period elapsed while the Applicant and the Administration exchanged on the issue. It is only normal that the decision to deviate from the modalities that had been established and announced to all candidates takes a certain time. Additionally, the Administration granted a one-day extension precisely to mitigate the inconveniences derived from the fact that the above-mentioned communication was sent the day before the deadline initially set to take the test.

Conflict of interests with two members of the assessment panel

29. The Applicant contends that the two Russian-speaking members of the panel had a conflict of interests vis-à-vis him, and that they were maintained in the panel despite the fact that he raised his concern in this respect both before the written test and, again, before the interview.

30. According to the Applicant, the alleged conflict of interest arose as the aforementioned panel members were "parties" to cases brought by the Applicant before the internal justice system; by "parties", nonetheless, he means that they took part in previous selection processes that he later contested.

31. The Tribunal notes and is satisfied that the Administration took measures to address the Applicant's concerns regarding the panel's impartiality. An *ex officio* member from HRMS was present during the Applicant's interview, as an additional safeguard of the interview's objectivity. Moreover, the Applicant did not adduce, and the Tribunal could not find any indication, that any of the panel members displayed any sort of animosity or ill-disposition against him. Importantly, the panel found that the Applicant met all the competencies and

requirements for the post, and recommended him along with three other candidates.

32. For all of the above, the Tribunal does not consider established that any prejudice or bias on the part of the panel, or some of his members, prevented the Applicant's candidacy from being properly considered.

Discrimination

33. The Applicant submits that there is a pattern to promote translators within each duty station, that in practice eliminates any chance for candidates from other duty stations to be selected.

34. It is a well-settled principle that burden of proving any allegations of ill-motivation or extraneous factors is incumbent on the applicant (*Jennings* 2011-UNAT-184, *Obdeijn* 2012-UNAT-201, *Beqai* 2014-UNAT-434). Besides, the Appeals Tribunal held in *Rolland* 2011-UNAT-122 that official acts are presumed to have been regularly performed; accordingly, in recruitment procedures, if the management is able to even minimally show that the staff member's candidature was given a full and fair consideration, the burden of proof shifts to the candidate, who must show that she or he was denied a fair chance.

35. The Tribunal cannot but note that the Administration deployed significant efforts at different stages to address issues that could affect the fairness and impartiality of the process. First, after the release of the eligible candidates, the Chief, RTS, recused himself as Hiring Manager in the selection process at hand; later, before the Applicant sat for the written test, the requirement that the answers be typed was lifted at the Applicant's request; lastly, for the Applicant's interview, an HRMS *ex officio* member was appointed. In addition, the Applicant passed the test and the interview. The Director-General, UNOG, having received a complete record of the procedure selected a different candidate.

36. In light of all of the above, the Tribunal is of the view that the Administration has minimally showed that the Applicant was fully and fairly considered. It considers that the Applicant did not adduce sufficient evidence to demonstrate that his non-selection was due to any sort of discrimination, either personal or systemic, and to outweigh the presumption of regularity of the contested decision.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Judge Thomas Laker

Dated this 27th day of June 2016

Entered in the Register on this 27th day of June 2016

(Signed)

René M. Vargas M., Registrar, Geneva