



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/061

Judgment No.: UNDT/2014/058

Date: 30 May 2014

Original: English

Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko

STAEDTLER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Katya Melliush, UNON

Introduction

1. The Applicant, a staff member of the United Nations Human Settlements Programme (UN-Habitat), challenges the decision not to include him in the professional roster following competency based interviews for two job openings - one in Cairo as a Senior Human Settlements Officer at the Regional Office there (the Cairo post), and the other in Fukuoka also as a Senior Human Settlements Officer at the Regional Office there (the Fukuoka post).

2. He also challenges the Respondent's refusal to disclose information regarding the two selection exercises.

3. The Applicant has four other applications before the United Nations Dispute Tribunal (UNDT) in Nairobi. In UNDT/NBI/2013/021 he challenged his performance evaluation for the periods 2011-2012 and 2012-2013, and the administrative decisions not to grant him protection against retaliation and not to renew his fixed-term contract. In UNDT/NBI/2013/098, he challenged the decision of the Office of Staff Legal Assistance to not represent him. In UNDT/NBI/2014/012, the Applicant challenged the decision of the Management Evaluation Unit (MEU) to misrepresent his request for management evaluation; and in UNDT/NBI/2014/013, he challenged the decision of the Office of Internal Oversight Services (OIOS) to not investigate the misconduct he reported.

Preliminary Matters

4. In his reply to the Application, the Respondent submitted that it was not receivable. In Judgment UNDT/2013/179, this Tribunal found that the Application in respect of the Cairo post was not receivable by the Tribunal but the Application regarding the Fukuoka post was receivable.

5. The Tribunal issued Order No. 235 (NBI/2013) and Orders No. 039, 052, 065, 069 and 073 (NBI/2014) on issues pertaining to the disclosure of documents.

6. Both Parties advised the Tribunal that an oral hearing was not necessary. The Tribunal determined that the matter could be dealt with on the papers. The following facts relating to the Fukuoka post are taken from the pleadings of the parties and the relevant documents submitted by them.

The Issues

7. Are the decisions to decline access to documentation administrative decisions capable of review by the Tribunal?

8. Was the decision not to include the Applicant in the roster following the Fukuoka selection process lawful?

Facts

9. The Applicant has substantial experience as a consultant in architectural and master plan preparation. He joined UN-Habitat on 13 September 2011 on a one year fixed term appointment as a Technical Officer at the P-4 level based in the UN-Habitat Regional and Technical Cooperation Division (RTCD) office, in Tripoli, Libya. He also acted as UN-Habitat's Focal Point for Libya until he was re-assigned to Amman, Jordan.

10. The Applicant contends that he was reassigned following his reports of prohibited activities in the Libya programme.

11. His fixed term contract expired on 31 December 2012. As it was not renewed he was separated from service on 1 January 2013.

12. On 18 October 2012, the Applicant applied for the Fukuoka post of Human Settlements Officer. The competencies of the post were listed as: professionalism; judgment and decision-making; planning and organising; and leadership.

13. The Applicant was pre-screened and was found to have met the minimum requirements of the job opening. He was then shortlisted by the hiring manger from a total of 35 applicants as one of four persons to be interviewed for the vacancy. In February 2013, the four shortlisted candidates underwent a competency based assessment by a departmental panel (the Panel).

14. In March 2013, the Panel produced a report which recorded the assessments of each candidate against the competencies listed in the vacancy announcement (VA) for the Fukuoka post.

- a) Candidate 1 fully met all the requirements of each of the competencies.
- b) Candidate 2 (the Applicant) was assessed as having fully met one of the requirements, partially meeting one of the requirements and not meeting the other three requirements. In the overall assessment of the Applicant the Panel noted:

Whilst the interview validated the PHP assessment by the panel, it was clear that he had no experience of working in Asia or the Pacific (indeed the candidate admitted the same), and failed to convince the panel that he had the leadership, judgment and decision making competencies to undertake this position.

- c) Candidate 3 partially met two of the requirements and fully met the other three requirements.

d) Candidate 4 fully met the requirements of each of the competencies.

15. The Panel recommended candidates 1 and 4 for the post.

16. On 22 May 2013, the Central Review Body (CRB) advised the Executive Director that the evaluation criteria had been properly applied and that the applicable procedures were followed. It recommended the two proposed candidates for selection or placement on the roster.

17. On 6 June 2013, the Applicant was notified that he had not been selected for the post.

18. The Applicant requested the Officer-in-Charge (OIC) of the Recruitment and Planning Section of the Human Resources and Management Section at the United Nations Office in Nairobi (HRMS/UNON) to advise if he had been included on the professional roster following the selection processes for the Cairo and Fukuoka posts; the procedures for inclusion in the roster; and whether this case had been reviewed by the CRB. He also requested the “mandatory documentation of the selection process and roster decision in INSPIRA”.

19. The OIC responded on 17 June 2012.¹ She advised that he had not been included in the roster but if any rostering took place the candidate would be advised through INSPIRA. She told him the procedures followed were those in section 9.4 of the Staff Selection System and that the rostering system is handled automatically by the INSPIRA system. She confirmed that his case had been reviewed by the CRB.

20. She declined his request for documentation on grounds that documentation in recruitment cases is treated as confidential and will not be made public adding that even when the UNDT has ordered the disclosure of this type of confidential material, access to it by unsuccessful candidates is very rarely granted.

¹ Applicant’s Annex 1-3.

21. The Applicant then sought further information about the composition and membership of the CRB and the criteria for endorsement by the CRB.

22. The OIC advised that she could not share the identity of the members of the CRB on posts he was candidate for as the information was kept confidential to maintain their independence.

23. On 13 July 2013, the Applicant requested management evaluation of the decision not to provide information of the process leading to and supporting the administrative decision not to include him in the roster; and not to disclose the membership of the CRB.

24. Following a review by the Management Evaluation Unit (MEU) the contested decisions were upheld by the Under-Secretary-General for Management.

Submissions of the Parties

Applicant's submissions

25. The Applicant submits that his employment history and experience with UN-Habitat provides a *prima facie* presumption of irregularity of the impugned administrative decisions and related processes and that these decisions were taken in retaliation to the Applicant's report of prohibited activities in the Libya programme.

26. Based on this *prima facie* presumption of irregularity and due to his lack of knowledge of the records of the selection processes his right to good faith and fair dealing was violated and as a result he was not placed on the roster.

27. Noting that MEU had stated that the selection panel had noted his lack of experience in working in the Asia-Pacific region the Applicant submitted that work experience in Asia or the Pacific was not required in the vacancy announcement and in any event he has work experience in Asia.

28. The issue of work experience is assessed at the prescreening and assessment stage of the selection process and not by the assessment panel. In his case, the assessment panel made up a “freely invented requirement of work experience and overstepped its competency by arbitrarily overruling the predetermined evaluation criteria and the corresponding pre-screening”.

29. Having been granted access by the Tribunal to the redacted documents relating to the selection process, the Applicant submitted that the Respondent did not “provide the requested notes taken by the panel members”. The Applicant took issue with the Respondent’s inability “to find the notes taken by the members of the interview panel as they are not kept on file” and submits that the failure to provide the interview notes “violates his due process rights in that it deprives him of the only means to show the inaccuracy of the comparative report”.

30. The Applicant stated that:

[T]he comparative report (Annex R4) misleadingly reflects his answers given in the interview. The Applicant further submits that the significant deviations support the strong assumption of a deliberate misrepresentation by the panel, respectively by any editor of the report thereafter that, in turn, grossly violates the Applicant’s right to due process.

31. With regard to the documents that were disclosed, the Applicant makes the following submissions:

a. A more legible copy of Annex 4:

The comparison of the previously and newly provided version of Annex R4 shows that the documents are not identical supporting the strong assumption of an illegitimate alteration by the Respondent. The above-mentioned assumption is supported by the fact that the blacked parts are not identical as well as that the location of the one and only blacked part on page 3 of the comparative report differ significantly.

b. Pre-approved evaluation criteria for VA 12-PGM-UNHABITAT-25042-R-FUKUOKA (O) (VA 25042):

The word-document provided showing the pre-approved evaluation criteria does not show any reference to the specific job opening and/or to the data-set stored and/or to any date supporting the strong assumption that the document was retroactively generated. In addition, the document does not show the necessary level of detail and/or crucial information e.g., as to what experience concerning the Field of Work is required.

c. The Interview questions for VA 25042:

The document provided showing the questions for the interview does not show any reference to the data set stored supporting the strong assumption that the document was retroactively generated. Given that the Respondent claims that the notes of the panel members were not filed, it remains questionable why the Respondent was able to provide the template for the interview questions.

It is to be noted that none of the documents provided by the Respondent shows any reference to the standard procedures requiring that the evaluation process needs to be recorded in the electronic system of INSPIRA. This only allows for the strong assumption that the entire evaluation process was undertaken in violation of the applicable rules and regulations that, in turn, grossly violated the Applicant's right to due process.

32. The Applicant further alleges that the Panel took an overall negative approach to his evaluation and submits that it:

[I]s clear that the panel's misrepresentation of the Applicant's work experience is a deliberate act aiming at providing the base for the panel's subsequent false conclusions concerning the Applicant's alleged lack of post specific competencies.

[...]

33. The Applicant submits that the overall assessment of his competencies stated in the comparative report supports the repeatedly stated presumption of bias of the Panel against him. As already shown, the Panel's assessment that

“it was clear that he had no experience of working in Asia or the Pacific (indeed the candidate admitted the same)” is a patent fabrication in that the Applicant’s PHP shows his distinct and relevant work experience in Asia as Director of a USAID-funded ‘Capacity Building Programme for Urban Recovery’ in Kabul, Afghanistan. Therefore, the Panel’s remark in brackets that the Applicant would have admitted the lack of work experience in Asia borders “criminal acting”.

34. Referring to the statement of the Panel that the Applicant “failed to convince the panel that he had the leadership, judgment and decision making competencies to undertake this position”, the Applicant again submits that the comparative report does not reflect the answers given by him supporting the strong assumption that the Respondent’s failure to produce the notes taken by the Panel members is a deliberate act by the Respondent to deprive the Applicant of his right to have reasonable and effective means to contest administrative decisions and, therefore, of his right to due process.

Respondent’s submissions

35. The Respondent submitted that the non-inclusion of the Applicant in the roster after the Fukuoka selection process was proper as it was not discretionary, did not breach any rights of the Applicant nor was it taken in breach of any rule or regulation.

36. Relying on the frame work for inclusion on the roster in ST/AI/2010/3 (Staff Selection System), the Respondent submitted that only candidates proposed by the hiring manager and subsequently endorsed by the CRB but not selected are placed on the roster.

37. The Applicant was not on the list of candidates proposed by the hiring manager and endorsed by the CRB and therefore had no right to be included on the roster.

38. Following the CRB's review the ultimate selection decision is an automated process and is not discretionary.

39. The Applicant repeated his request for the identity of the membership of the CRB. This application was refused by the Tribunal in Order No. 065 (NBI/2014). The Applicant has provided no grounds for the Tribunal to reconsider the application.

40. With regard to the allegations made by the Applicant in respect of the Respondent's disclosures, the Respondent made the following submissions.

41. The Respondent is unable to provide the interview notes of the individual Panel members because they were not retained and are not in the Respondent's possession. It is noted that each Panel member signed the report based on his/her notes and this amounts to acceptance that the report reflects the views of the signatories.

42. The comparative report represents the final and accurate views of the Panel members on the competencies of the candidates for the positions. The allegation of bias on the part of the Panel members is without evidence to support it and a grave impeachment of the character and conduct of the panelists.

43. The second copy of the comparative report provided by the Respondent was a brighter copy which was freshly redacted. The difference in pen colour and small variations to the redactions does not affect the original text.

44. The pre-approved evaluation criteria are disclosed in a word document which is a snap shot from INSPIRA. The other details are outlined in the Job Opening and the pre-screening questions.

45. The Respondent strongly denies that the interview questions were retroactively generated for the purposes of this litigation.

46. The process was undertaken in full compliance with the relevant rules. The only right of a candidate is for full and fair consideration in the selection process.

Considerations

47. Sections 7 and 8 of ST/AI/2010/3 govern the staff selection process including the rostering of candidates. This AI defines ‘roster’ as:

[A] pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of Department /Office/Mission who are available for selection against a vacant position.

48. Candidates are pre-screened by the Office of Human Resources Management (OHRM) to ascertain if they meet the minimum requirements of the job opening and the names of those candidates are released to the hiring manager.² The hiring manager further evaluates the candidates according to their documentation and prepares a shortlist of those who appear most qualified for the job opening.³

49. Shortlisted candidates may be, as in this case, assessed in a competency based interview⁴ and a reasoned and documented record of the evaluation of the proposed

² Section 7.1 ST/AI/2010/3

³ Section 7.7 ST/AI/2010/3.

⁴ Section 7.5 ST/AI/2010/3.

candidates against the applicable evaluation criteria is prepared to allow the CRB to review the proposal and the head of department to make the selection decision.⁵

50. Section 7.7 provides that for position specific job openings the hiring manger or occupational group manager shall submit a proposal for candidates to the central review body.

51. Section 8.1 empowers the CRB to review departmental proposals for filling a position specific job opening. It is the responsibility of the CRB to ensure that applications are correctly evaluated against the corresponding evaluation criteria and that the applicable procedures are followed.

52. Section 9.4 provides that candidates for position specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the opening.

53. Under these rules, it is a requisite for placement on a roster that a candidate should be proposed by a hiring manager following an evaluation and endorsement by the CRB.⁶

54. There is a presumption of regularity in the staff selection processes “that official acts have been regularly performed”.⁷ The Respondent is required to make a minimal showing of regularity and it is for the Applicant to rebut that presumption. The Applicant’s submission that there is a presumption of irregularity is a mistaken statement of the applicable law.

55. The evidence in this case shows that the Applicant passed the preliminary pre-screening step and therefore was deemed to have met the minimum requirements for

⁵ Section 7.6 ST/AI/2010/3.

⁶ Sections 7.7 and 9.4 ST/AI/2010/3.

⁷ *Rolland* 2011-UNAT-122.

the post. He then was assessed by the hiring manager as being amongst the 4 most suitable candidates and was shortlisted for the post.

56. The assessment by the Panel followed the same structure for each of the shortlisted candidates who were evaluated against the competencies listed in the VA. The Panel decided that the Applicant met the competency for planning and organization but did not meet the other three required competencies.

57. In addition to their comments on the specific competencies, the Panel commented in general on the other qualities of each of the candidates in the section marked overall assessment.

58. The overall assessment of Candidate 1 referred to his experience in relevant countries. It noted that Candidate 2, the Applicant, had no experience of working in Asia or the Pacific. Candidate 3 was noted as having limited understanding of the urban sector. Candidate 4 was noted as having experience in a community based poverty alleviation project. None of these factors were required competencies but all appear to be highly relevant to the overall suitability of each candidate for the post.

59. The Tribunal rejects the Applicant's contention that the reference to his lack of experience in Asia and the Pacific was in breach of the lawful requirements imposed on the Panel.

60. The Tribunal, has considered the Applicant's extensive submissions (some of which are reproduced in this Judgment) on the Panel's competency based deliberations. It finds that the Panel objectively assessed the Applicant and the other shortlisted candidates on the basis of their submitted documentation and against the required competencies. The Panel did not import different or new competencies from those stipulated. The assessment of each candidate against each of the competencies was documented in the report of the Panel. The Applicant did not meet three of these competencies. The reference to his work experience was an additional relevant factor

outside the competencies which was considered by the Panel for each of the candidates. The CRB also took into account geographical representation.

61. The Applicant's repeated allegations of bias are unfounded. The so-called evidence of bias is no more than the Applicant's disagreement with the assessments of his competencies by the Panel. His further assertion that the findings of the Panel "amounts to criminal acting" is unfounded. In the absence of any evidence to support such serious allegations they are irresponsible and reprehensible.

62. The Panel's recommendation of only those candidates who met all of the competencies is rational. The endorsement of those two candidates by the CRB was likewise proper. As the Applicant was not a candidate endorsed by the CRB he was not eligible to be placed on the roster pursuant to section 9.4 of ST/AI/2010/3.

63. The Tribunal finds no evidence to support the Applicant's contention that his past experience while working in Libya gave rise to a presumption of irregularity. While the Applicant has expressed strong views about the justness of his treatment while in Libya there is no evidence of a factual nexus between the events he describes in 2011 and the selection processes in 2012 and 2013.

64. The Tribunal concludes that the selection exercise for the Fukuoka post was properly conducted in accordance with the requirements and provisions of ST/AI/2010/3 and that the Applicant was given full and fair consideration by the Panel.

Disclosure Claims

65. The Tribunal finds that the other claims made by the Applicant concerning the refusal of disclosure of documents were misconceived. Such claims are generally not substantive administrative decisions that can be reviewed by the Tribunal pursuant to article 2.1 of the Tribunal's statute. In the present case they are ancillary matters

considered by the Tribunal in the context of the applicant substantive claim which contests an administrative decision. Usually they may be resolved by preliminary rulings about disclosure before the substantive case is determined and/or in the course of the judgment.

66. Be that as it may, given the seriousness of the Applicant's allegations and for clarity of record, the Tribunal sought and considered submissions from the Respondent on the specific allegations made by the Applicant concerning disclosure.

67. The Tribunal finds that the only documents that the Respondent did not produce were the original interview notes of the panel members. The Tribunal accepts on the basis of the Respondent's explanation that these documents are not in the Respondent's possession and he cannot be compelled to produce them.

Conclusions

68. In the present case, the decisions to decline access to documentation were not substantive administrative decisions. Access to documents for the purposes of the Applicant's claim before the Tribunal is an evidentiary matter resolved by orders of the Tribunal.

69. The decision not to include the Applicant in the professional roster following competency based interviews for the Fukuoka post was lawful as it was taken after a selection process conducted in accordance with the procedures required by ST/AI/2010/3.

70. The Applicant's claims are dismissed.

(signed)

Judge Coral Shaw

Dated this 30th of May 2014

Entered in the Register on this 30th day of May 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi