



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

DHANJEE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Simon Buettner, UNOG

Introduction

1. By application filed on 28 December 2012, the Applicant, a Legal Affairs Officer (P-4) at the Office of the Director, Division of International Trade in Goods and Services and Commodities (“DITC”), United Nations Conference on Trade and Development (“UNCTAD”), contests the decision not to include him in the shortlist of candidates interviewed for a P-5 post of Senior Economic Affairs Officer, UNCTAD, Vacancy Announcement (“VA”) No. 10-ECO-UNCTAD-15853-R-GENEVA (“the contested post”).

Facts

2. On 24 November 2010, the contested post was advertised in *Inspira*, and the Applicant applied for it on 18 January 2011. The VA mentioned that the post was located in the Trade Negotiations and Commercial Diplomacy Branch (“TNCDB”), DITC, UNCTAD, and listed the following competencies: “professionalism”, “communication”, “planning and organizing”, “managing performance” and “leadership”. The required work experience consisted in

“[A]t least 10 years of progressively responsible post-graduate experience at the national/international level dealing with analytical work on trade and development issues and international trading system, trade policy formulation and implementation, trade-related technical cooperation activities and monitoring and evaluation. Demonstrated capacity for leadership and responsibility. Experience of work with government officials, in particular with those from developing countries, and other intergovernmental organizations”.

3. In total, 36 applications were submitted by the responsible Human Resources Officer to the Hiring Manager (“HM”), the Head, TNCDB, DITC, UNCTAD; six applicants withdrew their application during the recruitment process.

4. Upon assessment by the HM, six candidates other than the Applicant were initially shortlisted and invited for a competency-based interview. The HM had determined that the Applicant did not meet all the requirements of the post, in particular with respect to work experience. To justify her decision, the HM wrote in *Inspira*:

Partially meets the requirement. He does not have at least 10 years of progressively responsible post-graduate experience at the national/international level dealing with analytical work on trade and development issues and international trading system, and trade policy formulation and implementation. He has no demonstrated capacity of leadership and responsibility. He has limited experience with trade-related technical cooperation activities and monitoring and evaluation. He has experience of work with governmental officials, in particular with those from developing countries and other intergovernmental organizations. He worked in the government on legal affairs and has worked in UNCTAD and ECE on intellectual property rights, competition and trade facilitation.

5. After the interviews, only one candidate was deemed to meet all the requirements of the post and was thus recommended. Her name was transmitted to the Central Review Board (“CRB”) by the Director, DITC, UNCTAD, through the Human Resources Management Service (“HRMS”) of both UNCTAD and UNOG, by memorandum of 21 December 2011.

6. On 1 February 2012, the recommendation for filling the post was transmitted to the Secretary-General of UNCTAD. On 3 February 2012, he selected the recommended candidate “subject to the review of the Central Review Bodies”.

7. Following its meetings of 22 February 2012 and 28 March 2012 at which it reviewed the case, the CRB requested clarifications from the HM on the assessment of several candidates, including the successful candidate, respectively on 28 February 2012 and 3 April 2012. However, none of the specific clarifications the CRB sought from the HM related to the Applicant’s candidature.

8. Following receipt of the clarifications, the CRB endorsed the recommendation presented to it, and on 22 June 2012, its approval was submitted to the Secretary-General of UNCTAD, noting that he could proceed with the final selection, which he did.

9. By e-mail of 29 June 2012, the HM informed the Applicant of the decision to select another candidate for the contested post. By e-mail of 22 July 2012 and subsequent reminder of 8 August 2012, the Applicant requested feedback from the HM on his non-selection, including the reason why he had not been invited for an interview.

10. On 21 August 2012, a generic e-mail was sent to the Applicant from the account hr_department@un.org, informing him that his application for the contested post “[would] not be considered further”.

11. On 24 August 2012, the Applicant requested administrative review of the decision to select another candidate for the contested post.

12. By letter of 9 October 2012 from the Under-Secretary-General for Management, communicated to the Applicant by e-mail of 11 October 2012, the latter was informed that the contested decision was upheld.

13. On 28 December 2012, the Applicant submitted his application to the Tribunal. In his submission, he requested the Tribunal to order the Respondent to provide documents regarding the selection process.

14. On 2 January 2013, the application was served on the Respondent and on 1 February 2013, he submitted his reply, along with four annexes filed *under seal*. Counsel for the Respondent later confirmed to the Registry that it had been his intention to file the five annexes on an *ex parte* basis. An exchange of written submissions followed regarding the subsequent request filed by the Applicant on 12 February 2013 to order production of some documents pertaining to the selection process, and to access the annexes filed by the Respondent on an *ex parte* basis.

15. By Order No. 140 (GVA/2013) of 1 October 2013, the Tribunal ordered the Respondent to provide explanations on some issues relating to the consideration of the Applicant's candidacy for the contested post. The Respondent submitted the requested information on 16 October 2013.

16. On 6 November 2013, the Applicant filed comments, as well as a new motion for production of documents; he also asked that witnesses be allowed to testify during a hearing on the merits of the case.

17. By Order No. 19 (GVA/2014) of 28 January 2014, the Tribunal convoked the parties to a hearing on the merits of the case to be held jointly with Case No. UNDT/GVA/2013/001 relating to the same selection procedure. In that Order, the Tribunal also informed the parties that no witnesses would be heard at that juncture, and that it did not consider it necessary at this stage to grant the motion for production and disclosure of documents filed by the Applicant. The hearing was held on 18 February 2014 in the presence of the parties of both Case No. UNDT/GVA/2012/094 and No. UNDT/GVA/2013/001.

18. By motion filed on 3 March 2014, the Applicant requested the Tribunal to order the production of a letter allegedly received by the Secretary-General of UNCTAD in relation to the application of the selected candidate, and to "re-open the hearing to allow [him] to call a witness" to testify on this issue.

Parties' submissions

19. The Applicant's principal contentions are:

- a. The selection process was carried out in an improper way; he contests the evaluation of his candidacy and his non-inclusion by the HM in the shortlist of candidates to be interviewed;
- b. His professional experience was wrongly evaluated; the HM manifestly erred in considering that his work on legal affairs, intellectual property rights, competition and trade facilitation was not relevant and that he did not fulfil the requirements of the post as stipulated in the VA; he was deprived of a fair opportunity to compete for the contested post; the

assessment that only his assignment with the Office of the Director of DITC was relevant was incorrect, on the contrary, he has 22 years of post-graduate experience on trade issues;

c. Hiring Managers have no subjective discretion in deciding whether the experience of applicants who have passed the pre-screening process is satisfactory or not; they can only place applicants on the “not-suitable list” based on work experience if, “as a matter of objective fact, it is self-evident that such experience is unsatisfactory”, and this should be verified by HRMS/UNCTAD, which was not done in his case;

d. The criteria set in the VA were applied in a more lenient way to the successful candidate with regard to the relevance of her work experience;

e. The pre-screening questions asked in the application form for the VA related to the field of law, which demonstrates that his work on legal affairs was relevant to the work experience requirements of the contested post;

f. The fact that the CRB requested additional information regarding other candidates in a similar position, who were eliminated before the interview for lack of sufficient work experience, indicates that it “had concerns which would be relevant to the question of full and fair consideration of [his] candidature for the post”; and “[e]ven though the [CRB] concerns were eventually allayed, this may well have been because it did not have enough substantive knowledge of the international trading system and trade policy and of [TNCB] work to realize the erroneous nature and disingenuousness of [the HM’s] assertions regarding the relevance of [his] work experience”;

g. He requests disclosure of documents pertaining to the selection process, and asks for moral and material damages as compensation for unjust and discriminatory treatment and breach of his rights as a UN staff member, and for the “loss of a chance of career advancement after over 30 years of service to the UN, causing [him] mental anguish”.

20. The Respondent's principal contentions are:
- a. The selection process was correctly carried out; the decision of the HM not to invite the Applicant to an interview was lawful and justified on objective grounds: his work experience does not fulfil the requirements stipulated in the VA as he "does not have the required 10 years of progressively responsible post-graduate experience at the national/international level dealing with analytical work on trade and development issues and international trading system, and trade policy formulation and implementation"; he has only one year and eleven months of relevant experience and his area of work experience is "mainly law/international trade law";
 - b. The HM assessed the candidates in conformity with the applicable provisions, and "in the case of the Applicant she determined that his academic and language skills were satisfactory but that his previous work experience was only partially satisfactory", therefore, "the overall rating was 'partially satisfactory' which led to the conclusion that the Applicant was not suitable for the position", and hence he was "not invited to a competency based interview"; such an assessment was within the HM's broad discretionary power;
 - c. The UNDT and UNAT jurisprudence clearly establish that the Secretary-General has broad discretion in making decisions regarding promotions and appointments; in reviewing such decisions it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process;
 - d. In accordance with *Rolland* 2011-UNAT-122, it was demonstrated that the Applicant's candidature was given full and fair consideration; the burden of proof then shifts to the Applicant to demonstrate the contrary but he has not discharged it; the same is true for his contention that the HM discriminated against him;

- e. The selected candidate meets all the requirements set forth in the VA for the contested post and was the “only suitable candidate for the position”; the principle of “equal treatment” applies only “in comparable situations, which have not been demonstrated or substantiated by the Applicant”, as the successful candidate’s experience is “not comparable” to his; furthermore, “the principle of equal treatment may not be relied on for the purpose of requesting equally inappropriate or illegal treatment”;
- f. The CRB “did not request further specific clarifications with regard to the Applicant’s case but was satisfied that his candidature had been evaluated on the basis of the pre-approved evaluation criteria and that the applicable procedure had been followed”;
- g. The application should be rejected in its entirety.

Consideration

Scope of the application

21. At the outset, the Tribunal notes that in his request for management evaluation of 24 August 2012, the Applicant indicated that he challenged the decision to select another candidate for the contested post, whereas in his application before the Tribunal, he identified the contested decision as the decision not to include him in the shortlist of candidates interviewed for the post. At a later stage in the proceedings, the Applicant requested leave to amend his application to also cover the decision to select the successful candidate; however, he expressly mentioned that he was not requesting rescission of that decision, but merely to be able to submit the argument that the successful candidate had benefited from a more lenient interpretation of the work experience requirement than himself. For his part, in his reply to the application, the Respondent focused on the decision not to select the Applicant for the post, and stated at the hearing that he did not raise any objection to the fact that the Applicant also wished to contest the selection of the successful candidate for the post.

22. The Tribunal recalls what the Appeals Tribunal held in *Massabni* 2012-UNAT-238:

2. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.

3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

23. Based on the above, the Tribunal considers that the decision challenged by the Applicant is the decision not to select him for the contested post, communicated to him by e-mails of 29 June 2012 and 21 August 2012, which is tantamount in his case to the decision not to include him in the shortlist of candidates who were further considered for a competency-based interview. Indeed, the fact that he was not further considered constitutes a final decision on his candidacy, and the scope of the judicial review is restricted to the question of whether or not he was rightfully excluded from the selection process at that stage.

Legality of the contested decision

24. Having defined the scope of the present application, the Tribunal turns to the Applicant's main argument, which is that he was erroneously excluded from the shortlist of candidates convoked for an interview by the HM. The Applicant considers that the decision not to shortlist him was based on illegal grounds hence procedurally flawed, as well as tainted by extraneous motives or bias against him, in order to favour the selected candidate.

25. The Tribunal recalls that pursuant to established jurisprudence of the Appeals Tribunal, "the Secretary-General has a broad discretion in matters of promotion and it is not the function of [the Appeals] Tribunal, or the UNDT, in

the absence of evidence of bias, discriminatory practices or *mala fides* to substitute its judgment for that of the competent decision-maker” (*Bofill* 2013-UNAT-383 and jurisprudence quoted therein). In reviewing administrative decisions regarding appointments and promotions, the Tribunal examines: “(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration” (*Majbri* 2012-UNAT-200, *Abbassi* 2011-UNAT-110). A selection “should be upheld when candidates have received full and fair consideration, when discrimination and bias are absent, when proper procedures have been followed, and when all relevant material has been taken into consideration” (*Charles* 2013-UNAT-286, quoting *Rolland* 2011-UNAT-122).

26. Furthermore, in *Rolland* 2011-UNAT-122, the Appeals Tribunal stated:

There is always a presumption that official acts have been regularly performed. This is called the presumption of regularity. But this presumption is a rebuttable one. 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 show through clear and convincing evidence that she was denied a fair chance of promotion.

27. Applying the above-mentioned principles to the present case, the Tribunal is unable to conclude, based on the record before it and the evidence adduced by the Applicant, that the decision not to convoke him for an interview, hence not to select him for the contested post, was flawed or vitiated by any bias, discrimination or breach of a procedural rule.

28. At the outset, the Tribunal notes that all applicable procedures were complied with in the instant case: the selection process for the contested post was governed by administrative instruction ST/AI/2010/3 (Staff selection system), and its sec. 7 (Pre-screening and assessment) provides the pertinent procedures for the shortlisting and assessment of candidates, as follows:

7.1 Applicants applying to job openings will be pre-screened on the basis of the information provided in their application to

determine whether they meet the minimum requirements of the job opening.

7.2 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support will release electronically to the hiring manager (for position-specific job openings) and occupational group manager (for generic job openings), within and/or shortly after the deadline of the job opening, the applications of candidates who have successfully passed the pre-screening process, together with the names of pre-approved eligible candidates, for consideration for selection.

...

7.4 The hiring or occupational group manager shall further evaluate all applicants released to him/her and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation.

7.5 Shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written tests, work sample tests or assessment centres.

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.

7.7 For position-specific job openings, up to and including the D-1 level, the hiring manager or occupational group manager shall transmit his/her proposal for one candidate or, preferably, a list of qualified, unranked candidates, including normally at least one female candidate, to the appropriate central review body through OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support. OHRM, the local human resources office or the Field Personnel Division shall ensure that, in making the proposal, the hiring manager or occupational group manager has complied with the process.

29. In accordance with these rules, following release of the pre-screened applications to the HM, the latter reviewed the candidates and shortlisted six of them for a competency-based interview. The shortlist did not include the Applicant who was deemed by the HM to only partially meet the work experience required for the post under the terms of the VA. Following the interviews, a

comparative analysis report was prepared in *Inspira* documenting the assessment of all interviewees. The recommendation of the successful candidate for selection was forwarded to the CRB, which endorsed it after receipt of further clarifications and after an additional internal male candidate had been interviewed.

30. As regards the allegation raised by the Applicant that his work experience was in fact meeting the requirements specified in the VA and that he was wrongly excluded from the shortlist, the Tribunal recalls that sec. 7.4 of ST/AI/2010/3, quoted in full above, expressly instructs the HM to “prepare a shortlist of those [released applicants] who appear most qualified for the job opening based on a review of their documentation” (emphasis added). In the same vein, the Instructional Manual for the Hiring Manager on the Staff Selection System (*Inspira*) (“the Hiring Manager’s Manual”) mentions in its Chapter 9 that the HM invites the “most promising candidates” for a competency-based interview and/or an assessment exercise. It follows from these provisions that the HM has broad discretionary power to exercise a preliminary evaluation of the applicants in order to establish the shortlist of candidates to be invited for further assessment; indeed, such a list, per definition, does not have to include all pre-screened candidates but only the most qualified or promising ones. In order to assess which applicants fall into that category, the HM must exercise his or her judgment and the Tribunal will not easily interfere with the broad discretion of the Administration in these matters and substitute its judgement for that of the competent decision-maker.

31. Moreover, the Tribunal notes that in the instant case, the work experience required for the contested post as listed in the VA was described in rather broad terms, thus opening the door to large discretion as to what could be considered relevant or irrelevant experience; indeed, the VA in its relevant part reads “[a]t least 10 years of progressively responsible post-graduate experience at the national/international level dealing with analytical work on trade and development issues and international trading system, trade policy formulation and implementation, trade-related technical cooperation activities and monitoring and evaluation”.

32. Based on the above observation, it is clearly not for the Tribunal to substitute its own views and to elaborate on the assessment of those criteria by the HM, as long as the assessment itself was not based on obviously wrong facts that could be objectively verified, such as the misquotation of relevant time periods taken from a PHP to calculate the relevant work experience. This was certainly not the case here, and it was the HM who had the authority and was in the best position to assess whether the Applicant's work experience was indeed meeting the requirement of the VA. Despite the in-depth explanations provided by the Applicant as to the relevance of his work experience, and notwithstanding his understandable frustration that he was not even invited for the interview, the Tribunal does not find any evidence in the record before it that the HM's decision in this regard was unreasonable or tainted by extraneous motives, bias or discrimination towards him.

33. In view of its conclusion that the decision not to select the Applicant for the contested post, by not shortlisting him to be invited for an interview, was legal, the Tribunal considers it unnecessary to hear witnesses in this case, to grant the Applicant access to the documents filed *ex parte* by the Respondent, or to order production of further evidence. Indeed, the Applicant's exclusion at such an early stage of the selection process confirms that he had no real chance for being promoted; he therefore has no legally protected interest in the subsequent steps of the selection procedure and his contentions with regard to the qualifications of the successful candidate are of no avail to his own case (see Judgment *De Saint Robert* 2012-UNAT-259).

Conclusion

34. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed in its entirety.

(Signed)

Judge Thomas Laker

Dated this 13th day of March 2014

Entered in the Register on this 13th day of March 2014

(Signed)

René M. Vargas M., Registrar, Geneva