



Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

CHARLES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Marcus Joyce, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a staff member at the P-3 level in the Procurement Division, Office of Central Support Service (“OCSS”), Department of Management (“DM”) of the United Nations Secretariat in New York. After consideration by an expert panel of his application for the generic post of Board of Inquiry Officer at the Field Personnel Division (“FPD”) in the Department of Field Support (“DFS”), he was not placed on the roster. He alleges that not all members of the expert panel had been properly trained in competency-base interviewing skills.

2. In reply to Order No. 287 (NY/2011) dated 30 November 2011, both parties agreed to the present case being handled on the papers. This is not a disciplinary case and all the necessary documentation is to be found on the file. This is an appropriate case for a hearing on the papers.

3. On 23 January 2012, the Applicant filed an *ex parte* motion in which he stated that “[i]n light of the increasingly negative impact of the on-going litigation and the resulting consequences, I hereby temporarily suspend my participation in all activities relating to the subject case until the end of February 2012”. In support of his motion, the Applicant attached a copy of his medical records and asked that these medical records be kept confidential.

4. As this judgment was close to completion at the time the motion was received, no further participation or submission by either party was required by the Tribunal before the judgment is rendered and published. In order to respect the confidentiality of the Applicant’s medical records, they will neither be taken into account nor referred to in this judgment.

Preliminary matter

5. On 13 September 2011, following receipt of the Respondent's reply dated 6 September 2011, the Applicant filed a motion to strike out the Respondent's reply and enter summary judgment.

6. Contrary to the Applicant's submission and for the reasons discussed in this judgment, the Tribunal holds that the matters raised by the Respondent in its reply are arguable. The other issues raised by the Applicant in the motion to strike out are by and large repetitive of what he had already set out in his application and may be dealt with in the substantive judgment. Parties are discouraged from making such motions except in the rarest cases. They consume valuable resources of time and energy of the Tribunal which are best reserved for determining the case on its merits.

7. The only matter worthy of further consideration in the Applicant's motion of 13 September 2011 was the failure of the Respondent to address the Applicant's submission about the training received by the interview panel. To address this, the Tribunal issued Order No. 287 (NY/2011), to which the Respondent responded on 6 December 2011. It provided evidence of the training received by each expert panel member. The Applicant filed a further written submission in response, which has been considered by the Tribunal.

The issues

8. Based on the submissions of the parties, the questions for the Tribunal to determine in the present case are as follows:

a. Was the expert panel authorized to recommend candidates in the selection process?

b. Was the training of members of the expert panel mandatory and would any lack of training of panel member constitute a breach of the Applicant's

rights under his employment contract to the extent that it invalidates the selection process?

Facts

9. The following facts were established from the documents provided by the Applicant and the Respondent and materials included in the case record.

10. On 21 September 2010, the generic post of Board of Inquiry Officer was advertised as Vacancy Announcement (“VA”) No. 10-ADM-PMSS-424839-R-MULTIPLE D/S (“the Post”). The VA was issued for the purpose of populating a roster. Shortly thereafter, the Applicant applied for the post.

11. The Applicant and 64 other candidates were pre-screened by the Office of Human Resources Management. The hiring manager invited these 65 candidates to participate in a written test. Thirty-five candidates, including the Applicant, successfully completed the test and were invited for interview. The interviews took place between 3 and 15 December 2010 before a three-member expert panel.

12. Two of the three expert panel members who interviewed the Applicant had received relevant interview training: one in 2004 and the other as part of an expert panel training in March 2009. The third member did not receive his interviewing training certificate until February 2011, some months after the Applicant’s interview.

13. All candidates, including the Applicant, were assessed by the panel against the competencies of leadership, teamwork, managing performance and judgment/decision making. The expert panel prepared a reasoned, documented record of their evaluations of the candidates. Candidates who were rated as “marginal” in one or more of the competencies were not recommended.

14. The Applicant received the rating of “good” in professionalism, leadership and teamwork. He received the rating of “acceptable” in judgment and decision-making. He was rated as “marginal” in managing performance. Accordingly, he was not

recommended for the roster. The expert panel recommended 23 candidates for placement of their names on the roster.

15. On 2 February 2011, the Field Central Review Body endorsed by email the recommendations of the interview panel.

16. On 10 February 2011, DFS informed the Applicant by email that his job application was unsuccessful. Upon enquiry, the Applicant was further informed that he had not been recommended as a suitable candidate because the expert panel had assessed his performance management competency as marginal.

17. On 7 April 2011, the Applicant requested a management evaluation of the decision not to select him for the Post.

18. On 11 May 2011, the management evaluation report was conveyed to the Applicant. He was informed that the decision he contested was “appropriate in the circumstances” and that the Administration had advised that the Applicant had:

... received the rating of “marginal” with respect to managing performance and as a result was not recommended for rostering. With respect to this competency, the [interview panel] found that [the Applicant] failed to demonstrate a sufficient level of knowledge of most key indicators in this area and that his response to the question lacked the clear and demonstrable level of competency in Managing Performance as expected of an officer at the P4 level.

Applicant’s submissions

19. The Applicant’s principal contentions may be summarised as follows:

a. As the Applicant applied for a generic job opening, the expert panel was only competent to conduct an assessment of his candidacy on behalf of the Director of FPD/DFS, and it did not have the authority to take the final recommendation decision. The expert panel only makes recommendations with regard to the suitability of candidates to be rostered. The recommendation of the

expert panel should therefore be reversed by those entrusted with the responsibility and delegated authority to make a final administrative decision;

b. According to a report of Secretary-General to the General Assembly (A/61/822, “Human resources management reform: recruitment”, dated 27 March 2007), it was mandatory for all expert panel members to receive training in competency-based interviewing skills. In the absence of the mandatory training in competency-based interview techniques, the recommendation of the expert panel is invalid and should be considered null and void;

c. From the manner in which the interview was conducted, evaluated and recorded, the expert panel members were unqualified, untrained and incompetent to assess the Applicant’s competencies.

Respondent’s submissions

20. The Respondent’s principal contentions may be summarised as follows:

a. The Applicant has not provided any clear or convincing evidence that the alleged lack of training of the panel members or the interview process affected his right to a full and fair consideration;

b. The lack of training of one of the expert panel member does not constitute a procedural irregularity that invalidates the whole selection process.

Considerations

The burden of proof in selection cases

21. The general burden of proof in matters of selection was stated by the United Nations Appeals Tribunal in *Rolland* 2011-UNAT-122. The primary burden is on the Applicant provided that the Respondent can minimally show that the Applicant was

given full and fair consideration. The Appeals Tribunal set out the test for whether a candidate has received full and fair consideration as follows:

4. We hold that the selection process conducted by an interview panel can be rescinded under rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the selection shall be upheld.

5. We also hold that there is always a presumption that official acts have been regularly performed. This is called the presumption of regularity, but it is a rebuttable presumption. If the management is able to even minimally show that the appellant's candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the appellant who must be able to show through clear and convincing evidence that she was denied a fair chance of promotion.

The authority of the expert panel to recommend candidates

22. The definition of an "expert panel" is set out in sec. 1 of ST/AI/2010/3 (Staff selection system) as follows:

(g) *Expert panel*: similar in constitution to an assessment panel, assists the Director of the Field Personnel Division, Department of Field Support or his/her designate in undertaking the assessment of applicants for a generic job opening. Hereinafter, the term assessment panel will also refer to an expert panel, unless specifically stated otherwise.

23. The definition of an "assessment panel" is also set out in sec. 1 of ST/AI/2010/3 (Staff selection system) as follows:

(c) *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.

24. The term “hiring manager” is defined in sec. 1 of ST/AI/2010/3 as follows:

(m) *Hiring manager*: the official responsible for the filling of a vacant position. The hiring manager is accountable to his/her head of department/office to ensure the delivery of mandated activities by effectively and efficiently managing staff and resources placed under his or her supervision and for discharging the other functions listed in section 6 of ST/SGB/1997/5 (as amended by ST/SGB/2002/11).

25. Sections 7.6 and 7.8 of ST/AI/2010/3 further provide:

7.6 For each job opening, the hiring manager or occupational group manager, as appropriate, shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and a selection decision by the head of the department/office.

...

7.8 For generic job openings in peacekeeping operations and special political missions, the Director of [FPD/DFS] shall ensure that the process has been complied with and that the recommendations are reasoned and organizational objectives and targets have been taken into account, and shall transmit the proposed list of qualified, unranked candidates including normally at least one female candidate to the field central review body for inclusion in a roster.

26. Pursuant to ST/AI/2010/3, the Tribunal finds that the expert panel has the authority to assess candidates and make recommendations to the Director of FPD/DFS, who then transmits the list of recommended candidates that he or she endorses to the field central review body to be included on the roster. This interpretation is based on the definition of expert panel’s functions in sec. 1(g) and 1(c). The panel is designated to assist the Director of FDP/DFS in “undertaking the assessment of applicants for a generic job opening”.

27. ST/AI/2010/3 describes the hiring manager’s role in the selection process, based on the expert panel’s assessment, as that of preparing “a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria” (see sec. 7.6).

28. The primary responsibility of the Director of FPD/DFS is to ensure that “the process has been complied with and that the recommendations are reasoned and organizational objectives and targets have been taken into account” (see sec. 7.8).

29. The Tribunal rejects the Applicant’s submission that the expert panel did not have the authority to compile a list of recommended candidates to the Director of FPD/DFS based on its assessment of all the candidates participating in the selection process.

Training requirements for expert panel members

30. There is no requirement in any of the regulations, rules or policies of the Organization for all expert panel members to undergo training in competency-based interviewing.

31. ST/AI/2010/3 sets out the procedures applicable to staff selection processes as from 21 April 2010. It is a comprehensive document that is presumed to include all that is necessary for the correct execution of the selection process. It states that all manuals are to be read subject to the administrative instruction, but is silent as to the requirement that all interview panelists are required to complete training. The definition of assessment and expert panel are set out above in paras. 22 and 23.

32. Paragraph 26 of A/61/822 states:

26. With a view to speeding up the process, the Office of Human Resources Management has been conducting training on the preparation of vacancy announcements, evaluation criteria and the evaluation of candidates tailored to meet the needs of programme managers and the members of central review bodies. In addition, all expert panel members are now required to complete training in competency-based interviewing.

33. The Tribunal does not accept that para. 26 of A/61/822 means that a lack of training in competency-based interviewing constitutes a procedural error in selection processes. As stated on its cover page, the purpose of that report is to provide:

an overview of progress made to date and next steps planned regarding the development and implementation of an induction and training programme for the members of the central review bodies, continuing efforts being undertaken to reduce the period required to fill vacancies, and further elaboration of the proposals for the use of pre-screened rosters for recruitment.

32. The reference to training requirements for “all expert panel members” in the second sentence of para. 26 is for the stated purpose of speeding selection processes and not, as contended by the Applicant in the present case, of ensuring a certain minimum standard at an interview. Moreover, reports of the Secretary-General to the General Assembly cannot be regarded as an instrument introducing a policy or rule of general application. Such policy or rule must be properly promulgated. Accordingly, A/61/822 has no regulatory effect.

34. In addition, as pointed out by the Respondent, sec. 4.2.1 of the Standard Operating Procedures (“SOP”) for Staff Selection in United Nations peacekeeping operations, which was in effect from 18 April 2008 to 21 April 2010, the time of the contested administrative decision, provided only that it was preferable that at least one of the panel members had received interview training. This document did not refer to the representation made in the Secretary-General’s report of the previous year. The use of the word “preferable” cannot be interpreted to mean that training is a substantive and mandatory requirement. It does not mean that the lack of training of any of its members would render a panel incompetent.

35. The Tribunal concludes that the fact that one out of three members of the expert panel who interviewed that Applicant had not received competency-based training in interviewing does not in and of itself result in a breach of the Applicant’s rights. There is no relevant legal instrument which accords such a right.

36. Neither has the Applicant substantiated his contention that the expert panel members were “unqualified, untrained and incompetent to assess [the Applicant’s] competencies” to the extent that this would render the entire selection process void.

37. There is no evidence at all before the Tribunal that the expert panel committed any procedural or other errors that had any impact on the selection process. On the contrary, as documented, the selection process in all respects followed the comprehensive system prescribed by ST/AI/2010/3.

38. The Tribunal notes that even if there had been a single procedural irregularity in a selection process this does not in itself entitle an applicant to compensation. It is necessary for an applicant to demonstrate that she or he has suffered harm as a consequence of the breach. In *Sina* 2010-UNAT-094, the Appeals Tribunal stated that, “This Court will not approve the award of compensation when absolutely no harm has been suffered” and found that the detected procedural irregularity was “inconsequential”.

39. The Tribunal finds that the evidence on the record establishes to a higher degree than that required by the test in *Rolland* that the evaluation of the Applicant’s candidacy was done fully and fairly and that the selection process was not vitiated by any irregularity. The Applicant was assessed against objective standards which applied to each candidate who was interviewed. Both his strengths and weaknesses were noted. In the face of such finding the Applicant has not shown through clear and convincing evidence that he was denied a fair chance of promotion.

40. The Applicant’s challenge to the selection decision that he was not suitable for the roster is without foundation. Contrary to his submission, there is no rule or policy of the Organization which renders an expert panel incompetent if its members or some of them are not trained in competency-based interviewing.

Observation

41. The limited resources of the Tribunal have been unnecessarily called on in this case to re-state the clear policy of the Organization in respect of staff selection processes. The Applicant has made claims of irregularity with no evidence at all to support such allegations. The Tribunal discourages such unnecessary litigation.

Conclusion

42. The Tribunal finds that the Applicant's candidature was given full and fair consideration. His challenge to the qualifications of the competency-based interviewing panel is without foundation. The Respondent has satisfied the Tribunal that the interview was conducted in an objective and fair manner.

43. The present application is dismissed in its entirety.

(Signed)

Judge Coral Shaw

Dated this 14th day of February 2012

Entered in the Register on this 14th day of February 2012

(Signed)

Hafida Lahiouel, Registrar, New York