



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

CHARLES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. On 17 April 2013, the Applicant, a staff member in the Procurement Division of the Department of Management, United Nations Secretariat in New York, filed an application contesting what he described as the “unfair, biased, improper and incomplete evaluation of [his] candidature for the advertised job opening of Procurement Officer (P-4)” in Nairobi, Kenya.

2. The Applicant alleges that the selection exercise was procedurally flawed and deliberately conducted in a manner designed to ensure his non-selection. He submits that Ms. EE, Chief of the Procurement Section, United Nations Office at Nairobi (“UNON”), who assessed the candidates’ answers to the written test, was biased against him. He states that he was prejudiced by the delay in receiving the test exercise that was used during the selection process. He makes a number of additional allegations, including the claim that the selected candidate did not meet the requirements for the position.

3. The Respondent states that the Applicant’s claims are without merit as he was not selected to be interviewed because of his low test score. The Respondent submits that the Applicant did not show that the selection process was tainted by any extraneous considerations, nor is he able to substantiate any claims of harm or prejudice.

Procedural matters

4. Having considered the application and the reply, and having noted the issues in contention, the Tribunal (Judge Ebrahim-Carstens) issued Order No. 129 (NY/2013), directing the parties to file, by 5 p.m. on 2 August 2013, a jointly-signed statement on agreed and disputed issues of law and fact. Order

No. 129 further stated that, following the filing of the joint submission, unless the parties agreed to attempt informal resolution of the matter, all judicial case management shall be stayed pending the assignment of this case to a judge for further consideration.

5. On 2 August 2013, the Respondent filed a submission stating that the parties were unable to agree to a joint submission as ordered by the Tribunal. The Respondent further identified his position with respect to the issues of law and fact. The Applicant filed his submission at 5:15 p.m. on 5 August 2013. It is noted that this was after the deadline of 2 August 2013.

6. The case was assigned to the undersigned Judge on 1 October 2013.

7. On 10 October 2013, the Tribunal issued Order No. 248 (NY/2013), stating that the case would be decided on the papers before it, unless either party filed a reasoned request for a hearing on the merits. The Tribunal invited the parties to file additional submissions, if any, by 17 October 2013.

8. The Respondent did not file any submissions in response to Order No. 248. In his submission dated 17 October 2013, the Applicant stated that he did not see a need for a hearing in this case and invited the Tribunal to proceed with consideration of the matter on the papers before it. Although in his initial filings the Applicant sought the production of several documents, including the test answers of the interviewed candidates, in his submission he confirmed that he wished to have the case decided on the papers presently before the Tribunal, which proceeded accordingly.

Facts

9. The job opening was advertised on 11 July 2012, with a closing date of 9 September 2012. A total of 177 candidates applied. Twenty-two applicants, including the Applicant, were invited to take a two-hour written test, which was scheduled to take place on 3 December 2012, from 3 to 5 p.m. (Nairobi time). At the Applicant's request, he was permitted to take the test from 5 to 7 p.m. (Nairobi time) on 3 December 2012. Two other candidates were similarly permitted to take the test later.

10. The Applicant experienced some difficulties in receiving the email test papers and submitting his answer. He did, however, receive the test at approximately 5:30 p.m. (Nairobi time), following several emails between himself and UNON. Although he appears to have submitted his answers after the two-hour deadline, they were accepted and evaluated.

11. The test consisted of two sections: the first section consisted of an essay and the second section had 14 short questions. The test instructions clearly stated that the answers would be evaluated anonymously and, for this reason, if any candidate were to include any information that would make it possible to identify them, it would lead to their disqualification. The test instructions further stated that each of the short questions should be answered and that the answers to each question would be graded on: knowledge of UN procurement policies; comprehensiveness of the response; composition and language; and adherence to instructions.

12. Each candidate was assigned an alphabetical letter by Ms. CG, who was administering the test, to ensure that their names would not be seen during the test evaluation process. Their written answers, identified by their assigned

alphabetical letters, were transmitted on 4 December 2012 to the Chief, Procurement Section, UNON, for evaluation. There is no evidence to suggest that the Chief knew the identities of the candidates to whom the alphabetical letters were assigned until after the assessment.

13. The responses to the test were evaluated against pre-determined criteria. A passing mark consisted of an acceptable essay (with assessments ranging from “poor” to “very good”) and 13 out of 44 points on the questions section. Each question was allotted a rating of three points, with the exception of question number 12, which carried a rating of five points. Also, six questions were identified as “key questions”, although they were rated on the same three-point scale. Each candidate received a score in relation to each individual question and a combined total score.

14. The review of the answers to the test proceeded in several rounds. The first round consisted of a review of compliance with the basic test requirements (such as not writing their name on the test answers). One candidate was disqualified.

15. The second round consisted of a review of responses to the essay. Two candidates were disqualified, leaving 19 candidates standing, including the Applicant.

16. The third round consisted of the elimination of candidates who scored below 13 points on the short questions and whose essays were rated as poor. Five candidates were eliminated. Thus 14 candidates remained in the running. Although the Applicant and two other candidates scored below 13 points on the short questions, they progressed to the next stage on the strength of their essays.

17. The fourth round concentrated on the essays and resulted in the elimination of three candidates, thus leaving 11 candidates, including the Applicant, in the running.

18. The fifth round included the evaluation of the six “key questions”. The total maximum score for the “key questions” was 20. The Applicant received a score of 2.5 for his answers to the “key questions”. The Applicant and three other candidates were eliminated due to their low scores on the six key questions. Seven candidates thus remained.

19. On 12 December 2012, the Chief of the Procurement Section, UNON, sent an email to Ms. CG, asking her to release the names of the remaining seven candidates in order to invite them for competency-based interviews. The interviews were conducted by a panel of three staff members. Up to that point, the candidates were known to the Chief only by alphabetical letters assigned to them.

20. Four candidates were recommended for the job following the interviews. The selected candidate, who apparently was also on the roster of P-4 candidates pre-approved for similar functions, was notified of his selection on 11 February 2013.

21. On 22 February 2013, the Applicant was informed that he was not successful. He filed a request for management evaluation on 28 February 2013.

22. On 1 March 2013, the Applicant filed an application for suspension of action, pending management evaluation, of the decision not to select him for the P-4 vacancy in Nairobi. On 8 March 2013, the Tribunal issued Order No. 68 (NY/2013), dismissing the Applicant’s application for suspension of action,

finding that the Applicant did not satisfy the requirement of *prima facie* unlawfulness.

Consideration

23. The Applicant's claims regarding the selection process are addressed below.

Test assessment

24. The Applicant questions the methodology used to grade the test and states that, had he known that six of the fourteen questions were "key questions", he would have planned his time and responses accordingly.

25. The Tribunal does not agree that the Applicant was prejudiced by the manner in which the test was carried out. All of the candidates were given the same instructions and were thus placed on an equal footing. The record in this case does not reflect that any differential treatment was afforded to any of the candidates. The candidates were aware ahead of time that a written test would be held. The instructions for the test were sufficiently clear. The candidates took the same test and their responses were marked anonymously. The candidates were graded against the same scoring system and assigned individual scores based on their answers and not based on a comparison with other candidates. The Applicant has not referred the Tribunal to any legal instrument that would state that, prior to or at the time of the test, the Applicant was entitled to full access to the assessment methodology and the scoring criteria that would be used to evaluate the answers. In any event, there was no differential treatment accorded to the Applicant.

26. The Applicant referred the Tribunal to several sections of the Manual for the Hiring Manager on the Staff Selection System (“Recruiters Manual”), including sec. 5.3.5, which states that an “assessment panel should be three persons”. The Applicant states that this was not followed in this selection exercise. However, the Recruiters Manual sets out *guidelines* to the hiring managers and is not a properly promulgated administrative issuance. It does not lay down mandatory requirements in respect of all components of the selection process. Further, the Applicant is mistaken in respect of the competency-based interviews of the short-listed candidates; the assessment panel did consist of three panel members.

27. Even if the Tribunal were to accept the Applicant’s submission that the assessment of the written tests also should have been done by a panel of three rather than one assessor, the Tribunal finds that, in the circumstances of this case, the anonymously marked evaluation of the written answers by a single assessor did not vitiate the selection process so as to improperly result in the Applicant’s non-selection. The Applicant’s criticisms are insubstantial when viewed against the evidence regarding his performance on the test. The Applicant simply did not answer five of the 14 questions, contrary to the explicit instruction that *each* of the short questions should be answered and would be graded. As a result, the Applicant scored a total of 10.5 points out of the maximum of 44 for the short answers section. His total score for that section was lower than the scores of 17 other candidates. It is inconceivable, given the Applicant’s failure to answer five of the 14 questions, that had his test been marked by three evaluators instead of one, his total scores would have been significantly different. Given his low scores, the Applicant was not invited for an interview. In all the circumstances, this was a reasonable decision to make, and the Tribunal sees no basis to interfere.

28. The Tribunal finds that, despite making a wide range of allegations of bias on the part of the Chief, Procurement Section, UNON, the Applicant has produced no evidence, written or oral, to substantiate them.

Difficulties in receiving the test

29. The Applicant submits that, as a result of the delays in receiving the test, he took it “in a state of panic and distress”. He alleges that he was so stressed by the delay that it had “a severe negative impact on his mental and emotional state”.

30. The Tribunal notes that the Applicant’s request to take the test at a time more convenient for him was accommodated. Contemporaneous emails exchanged by the Applicant and UNON reflect no signs of distress or panic on the part of the Applicant. Rather, they demonstrate that some technical difficulties were experienced and resolved. There is no evidence that the delays in the Applicant receiving the test on the date of the examination were somehow “designed” by the Respondent, as the Applicant claims. On the contrary, upon learning of the difficulties experienced by the Applicant, UNON took all reasonable steps to assist him. His answers were accepted and evaluated despite UNON receiving them after the two-hour limit. Contrary to the Applicant’s allegations, the conduct of UNON in relation to the Applicant indicates a considerate and accommodating approach.

Selected candidate

31. The Applicant alleges, without providing any evidence in support, that the selected candidate did not have the necessary years of experience for the position. This is contradicted by the unchallenged submission in the Respondent’s papers that the selected candidate had been previously placed on

a pre-approved roster for P-4 level positions, which indicates that he had sufficient years of experience. In any event, given that the Applicant was not invited to an interview because of his test scores, it is not open to him to question the eligibility of the recommended and selected candidates.

Other matters

32. The Applicant made a number of additional claims and allegations, which, on the evidence, are unsubstantiated. The Applicant is reminded that suspicion alone, without any rational basis, is not enough to substantiate an allegation of unlawfulness. He is urged to concentrate on his day-to-day duties and to work positively and constructively to achieve the career advancement that he clearly seeks. However, to do so he must identify and adopt a strategy that is fundamentally different to the one he seems to be following. It seems that, at present, when unsuccessful, the Applicant files a series of unmeritorious claims before the Tribunal, which cannot do much for his self-esteem.

33. One of the ancillary and wholly unmeritorious claims of the Applicant concerns the delay in receiving a management evaluation response, which the Applicant claims caused him increased suffering, mental anguish, and stress. The Tribunal notes that the receipt of a response from the Management Evaluation Unit is not a pre-requisite for the filing of an application with the Tribunal. Article 8.1(d) of the Tribunal's Statute and staff rule 11.4(a) provide that, in the event of no response being provided to a staff member's request for management evaluation, the staff member may file an appeal with the Tribunal within the applicable time limit. The Applicant's claim that the delayed management evaluation response caused him loss or damage is misconceived and is dismissed.

34. Whilst the Tribunal does not have power in the circumstances of this case to order the Administration to transfer the Applicant laterally from his department as requested by him, the Tribunal notes the extraordinary number of applications filed by the Applicant. This must have an adverse impact both on the Applicant and the department concerned. The Tribunal considers that it is about time that both parties took proactive measures to resolve the underlying problems which sap the energy of the individual affected as well as the managers concerned. It adds to the backlog of cases before the Tribunal, is costly to the Organization, with apparently no end in sight, and fails to take into account the fact that the duty of the Tribunal is to make judicial decisions which sometimes leave the underlying employment relations issues unresolved.

Conclusion

35. The application is dismissed in its entirety.

(Signed)

Judge Goolam Meeran

Dated this 15th day of November 2013

Entered in the Register on this 15th day of November 2013

(Signed)

Hafida Lahiouel, Registrar, New York