



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/083

Judgment No.: UNDT/2012/187

Date: 30 November 2012

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

ZHOUK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is contesting his non-selection in connection with post vacancy announcement 09-IST-OCHA-421757-R-NEW YORK for the P-3 post (“the Post”) of Information System Officer, Office for the Coordination of Humanitarian Affairs (“OCHA”).

Relevant Facts

2. Following his 29 September 2009 application for the Post, the Applicant, on 28 December 2009, emailed the Administrative Officer responsible for the Post at OCHA to enquire as to the status of his application. As part of his request for information the Applicant stated “[a]s I have not received any notification about my application ... I assume it was not successful. In this case, I will really appreciate your feedback”.

3. On 13 January 2010, the Administrative Officer informed the Applicant that the Panel who had reviewed his application “considered that [he] did not have the required experience as per the Vacancy Announcement”.

4. On 8 April 2010, the United Nations employment website (“Galaxy”) listed that the vacancy announcement had been filled. That same day the Applicant requested a management evaluation of the decision not to select him.

5. On 20 April 2010, the Management Evaluation Unit (“MEU”) informed the Applicant that his request was time-barred before revising its position upon being provided with additional information as to the date of the contested Administrative decision.

6. On 14 July 2010, the Applicant filed an appeal with the Dispute Tribunal contesting his non-selection for the Post.

7. On 30 August 2010, the MEU completed its review of the Applicant's request and "concluded that [the Applicant was] given priority consideration for the instant Post in accordance with Section 7.1 of ST/AI/2006/3 rev.1 [(Staff selection system)] and that [the Applicant had been] fully and fairly considered for it".

8. On 2 September 2010, the Respondent filed his reply and the Applicant filed a response on 12 October 2010.

9. On 26 July 2012, the Tribunal issued Order No. 153 (NY/2012) requesting that the parties inform it by 10 August 2012, as to whether they had any objections to the case being disposed of on the papers. Neither party objected to the Tribunal's request, therefore the Tribunal proceeded accordingly.

Applicant's submissions

10. The Applicant's principal contentions may be summarised as follows:

a. The selection process for the Post did not follow the Organization's policies, instructions and procedures with regard to the staff selection system resulting in a violation of his right to a full and fair consideration;

b. The panel's determination, which was reached without conducting an interview, that the Applicant did not meet the work experience requirements was unfair and did not afford the Applicant a fair chance to be considered for the Post nor did it comply with ST/AI/2006/3, sec. 7.2(a);

c. The decision by the panel that reviewed the Applicant's application for the Post should be motivated by a proper reasoning and the panel should provide the Applicant with the relevant documentation to support their decision. Furthermore, the panel's decision indicates a pattern of non-compliance with the selection procedures;

d. ST/AI/2006/3, sec. 8, which defines the functions of the Central Review Bodies ("CRB") was not respected thereby impeding the CRB's roles

which is to prevent “prejudice or improper motive that could have prevented a full and fair consideration of the requisite qualifications and experience of the candidates”;

e. The denial of his right to a fair and due consideration for the position resulted in the denial of his “rights to move to new functions throughout his career as stipulated in ST/AI/2006/3, sec. 2.2”. The Applicant also submits that “[l]ateral moves are prerequisites to certain positions and not allowing him to exercise his right to complete one actually impedes his career development”;

f. The Applicant requests one-year of net base salary for the violation of his due process right and the damage to his career.

Respondent’s submissions

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

a. The Applicant was given priority consideration as a 15-day candidate as per ST/AI/2006/3/Rev.1. However, upon comparing the requirements for the Post listed under the “professionalism” portion of the vacancy and the Applicant’s Personal History Profile (“PHP”), it was determined that he did not have sufficient professional experience to meet the requirements of the vacancy;

b. The provisions of ST/AI/2006/3/Rev.1 were observed and the Applicant’s rights to full and fair consideration were fully respected. The priority requirements of ST/AI/2006/3/Rev.1 only apply to candidates deemed suitable for the vacancy announcement, which was not the case here, as it would not be reasonable to oblige the Organization to appoint a person who was not completely satisfactory in preference to possible better qualified candidates (*Abassi* UNDT/2010/086);

c. The Applicant's position that the Organization should not have drawn a conclusion as to his work experience before granting him an interview has no basis seeing that pursuant to sec. 7.2 of ST/AI/2006/3/Rev.1, only the candidates that meet all or most of the requirements of a vacancy announcement are invited for an interview. Furthermore, the United Nations Administrative Tribunal, in Judgment No. 594, *del Rosario-Santos* (1993) para. VI, stated that "[t]he Applicant is entitled to evaluate [his] own achievement and performance in any way [he] wishes (in spite of *nemo judex in sua causa*), but the assessment of candidates for posts is a responsibility within the lawfully exercised discretion of the Respondent";

d. There is no evidence to support the Applicant's claim that the CRB did not appropriately review the selection process for the contested post or that the role of the CRB was impeded in any way;

e. There is no basis to compensate the Applicant as he failed to establish that he suffered any injury or damages warranting compensation. The case of *James* UNDT/2009/025 which was referenced by the Applicant as part of his argumentation to request compensation for stress was overturned in *James* 2010-UNAT-009. Similarly to this case, *James* did not present evidence of a compensable damages or injury.

Consideration

Applicable legal provisions

12. ST/AI/2006/3 (Staff selection system), applicable until 11 January 2010, states, in part, as follows:

7.1 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;

7.4 The programme manager shall evaluate new candidates and roster candidates transmitted by OHRM or the local personnel office for consideration at the 15-, 30- or 60-day mark on the basis of criteria pre-approved by the central review body.

7.5 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. ...

Receivability

13. The present case meets all of the receivability requirements identified by art. 8 of the Tribunal's Statute.

Post selection process

14. As affirmed in *Abbassi* 2011-UNAT-110, the Secretary-General has broad discretion with regard to determining the suitability of candidates in matters of post selection and it is not the role of the Tribunal to substitute its own views for that of the Secretary-General. Nevertheless, the Secretary-General's discretion is not unfettered and the Tribunal may review whether selection procedures were properly followed as well as whether the resulting decision was tainted by undue considerations such as discrimination or bias (*Krioutchkov* UNDT/2010/065, *Rolland* 2011-UNAT-122, *Charles* 2012-UNAT-242).

15. Article 7.1 of ST/AI/2006/3, states that, as part of the post selection process, managers "must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark". It is only upon being satisfied that no suitable candidate has been identified at this stage that the hiring managers may start considering other candidates.

16. In the present case, the Programme Officer determined that the Applicant did not meet certain selection criteria for the Post and that he was therefore not suitable

for further consideration and was not afforded the opportunity to move on to the next stage of the post selection process as required by sec. 7.5 of ST/AI/2006/3.

Suitability

17. As part of his 3 September 2010 response to the Respondent's reply, the Applicant stated that he met "the requirements and therefore was suitable and eligible for the advertised position". An applicant is of course "entitled to evaluate [his] own achievement and performance" (United Nations Administrative Tribunal, in Judgment No. 594, *del Rosario-Santos* (1993)), however, as previously expressed, the evaluation of an applicant's skills is a discretion that belongs to the Secretary-General.

18. More importantly, as the Tribunal stated in *Krioutchkov* UNDT/2010/065,

The question of suitability in this respect is an overall notion that means that the candidate is fit to undertake the duties of the post. ... It is this ultimate suitability that is the key notion for determining the right to the priority given to 15-day candidates and not mere satisfaction of the mandatory or formal prerequisites for appointment.

19. On 9 October 2010, the Human Resources Case Officer, Office of Human Resources Management, informed the Administrative Officer, OCHA, that "the list of candidates eligible at the 15-day mark has been released in Galaxy for ... review". This list of two candidates was passed on to the Programme Manager who, according to ST/AI/2006/3, bears the responsibility of determining the suitability of candidates.

20. Upon completing his review of the 15-day candidates, the Programme Manager emailed the Administrative Officer, OCHA, that he had "done the evaluations in Galaxy - neither of the (two) candidates meets requirements". More specifically, the Programme Manager determined that the Applicant did not have the required "five years of experience in the implementation of websites/intranets for content management, publishing or collaboration" as required by the post vacancy announcement. Furthermore, when taking into account the other evaluation criteria, including education, languages and other skills, the Applicant obtained a total score

of 41 out of a possible 100 points resulting in an “overall evaluation: does not meet requirements”.

21. When reviewing the qualifications of 15-day candidate, the Tribunal has previously held that the Programme Officer can do so on the basis of an applicant’s PHP and Performance Appraisal (“ePAS”) as they represent an essential element of the evaluation process (*Xu* UNDT/2011/171, *Krioutchkov*). It is only following such an evaluation that candidates are invited for an interview or a written test. Consequently, the question that the Tribunal needs to consider is whether the Programme Officer’s evaluation of the Applicant’s qualifications was conducted fairly and fully without the influence of irrelevant matters and in accordance with the applicable rules.

22. It is the Applicant’s contention that he met all the requirements for the Post, however, he does not provide any supporting evidence for this assertion other than his own personal assessment of his skills. Similarly, there is no evidence before the Tribunal that would suggest that the appraisal of the Applicant’s qualifications can be called into question or that any of the applicable procedures, including that of the CRB, were not respected (*Xu* UNDT/2011/171). Furthermore, there is nothing before the Tribunal that could be made available to the Tribunal via the production of additional documents that would indicate that the Secretary-General exceeded his discretion when determining the suitability of the Applicant.

Reason for the decision

23. The Applicant asserts that the Respondent should have provided him with relevant documentation to support his decision. In *Obdeijn* 2012-UNAT-201, the Appeals Tribunal stated that:

the staff member bears the burden of proof of showing that the [administrative] decision was arbitrary or tainted by improper motives [and] the refusal by the Administration to disclose the reasons for a contested decision shifts the burden of proof, so that it is for the

Administration to establish that its decision was neither arbitrary nor tainted by improper motives

24. In the present case, upon contacting the Administration regarding the status of his application, the Applicant was informed that “the Panel who reviewed your application considered that you did not have the required experience as per the Vacancy Announcement”. The Administration provided the Applicant with a reason for its decision and the Applicant has failed to provide the Tribunal with any evidence that the selection decision was either improperly motivated or unlawful. Furthermore, nothing in the relevant documents that were produced during the proceedings bring into question the lawfulness of the decision or the reason provided for it.

Conclusion

25. The application is dismissed.

(Signed)

Judge Alessandra Greceanu

Dated this 30th day of November 2012

Entered in the Register on this 30th day of November 2012

(Signed)

Hafida Lahiouel, Registrar, New York