



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/017
Judgment No.: UNDT/2019/078
Date: 8 May 2019
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

DUNCAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Mohamed Abdou, OSLA

Counsel for Respondent:

Elizabeth Gall, ALD/OHR, UN Secretariat

Introduction

1. On 23 April 2018, the Applicant, a staff member with the Office of Internal Oversight Services, United Nations Secretariat, New York, filed an application in which she contests the decision not to select her for the post of Administrative Assistant - G-7, JO 83356 (“job opening”), or recommend her for placement in a roster for similar positions. The Applicant requests the rescission of the contested decision and as an alternative, damages for the loss of opportunity and for damage to her career progression.
2. On 4 April 2019, this case was re-assigned to the undersigned Judge.

Facts

3. The Applicant applied for the job opening on 21 August 2017. She was subsequently shortlisted for a competency-based interview along with other candidates.
4. On 4 November 2017, the Applicant was notified that her application had not been successful.

Consideration

Legal Framework

5. The Secretary-General has broad discretion in the selection and appointment of staff (see *Abbassi* 2011-UNAT-110; *Frohler* 2011-UNAT-141; *Charles* 2013-UNAT-286; Article 101(1) of the Charter of the United Nations and staff regulations 1.2(c) and 4.1).
6. In matters of staff selection, it is the role of the Dispute Tribunal to review the challenged selection process to determine whether the applicable regulations and

rules have been applied and whether a candidate has received full and fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration (*Rolland* 2011-UNAT-122; *Aliko* 2015-UNAT-540). The Tribunal's role is not to substitute its decision for that of the Administration.

7. The official acts of the Respondent enjoy a presumption of regularity (*Rolland* 2011-UNAT-122). If the management is able to even minimally show that the applicant's candidature was given a full and fair consideration, then the presumption of law stands satisfied (*Finniss* UNDT/2012/200 (affirmed by 2014-UNAT-397)).

8. Thereafter, the burden of proof shifts to the applicant who can rebut the presumption of regularity by showing through clear and convincing evidence that he or she was denied a fair chance of selection (*Rolland* 2011-UNAT-122; *Niedermayr* 2015-UNAT-603; *Ngokeng* 2017-UNAT-747).

9. Even if the Tribunal finds that the procedure was not properly followed, such irregularity will only result in the rescission of a non-selection decision if the candidate would have had a significant chance of selection (*Vangelova* 2011-UNAT-172; *Bofill* 2011-UNAT-174).

Was the selection process followed?

10. The Applicant submits that the Administration failed to follow the procedure set out in ST/AI/2010/3 (Staff Selection System) because the composition of the panel was not the same for all shortlisted candidates. She argues that this is a clear procedural flaw, especially considering that the assessment method consisted merely of a competency-based interview. Given the comparative nature of the selection process, the Applicant argues that it is unreasonable for the Respondent to assume that changes in the composition of the panel would be inconsequential.

11. The Applicant argues further that ST/AI/2010/3 does not allow for multiple panels to be established in respect of the same recruitment exercise. Moreover, the Applicant states that one panel did not include a member outside of the work unit as required by sec. 1(c) of ST/AI/2010/3.

12. Finally, the Applicant states that the Respondent failed to disclose the names of all the members who participated in the panels for each interview, as directed by Order No. 207 (NY/2018).

13. The Respondent responds that the assessment panel was properly constituted. He states that sec. 1(c) of ST/AI/2010/3 provides a definition of an assessment panel but that its provisions are not mandatory. The practice of alternating one of the three members of the panel is not prohibited and the Central Review Panel approved this procedure. Further, the Respondent submits that the constitution of the panel was done for practical purposes and to ensure timely completion of the selection process.

14. The Respondent avers that the use of alternate members of the assessment panel did not impact upon the fair and consistent evaluation of the candidates. Two panel members participated in all the interviews (Hiring Manager and Finance and Budget Officer, P-3), which ensured a consistent approach to evaluating the candidates. The candidates were assessed against the same competencies, the interviews were conducted in the same manner using the same questions, and panel members have been trained in conducting competency-based interviews. The replacement of one of the panel members in two interviews due to exigent circumstances did not negatively impact the Applicant's right to full and fair consideration.

15. Section 1(c) of ST/AI/2010/3 reads as follows:

Assessment panel: 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. For D-2 level job openings, the panel should normally be comprised of at least three members, with two being from outside the department or office, and at least one female;

...

16. The Dispute Tribunal analyzed the language of sec. 1(c) of ST/AI/2010/3 in *Mianda* UNDT/2018/060, and concluded:

36. [...] The administrative instruction makes no reference whatsoever to a possible reconstitution of a panel or to reserve members of the panel, as there could be. There is thus no apparent right to substitute panel members, should they become unavailable.

...

40. The continuity of panel members making assessments is essential to ensure fairness and equality of treatment throughout the process, since assessments made by each member are subjective. Indeed, assessments are made by looking at how each candidate meets the competencies required for a job opening. To some extent, such assessments are also subjectively comparative between the candidates, as the panel seeks to identify the best candidate. Thus, the assessment necessarily contains a comparative element. As stated above, continuity of membership of an assessment panel is thus essential.

17. In the present case, it is undisputed that the composition of the panel varied throughout the process. This change is not permitted in ST/AI/2010/3 and constitutes a procedural flaw in the selection process.

18. The Applicant argues further that the Administration circumvented the procedural safeguards by omitting, in the transmittal memorandum to the Central Review Body, the name of one of the individuals participating in one of the assessment panels and indicating that the assessment panel consisted of the same members throughout.

19. The Tribunal notes that the transmittal memorandum to the Central Review Body states that the composition of the assessment panel varied throughout the

process. The Tribunal has found that these changes in the composition of the assessment panel constitute a procedural error. It is therefore irrelevant that the name of a panel member was omitted in the transmittal memorandum.

20. The Applicant further submits that the Administration failed to implement an appropriate evaluation method by not administering a written test and limiting the assessment method to a 30-minute interview. The Applicant states that the questions posed did not reflect the requirements of the job opening.

21. The Respondent responds that it is for the assessment panel, not the Applicant, to determine what questions are appropriate to ask during an interview. He avers that the candidates were evaluated on the three competencies listed in the job description.

22. The Tribunal notes that pursuant to ST/AI/2010/3, the administration of a written test is not mandatory. The choice is left to the hiring manager between “a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written tests [...].” Moreover, as the Applicant was shortlisted for the competency-based interview, she suffered no prejudice from the absence of a written test.

23. With respect to the type of questions asked during the interview, the Tribunal recalls that absent any improper motives, it is within the discretion of the Administration to decide what assessment method is best suited to evaluate candidates. The Appeals Tribunal has established that an applicant cannot substitute his or her own evaluation method for that of the Administration (*Wang* 2014-UNAT-454). In the instant case, the Applicant disagrees with the evaluation method elected by the Administration but fails to show that the Administration exceeded its discretion in this respect.

Did the procedural error impact the Applicant's right for full and fair consideration?

24. Having determined the selection process was affected by a procedural error, the Tribunal will next address whether the error impacted the Applicant's right for full and fair consideration.

25. It is the jurisprudence of the Appeals Tribunal that an irregularity in a selection process has no impact on the status of a staff member when he or she had no foreseeable chance of promotion or of being included in the roster. However, in a case where a staff member had a significant chance of promotion, the irregularity has a direct impact on the status of that staff member resulting in the rescission of the impugned decision (see *Pinto* 2018-UNAT-878; *Krioutchkov* 2016-UNAT-691; *Vangelova* 2011-UNAT-172; *Dualeh* 2011-UNAT-175; *Bofill* 2011-UNAT-174 and *Sina* 2010-UNAT-094).

26. It follows that there must be a link between the irregularity in the procedure and the failure to recommend the Applicant.

27. The evidence shows that two of the three members of the panel participated in the interviews of all the candidates throughout the recruitment process. All the candidates were evaluated on the same three competencies: planning and organizing, professionalism and communication, and there is no evidence that they were not all asked the same questions.

28. Even in the absence of the personal notes of one of the panel members, the evidence establishes that the Applicant was unanimously found to only partially meet the three competencies. Therefore, it cannot be concluded that the Applicant would have obtained a different result had the composition of the panel been the same for all candidates. Therefore, the Applicant fails to show that she had a significant chance of selection.

29. Based on the above, the Tribunal finds that the procedural error in the recruitment process did not impact the Applicant's right to be fully and fairly considered. Her application was fully and fairly reviewed by the hiring manager and it was within the reasonable discretion of the Organization to find that the Applicant's experience fell short of the minimum criteria required for the post.

Conclusion

30. The Tribunal finds that there was a breach of procedure in the change of the composition of the assessment panel throughout the recruitment process for JO 83356. However, as the Applicant failed to prove that she stood a significant chance of being selected or recommended, she was not denied a fair chance of being included in the roster as a result of this breach.

31. All other claims and allegations by the Applicant are rejected.

32. The application is dismissed.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 8th day of May 2019

Entered in the Register on this 8th day of May 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York