



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 former Joint Appeals Board (“JAB”) contesting the decision by the Under-Secretary-General (“USG”) of the Department of General Assembly and Conference Management (“DGACM”) not to select her for the post of Chinese Reviser at the P-4 level that was advertised in Galaxy under vacancy announcement (“VA”) number 08-CON-DGACM-418629-R-New York (“the contested post”) within the Chinese Translation Service (“CTS”), DGACM. At the time of the contested decision, she was working for the Division of Conference Services at the United Nations Office at Nairobi (“DCS/UNON”).

Procedural history

2. In accordance with ST/SGB/2009/11 (Transitional Measures Related to the Introduction of the New System of Administration of Justice), the JAB transferred its pending cases to the United Nations Dispute Tribunal (“the Tribunal”) on 1 July 2009. The Applicant’s case was transferred to the Tribunal in Nairobi.

3. On 7 January 2010, Izuako J. rendered Judgment No. UNDT/2010/002 on the Applicant’s claims, which was subsequently appealed by the Respondent to the United Nations Appeals Tribunal (“the Appeals Tribunal”).

4. In Judgment No. 2010-UNAT-053 dated 1 July 2010, the Appeals Tribunal held that the appeal was allowable on the ground that the Respondent’s counsel was not served with the hearing notice for 18 December 2009 and therefore could not present his case. Consequently, the Appeals Tribunal set aside Judgment No. UNDT/2010/002 and remanded the case back to the Dispute Tribunal to be re-tried afresh.

5. It was the view of the Appeals Tribunal that Respondent’s counsel was not notified of the date of the trial. With due deference and respect for the Appeals

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.

Background facts

8. Between 1 March 1997 and 29 December 2000, the Applicant was employed on various short-term contracts by the Organization. She entered into service at UNON on 10 April 2001 as a Chinese Translator at the P-3 level. On 1 June 2004, she was promoted to the post of Chinese Reviser at the P-4 level.

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 irregularities that affected her directly. In this respect, she submitted that her status as a 15-day mark candidate had been ignored and that a 30-day mark candidate had been selected for the contested post instead. Further, she contended that the decision violated the gender equality provisions of ST/AI/1999/9 and that it discriminated against her. She also asserted that she had been deprived of due process as she had not been informed of the decision not to select her. She subsequently received an unfavorable response to her request for administrative review from the Administrative Law Unit of the Office of Human Resources Management on 6 April 2009.

12. On 5 May 2009, the Applicant filed a Statement of Appeal with the former JAB in relation to the decision not to select her for the contested post. The matter was then transferred from the former JAB to the Dispute Tribunal on 1 July 2009.

Issues

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

- a. Whether the recruitment exercise for the contested post was conducted in accordance with the provisions of ST/AI/2006/3 (Staff selection system).
- b. Whether the provisions of ST/AI/1999/9 (Special measures for the achievement of gender equality) are applicable in this case and if so, whether they were adhered to?
- c. Whether the Applicant 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.

Issue 1

14. Was the recruitment exercise for the contested post conducted in accordance with the provisions of ST/AI/2006/3 (Staff selection system)? In this respect, the Tribunal considers the following to be the related issues for determination:

- a. Was the Applicant's candidacy as a 15-day mark candidate considered in accordance with section 7.1 of ST/AI/2006/3?
- b. Was the Applicant's candidacy given full and fair consideration in accordance with sections 7.4 and 7.5 of ST/AI/2006/3?
- c. Did the Respondent's failure to inform the Applicant of the outcome of the selection process for the contested post constitute a violation of her rights?

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 eligible to be considered at the 15 and 30-day marks respectively.

16. Section 7.1 of ST/AI/2006/3 provides that:

“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.”

Applicant's submissions

17. The Applicant avers that as a 15-day mark candidate, she was not given the priority due her under section 7.1 of ST/AI/2006/3 because she was not considered at the first stage as a lateral move but instead was considered together with 30-day mark candidates, one of whom was selected for the contested post. She submits that in evaluating the suitability of 15-day mark candidates, the programme manager should put them in a separate pool for evaluation before proceeding to evaluate 30-day mark candidates.

Respondent's submissions

18. The Respondent acknowledges that the Applicant was eligible to be considered for a lateral move at the 15-day mark in accordance with paragraph 5.4 of ST/AI/2006/3. However, the Respondent submits that the Programme Manager first determined that the Applicant was not a suitable candidate for the contested post and proceeded to consider the 30-day candidates in accordance with section 7.1 of ST/AI/2006/3.

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 Beijing when the 15-day candidate list came out. She did not return until just before the 30-day candidate list was due to be released. In a memorandum dated 29 May 2009 to the Executive Officer of DGACM, the Programme Manager explains that “[j]udging from evaluation of the suitability of [the Applicant] to the post done on

several occasions in the recent past, the panel decided to wait until the 30-day mark list came”.

24. Respondent submits in his reply of 13 October 2009 that the Programme Manager assessed the suitability of the Applicant for the post on the basis of previous assessments of the Applicant’s performance and determined that she was not suitable for appointment at the first stage of assessment and that candidates eligible at the 30-day mark should also be considered. What exactly was the basis of these “previous assessments” that the Programme Manager relied on in considering the Applicant at the 15-day mark?

25. According to the Programme Manager, five months prior to the selection exercise, she had had the opportunity to assess the Applicant’s competence during the course of a selection for a P-5 post and the Applicant had not been found to be suitable on the basis of her test results and interview. Additionally, the Programme Manager stated that she made enquiries with the Training and Programming Officers of the Chinese Service in regard to the Applicant’s suitability. She was informed by these Officers, who had seen her work in the Chinese Translation Service, that the Applicant was not suitable for the post. Lastly, the Programme Manager explained that when she noticed that the Applicant had been rostered for a P-4 Chinese Reviser post following a selection exercise conducted in Geneva, she made enquiries with the Chief of the Translation Service in Geneva about the Applicant’s suitability. The Chief of the Translation Service in Geneva informed her that even though the Applicant had been placed on the roster, she was not very good but had been placed on the roster to avoid “trouble”. Based on the foregoing, the Programme Manager concluded that the Applicant was a weak candidate and not suitable for the post. Once this determination had been made, the Programme Manager, decided to wait for the 30-day list to act further.

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*:

“**excellent** analytical, writing and translation skills; **highest** standards of accuracy, consistency and faithfulness to the spirit, style and nuances of the original text; **mastery** of terminological and reference research techniques; ability to use all sources of reference and information and to do research; **highest** level of initiative, political sensitivity, versatility, judgement and discretion [...]”. (*emphasis added*)

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 Applicant was being assessed at the higher responsibilities and competencies of the P-5 post even though she was being evaluated for a P-4 post. The Tribunal finds therefore that this assessment grossly failed to evaluate the Applicant against the requirements and competencies set out in the vacancy announcement for the P-4 Reviser post and was therefore not in conformity with the provisions of sections 7.4 and 7.5 of ST/AI/2006/3.

30. The Programme Manager then went on to collect the views of the Training and Programming Officers as to the Applicant’s suitability for the contested post. The Tribunal notes the subjective nature of this exercise and also notes that there is no evidence on the record to establish that the views presented by the Training and Programming Officers were based on the requirements and competencies set out in the vacancy announcement for the contested post. The Tribunal does not consider this

method of assessment employed by the Programme Manager to be one of the “appropriate evaluation mechanisms” envisioned by ST/AI/2006/3. The Tribunal finds therefore that this assessment tool was also rather illogical and not in conformity with the provisions of sections 7.4 and 7.5 of ST/AI/2006/3.

31. Lastly, according to the Programme Manager, she consulted the Chief of the Translation Service in Geneva about the Applicant’s suitability for the contested post because she had gone through a selection exercise for a P-4 Reviser post in Geneva and had been rostered. The Tribunal finds this to be a peculiar and unwarranted step for the Programme Manager to have taken given that roster candidates are deemed as having met all the requirements of the post for which they applied. Hence, why was there a need to consult on the suitability of a candidate who was already on the roster?

32. According to the Programme Manager, the Chief of the Translation Service told her the Applicant was not very good. She acknowledged, however, that he did not tell her in detail how he commented on the Applicant’s performance or her competence during the selection process. In this respect, the Respondent subsequently submitted into evidence a one-page overall evaluation of the Applicant for the post of Chinese Reviser, P-4 (VA No. 08-CON-UNOG DCM-415954-R-Geneva). Under “experience”, the Applicant received the following comments:

“Joined United Nations as a translator in 2001 and became P-4 reviser in 2004. Before her appointment at UNON, she had some experience of UN translation as a temporary translator under intermittent short-term contracts at UNHQ in 1999-2001 and at UNOG between 1991 and 1999. Her translations at UNOG needed heavy revision. The candidate does not have experience in a broad range of areas as mentioned in the VA. Her main work experience is with UNON where she has primarily worked on environment issues. Does not meet the requirement.”

33. Apart from the one-page overall evaluation, the Tribunal was not provided with any other document, including a copy of VA No. 08-CON-UNOG DCM-415954-R-Geneva, which would have placed the Geneva selection process in context.

Thus, it is difficult to judge whether or not the responsibilities and competencies for the Geneva post were identical to those for the contested post. Noting that the Geneva post was advertised in 2008, the Tribunal finds it unusual that the comments did not take into consideration her translation experience gained between 2001 and 2008 but focused only on her work at UNOG between 1991 and 1999. Her translations at UNOG between 1991 and 1999 may have needed heavy revision but what about her translations between 2001 and 2008?

34. During the 2007-2008 and 2008-2009 performance appraisal cycles, the Applicant, who was serving as a Chinese Reviser at the P-4 level, was rated as “frequently exceeds performance expectations”. Her performance expectations/goals for both cycles included translating and revising functions. Her first reporting officer provided the following comments in her 2007-2008 performance appraisal record:

“[The Applicant] has made successful delivery on all the goals she set for herself at the beginning of this cycle under review. In addition to performing her functions as an experienced reviser in the Unit and contributing to the productivity of the Unit as a whole, she was also assigned to a number of other responsibilities within the Organization, including working as a Compact Team member and carrying out tasks given to her in that capacity.”

35. In light of the foregoing, the Tribunal decides to give very little credence to the comments of the Chief of the Translation Service (see paragraph 32 above). The Tribunal finds the Programme Manager’s decision to utilize this method as a form of assessment to be unacceptable. Once again, the conclusion is that this mode of assessment was also not in conformity with the provisions of sections 7.4 and 7.5 of ST/AI/2006/3.

36. Based on the preceding paragraphs, the Tribunal concludes that the Applicant was not “considered” at the first stage as the iffy assessment methods the Programme Manager supposedly used lamentably failed to evaluate the Applicant against 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 considered at the first stage will not end here as the Applicant was subsequently interviewed but not recommended for the contested post because the Interview Panel concluded that she did not meet all of the evaluation criteria for the post.

38. In *Abbassi* UNDT/2010/086², the Applicant asserted that the Administration failed to properly assess her suitability as a 15-day candidate prior to considering other candidates. The Applicant applied for the post of Arabic Reviser on 22 June 2009 and was interviewed on 1 September 2009. Interviews of the 30-day candidates took place the following day. The Tribunal held that “the order of interviews is not relevant as long as the applicant was *considered* first, and, if found suitable (provided she was the only 15-day candidate), selected [...]”. The Tribunal was satisfied that the suitability of the applicant was considered immediately after her interview and that her evaluation narrative accurately reflected the consensus reached by the Interview Panel. The Tribunal concluded that because she was not found suitable, there was no error in not selecting her and in interviewing candidates from the 30-day pool. The decision not to select her was therefore found to be valid and lawful.

39. This Tribunal is of the view that the determining factor in *Abbassi* as to whether or not the Applicant was considered at the “first stage”, was that even though the interviews of the Applicant and the 30-day candidates were conducted very close in time i.e. one day apart, there was a distinct segregation of the 15- and 30-day mark candidates that allowed the Interview Panel to evaluate and conclude on the suitability of the Applicant for the contested post before proceeding to evaluate the 30-day mark candidates. That is, the Applicant was interviewed and deemed to be unsuitable on 1 September 2009, whereas the 30-day mark candidates were not interviewed and evaluated until the next day.

² See also *Abbassi* 2011-UNAT-110.

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 their own merits immediately after interview. If all candidates in, say, two pools, are assessed after all interviews are completed, even if the 15-day candidates are assessed first and (if considered suitable) put forward for appointment in accordance with sec. 7.1 of ST/AI/2006/3, common sense suggests that the assessment of the 15-day candidates is likely to have been inappropriately complicated by the knowledge of the panel members (and the programme manager) of the competing suitability of the other candidates who were interviewed. This would be inconsistent both with transparency and the important, if not strictly essential, requirement that compliance with the legally ordained procedures should not occur, but be manifestly seen to occur. In this hypothetical situation, it would be difficult to persuade the Tribunal that, as a matter of practical reality, the requirements of sec. 7.1 were complied with.”

41. In the present case, the Tribunal is not convinced in the least that the requirements of sec. 7.1 were complied with. It is noteworthy that after being deemed unsuitable by the Programme Manager, the Applicant was subsequently included in the selection exercise with another 15-day candidate and seven 30-day candidates. The record establishes that six of the 30-day candidates were interviewed two to three days before the Applicant and the other 15-day candidate were interviewed. In his closing submissions, the Respondent refers to the “contemporaneous notes” taken by the Interview Panel in relation to the Applicant. The Tribunal infers from this that the notes (i.e. interview evaluation sheets) taken by the Interview Panel during the interview of all the other candidates were also prepared contemporaneously. The Tribunal notes that these contemporaneous interview evaluation sheets also included a section at the end for the Interview Panel members to: strongly recommend, recommend or not recommend the candidate being evaluated. This section was filled out on the five interview evaluation sheets, including the Applicant's, that were

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 receive full and fair consideration. The question now is whether or not the Applicant’s candidacy was truly accorded full and fair consideration.

45. The Respondent submits that the evaluation of the Applicant’s candidacy by the Interview Panel demonstrates that she was fully and fairly assessed for the post. The Applicant asserts that it is unfounded for the Respondent to claim that the selection record establishes that she was fully and fairly considered against the applicable evaluation criteria set out in section 7 of ST/AI/2006/3.

46. As noted earlier, pursuant to sections 7.4 and 7.5 of ST/AI/2006/3, programme managers are required to evaluate candidates on the basis of “criteria pre-

approved by the central review body” and on the basis of “interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques”. The programme manager is also required to prepare a reasoned and documented record of the evaluation of the candidates “against the requirements and competencies set out in the vacancy announcement.”

47. Even though the Applicant was not accorded the 15-day mark priority to which she was entitled, the record shows that she was subsequently invited to submit translations samples and to participate in a competency-based interview, which she did. Although the Interview Panel found that the Applicant “largely meets the qualifications for the post”, the Panel ultimately concluded that she was not suitable for the post since she did not “grasp the very essence of teamwork and communications” and that she was not strong in technology or subject matters as chemicals, “which should be important for a language staff working in UNEP to know”.

48. Based on the history of this case, this Tribunal is convinced that the whole process of making the Applicant provide translation samples and submit to an interview was a farce. The record shows that the vacancy announcement for the contested post was issued on 18 September 2008. The Programme Manager was away on official travel from 4 October 2008 to approximately 12 October 2008. Soon after her return to duty in New York on 13 October 2008, she started her so-called assessment of the Applicant’s 15-day candidacy, which has been set out in paragraphs 22 to 35. She received the list of 30-day candidates on or about 24 October 2008 and emailed the candidates, both 15- and 30-day, about their submitting translation samples and participating in interviews. The interviews began on 27 October 2008 with three 30-day candidates being interviewed first. The Applicant was interviewed on 30 October 2008.

49. The time-line outlined above indicates that the Programme Manager received the negative reports on the Applicant's performance and suitability for the contested post from the Training and Programming Officers and the Chief of the Translation Service in Geneva sometime between 13 October and 24 October 2008. The Tribunal is not convinced in the least that approximately one to two weeks after actively seeking and receiving these negative reports, the Programme Manager was able to dissociate completely from these reports and give the Applicant the full and fair consideration that she was entitled to on 30 October 2008. Simple logic suggests that the assessment of the Applicant was more likely than not to have been inappropriately tainted by the negative knowledge the Programme Manager had already gathered on her suitability.

50. Additionally, the Tribunal notes that two of the Interview Panel members, i.e. the Training and Programming Officers, were the same people who had provided the Programme Manager with the negative reports on the Applicant's work and suitability for the post during her "assessment" of the Applicant's 15-day candidacy. Once again, the Tribunal finds it difficult to believe that these two Panel members could so easily and quickly divorce themselves from the negative appraisals they had personally provided to the Programme Manager and give the Applicant full and fair consideration for the same position they had already deemed her to be unsuitable for.

51. Noting that the Chief of the Translation Service in Geneva told the Programme Manager that the Applicant had been rostered during the Geneva selection exercise to avoid "trouble", the Tribunal is of the considered view that she was interviewed during this selection process solely to avoid her making "trouble" and muddying the waters in DGACM in view of the fact that she was a 15-day and roster candidate.

52. Thus, it is no big surprise that a candidate who "largely meets the qualifications for the post" was subsequently awarded awfully low scores by the

Interview Panel and deemed to be unsuitable for the same post and not even recommended for review by the CRC. It is surprising though that one of the aspects used to disqualify her candidacy was the fact she was not strong in technology or subject matters as chemicals, “which should be important for a language staff working in UNEP to know”. The Tribunal is of the considered view that it was incongruous for the Interview Panel to focus on the Applicant’s weakness in chemicals as one of the disqualifiers in light of the fact that the post she was competing for was in DGACM/New York and not with UNEP in Nairobi.

53. The sage words of Lord Denning in *Metropolitan Properties Co (FGC) Ltd v. Lannon*³ sum up the circumstances of this case most appropriately:

“There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased’.”

54. In light of the foregoing, the Tribunal concludes that the Applicant’s candidacy was not given the full and fair consideration to which she was entitled under ST/AI/2006/3.

Did the Respondent’s failure to inform the Applicant of the outcome of the selection process for the contested post constitute a violation of her rights?

55. Section 9.5 of ST/AI/2006/3 provides that “[a]ll interviewed candidates who are not selected or placed on a roster shall be so informed by the programme managers.”

³ [1968] 3 W.L.R. 694; [1969] 1 Q.B. 577.

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

programme manager to discharge this obligation violates the right of an unsuccessful candidate and gives rise to a legal remedy of some kind.

60. In the current case, the Respondent acknowledged in his reply that the Applicant had not been informed of the outcome of the selection process due to an “administrative oversight”. The Tribunal notes, however, that the particulars of this “administrative oversight” were not specified. In the absence of a tangible reason that led to this omission, the Tribunal concludes that the failure to inform the Applicant of the outcome of the selection process for the contested post violated her rights.

Conclusion on Issue 1

61. The Tribunal finds that the recruitment exercise for the post of Chinese Reviser at the P-4 level (VA No. 08-CON-DGACM-418629-R-New York) was not conducted in accordance with the relevant provisions of ST/AI/2006/3 and that the Applicant’s rights were violated as a result thereof.

Issue 2

62. Whether the provisions of ST/AI/1999/9 (Special measures for the achievement of gender equality) are applicable in this case and if so, whether they were adhered to?

63. Section 1.8 of ST/AI/1999/9 provides that:

“(a) Vacancies in the Professional category and above shall be filled, when there are one or more women candidates, by one of those candidates provided that:

- (i) Her qualifications meet the requirements for the vacant post;
- (ii) Her qualifications are substantially equal or superior to those of competing male candidates;

- (b) In accordance with staff regulation 4.4, the fullest regard shall be given to the qualifications and experience of women already in the service of the United Nations [...]"

Applicant's submissions

64. The Applicant submits that the decision not to select her violates United Nations' principles of gender equality since her experience of working in UNON as a translator and reviser proves that she is a fully qualified and competent.

Respondent's submissions

65. The Respondent asserts that the Applicant's qualifications did not meet the requirements of the contested post and that her qualifications were not "substantially equal or superior to" those of the male candidates who were recommended for the post. The Respondent submits therefore that section 1.8(a) of ST/AI/1999/9 did not apply to the Applicant.

Considerations

66. In light of the conclusion at paragraph 53 that the Applicant's candidacy was not given the full and fair consideration to which she was entitled under ST/AI/2006/3, it is impossible for the Tribunal to determine whether the provisions of ST/AI/1999/9 are applicable in this case and if so, whether they were adhered to.

Conclusion on Issue 2

67. In the Tribunal's considered view, the Interview Panel did not provide an objective evaluation that would enable a reasonable person to determine whether or not the Applicant's qualifications met the requirements for the vacant post and whether or not her qualifications were substantially equal or superior to those of the competing male candidates.

Issue 3

68. Was the Applicant 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?

Applicant's submissions

69. The Applicant submits that there was a systematic pattern of discrimination against candidates from duty stations other than United Nations Headquarters in New York and that there was a premeditation to exclude 15-day mark candidates from the selection process. In this respect, she asserts that it is well known among the Chinese language staff that personal interests and some extraneous factors are involved.

70. Additionally, the Applicant asserts that she was not treated fairly during the interview because she requested repeatedly during her interview that the Interview Panel members speak slowly and clearly and to repeat questions as the audio quality of the Nairobi phone line was inadequate but her request was ignored and even rejected. As an example of the discriminatory behaviour towards her, she submits that one panel member read out quickly a complicated and lengthy question (about half a page long). When asked to repeat the question, he flatly refused. She asserts that the candidates within CTS were given an unfair advantage due to the fact that they were physically present for the interviews and were able to listen to and answer the questions without any obstacles.

Respondent's submissions

71. The Respondent asserts that the Applicant failed to present any evidence to substantiate her allegation that staff members from outside New York were discriminated against.

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 at least one of the questions was about half a page long. None of the questions examined by the Tribunal were longer than two paragraphs with each paragraph comprising one or two sentences. Further, the Tribunal is of the considered view that the questions were generic competency-based questions that focused on the competencies listed in the vacancy announcement. The Tribunal therefore finds this claim to be without merit.

74. With respect to the Applicant's assertion that she was not treated fairly during the interview because the Interview Panel members refused to speak slowly and clearly even though the audio quality was poor, the Tribunal notes the Programme Manager's assertion that there was no problem with the audio quality but that rather there was a problem with the Applicant's understanding/grasp of the questions. It is unclear, however, whether or not the panel members in actuality refused to speak slowly and clearly. There is no doubt though that a bad/poor audio connection may: (i) result in a candidate not hearing questions and asking for them to be repeated; and (ii) Interview Panel members becoming frustrated and coming to conclusions about the candidate's comprehension abilities, which are not necessarily accurate. While the Applicant felt that she was not treated fairly, the Tribunal does not consider that this is a sign of discriminatory behaviour against her.

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 Applicant compensation pursuant of:

- 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