



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

XU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Ming Wu

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant filed a claim with the

Tribunal, this Tribunal notes that notification is made to the Administrative Law Section (formerly the Administrative Law Unit (“ALU”)), the institution that deals with cases before the Dispute Tribunal. In the present matter, notification was sent to the ALU as evidenced by the email of 2 December 2009. There is no rule that each individual counsel representing the Secretary-General should be notified. If such a rule should be applicable, it would mean that the Tribunal should embark on a chase of each individual counsel. Further, on the date of the hearing, one representative of the Secretary-General from ALU did put in an appearance. Though this issue is moot, this Tribunal felt duty-bound to set out its observations on this in the earnest hope that, on occasion arising, the Appeals Tribunal would give clear guidance on this notification aspect.

6. The Dispute Tribunal received a copy of Judgment No. 2010-UNAT-053 on 23 August 2010. On 1 September 2009, the Registry transmitted a hearing notice to the parties to inform them that the new hearing would be held on 9 November 2009. On 14 September 2010, the matter was transferred from Izuako J. to Boolell J by Order No. 177.

7. On 9 November 2009, the Tribunal held an oral hearing in the matter. The Applicant called a Senior Reviser, Chinese Translation Service (CTS/DGACM), as a witness. Although the Respondent’s counsel had indicated in an earlier submission that he intended to call three members of the Interview Panel as witnesses, he decided at the hearing to call only one, the Chief, CTS/DGACM, who was also the Programme Manager.

9. On 18 September 2008, the contested post was advertised in Galaxy under VA No. 08-CON-DGACM-418629-R-New York. The Applicant applied for the vacancy the same day and was subsequently invited to participate in a competency-based interview on 30 October 2008. She was not recommended for the post by the Interview Panel.

10. The Interview Panel placed a number of other candidates on the recommended list, which was subsequently transmitted to the Central Review Committee (“CRC”) for review. After the CRC review, one of these candidates was selected for the post by the USG/DGACM while the others were placed on the roster. The selected candidate was informed of the selection decision on 21 November 2008. The Applicant was not informed of her non-selection for the post.

11. Upon learning of the selection of another candidate for the contested post, the Applicant submitted a request for administrative review of the decision not to select her. She asserted that the selection process had been tainted by a number of flagrant

Issues

13. Based on the parties' written and oral submissions, the Tribunal deems the following to be the legal issues in this matter:

a.

Was the Applicant's candidacy as a 15-day mark candidate considered in accordance with section 7.1 of ST/AI/2006/3?

15. Sections 5.4 and 5.5 of ST/AI/2006/3 set out those staff members who are

Considerations

19. In *Kasyanov* UNDT/2009/022¹, the Tribunal provided the following discourse on the meaning of section 7.1 of ST/AI/2006/3:

“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 non-identification of a suitable candidate at the first stage. Accordingly, the order of consideration and the effect of consideration is not lost simply because of the date of consideration [...]”.

20. Hence, it is clear that only 15-day mark candidates are to be “considered” at the “first stage” and if a suitable candidate is not identified at this stage, 30-day mark candidates are then considered at the second stage. The question though is what exactly is required for a 15-day candidate to be deemed to have been “considered” at the first stage?

21. In *Krioutchkov* UNDT/2010/065, the Applicant, a Russian translator at the P-3 level applied for another Russian translator post at the P-3 level as a 15-day mark candidate. The Programme Case Officer (“PCO”) evaluated only the Applicant’s Personal History Profile (“PHP”) at the outset and decided not to interview him. A 60-day mark candidate was subsequently interviewed and recommended for the post to the Central Review Committee (“CRC”). The CRC returned the recommendation to the PCO as it was unclear how the weaknesses expressed by the PCO regarding the Applicant’s candidacy had been established based on his PHP. The PCO then restarted the evaluation process and reviewed the Applicant’s PHP and e-PAS records against the vacancy announcement. Despite a negative overall evaluation at this stage, the Applicant was tested and interviewed for the post. The Interview Panel

¹ See also *Kasyanov* 2010-UNAT-076.

considered that he did not satisfy the job requirements and did not recommend him for the post. The 60-day mark candidate was recommended and subsequently selected for the post. Based on the circumstances of the case, the Tribunal concluded that:

“Had [the Applicant] been found to be suitable, as the only eligible 15-day candidate he must have been appointed, however favourable had been the appraisals of the other candidates that had occurred in the meantime, since he could not lose the priority accorded to him by sec. 7.1 as an eligible 15-day candidate merely because, as it happened, the other candidates had been appraised before him as a matter of chronology: see *Kasyanov*. It follows that, once it be accepted that the applicant was found not [to] be suitable for appointment, there was no error in not appointing him.”

22. Based on *Krioutchkov*, the Tribunal considers that a review of the 15-day candidate’s PHP and ePAS against the requirements of the post is an essential element of the evaluation process. The Tribunal is also of the considered view that any consideration of the 15-day candidates at the “first stage” should be conducted in conformance with section 7.4 of ST/AI/2006/3, which directs programme managers to evaluate candidates at the 15-, 30- and 60-day mark on “the basis of criteria pre-approved by the central review body” and section 7.5 of ST/AI/2006/3, which provides the following:

“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.”

23. In the present case, the Programme Manager was away on official mission in

26. Firstly, the Tribunal wishes to note that none of the assessment tools (i.e. the previous assessments) utilized by the Programme Manager are provided for in ST/AI/2006/3. The Tribunal finds it quite interesting that the Programme Manager simply chose to ignore the tool that had been provided by the Organization (i.e. sections 7.4 and 7.5 of ST.AI.2006/3), which would have ensured objectivity, transparency, consistency and equality, and came up with her own system instead. It is also noteworthy that the Tribunal was not provided with a reasoned and documented record of the evaluation of the Applicant which should have been prepared by the Programme Manager after she conducted her first-stage assessment.

27. One of the assessment tools used by the Programme Manager during her assessment of the Applicant's 15-day candidacy was an evaluation of the Applicant that was conducted during the selection process for a P-5 Senior Reviser post even though she was being assessed for a P-4 Reviser post. The selection process for the P-5 post included a written test, which the Respondent submits the Applicant did not do well in. The Respondent asserts that the use of the results of the Applicant's written test for a P-5 post in the context of a P-4 selection process is irrelevant since the Programme Manager used the written test to determine whether the applicant attained the P-4 standard relevant to the post. This argument is difficult to understand and/or accept as an examination of the responsibilities for the P-5 and P-4 posts reveals that the duties for the two positions differ substantially, with the P-5 post shouldering more and heavier responsibilities. With respect to competencies, the P-5 post calls for, *inter alia*

28. On the other hand, the P-4 post calls for, *inter alia*:

“[...]**solid** analytical, writing and translation skills; proven ability to produce within established deadlines translation work that meets **high** standards of accuracy, consistency and faithfulness to the spirit, style and nuances of the original text; **a good grasp** of terminological and reference research techniques and a proven ability to research and use all sources of reference and terminology; a **high** degree of initiative, political sensitivity, versatility, judgement and discretion [...]” (*emphasis added*)

29. In light of the fact that the two positions called for different responsibilities and the competencies for the P-5 post were more arduous, it was patently unfair and improper for the Programme Manager to use the Applicant’s unsuccessful candidacy for the P-5 post as an assessment tool in the P-4 selection exercise. It stands to reason that the written test and interview for the P-5 post assessed the higher level responsibilities and competencies required for that specific post. Thus, the Respondent’s submission that the Programme Manager used the written test to determine whether the applicant attained the P-4 standard relevant to the post is nothing but bizarre and irrational. The Tribunal is of the considered view that the

requirements and competencies in the vacancy announcement for the contested post as set out in sections 7.4 and 7.5 of ST/AI/2006/3.

37. The above notwithstanding, the discussion of whether the Applicant was

40. In this respect, the Tribunal's clarification at paragraph 21 in the *Abbassi* judgment is relevant. This paragraph provides, *inter alia*, that:

“For obvious reasons it is desirable, as a general rule, that candidates given priority consideration as members of a separate pool should be assessed on

presented to the Tribunal by the Respondent. The inference here is that the candidates were strongly recommended, recommended or not recommended contemporaneously.

42. Based on the rationale contained in paragraph 39 and the circumstances outlined in paragraph 40 above, the Tribunal finds it hard to believe that the assessment of the Applicant in the present case had not already been inappropriately tainted by the knowledge of the Interview Panel members of the suitability of the 30-day candidates who had already been interviewed and deemed to be either “strongly recommended” or “recommended”. It is also hard to believe that the information received by the Programme Manager from her three sources of information had not also inappropriately skewed her assessment of the Applicant’s suitability.

43. In light of the preceding paragraphs, the Tribunal concludes that the Applicant’s candidacy as a 15-day mark candidate was not considered in accordance with section 7.1 of ST/AI/2006/3.

Was the Applicant’s candidacy given full and fair consideration in accordance with ST/AI/2006/3?

44. The Respondent noted in his closing submission that apart from being entitled to priority as a 15-day mark candidate, the Applicant’s candidacy was also entitled to

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Applicant's submissions

56. The Applicant asserts in her pleadings that she was never informed of the decision of non-selection for the contested post and that this omission deprived her of the right to due process.

Respondent's submissions

57. The Respondent acknowledges in his pleadings that the Applicant was not informed of the outcome of the selection process. He avers that this was due to an administrative oversight.

Considerations

58. Section 9.5 of ST/AI/2006/3 denotes the responsibility of a programme manager vis-à-vis candidates who are neither selected nor placed on a roster after a selection process. This not only ensures good management and transparency in the selection process, but also brings proper closure to an individual who has participated in such a process and has a justifiable stake in the end result, whether good or bad. In *Krioutchkov*, Adams J. noted that timely notification is essential to enable candidates to make a “timely decision whether they wish to exercise their rights under the internal justice system in respect of the decision”.

59. Pursuant to section 9.5, the programme manager has a duty to inform the unsuccessful candidate(s) of the outcome of the selection process. The language used by the drafters of this provision signifies that this is not a discretionary duty i.e. one that allows the programme manager to choose to perform or not perform. This is an affirmative duty that requires the programme manager to take a positive/specific step i.e. to inform. The Tribunal is of the view that the existence of this duty to inform on the part of a programme manager then creates a right in an unsuccessful candidate, such as the Applicant in the current case, to be informed. Thus, the failure of a

Issue 3

Considerations

72. The Tribunal notes that apart from the Applicant's general allegations regarding candidates stationed outside of New York (i.e. United Nations Headquarters) that is contained in her Statement of Appeal dated 5 May 2009, she did not proffer any evidence to substantiate this claim. Consequently, the Tribunal finds this claim to be without merit.

73. Based on a review of the questions that were posed by the Interview Panel during the selection process, the Applicant appears to be overstating the complexity and length of the questions by claiming that

Conclusion on Issue 3

75. The Tribunal concludes that the Applicant's allegation that she was discriminated against, on the basis that at the time she applied for the contested post her duty station was Nairobi rather than New York where the post was located, is without merit.

Remedies

76. The Applicant requests that the decision not to select her for the contested post be quashed and that she be granted compensation in the amount of one-year's net base salary for the violation of her rights.

Conclusion on remedies

77. The decision not to select the Applicant for the post of Chinese Reviser at the P-4 level (VA No. 08-CON-DGACM-418629-R-New York) in DGACM was unlawful as the selection process was beset by flagrant abnormalities that went against the spirit and letter of ST/AI/2006/3. This resulted in the Applicant's candidacy not being accorded the full and fair consideration to which she was entitled. This subsequently resulted in the violation of her rights.

78. The Tribunal assumes that the Applicant's request for the administrative decision to be quashed is actually a request for rescission, which is not appropriate in the present case due to the passage of time and the implementation of the decision. However, the Applicant is entitled to compensation under Article 10.5(b) of the Statute for the failure of procedure.

Decision

79. In light of the foregoing, pursuant to Article 10.5(b) of the Statute the Respondent is to pay the App

- a. Two months net base salary, calculated at her salary level at the date of this judgment, for the violation of her right to be considered at the 15-day mark in accordance with section 7.1 of ST/AI/2006/3;
- b. Four months net base salary, calculated at her salary level at the date of this judgment, for the violation of her right to be fully and fairly considered in accordance with ST/AI/2006/3; and
- c. US\$500 for the failure to inform the Applicant of her non-selection for the contested post.

80. The Applicant will be entitled to the payment of interest, at the US Prime Rate applicable at the date of this judgment, on these awards of compensation from the date this judgment is executable, namely 45 days after the date of the judgment, until payment is made. If the judgment is not executed within 60 days, five per cent shall be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment of the compensation.

(Signed)

Judge Vinod Boolell

Dated this 31st day of May 2011

Entered in the Register on this 31st day of May 2011

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi