UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/002
Judgment No.: UNDT/2016/088
Date: 22 June 2016
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NGOKENG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND RELIEF

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. The Applicant is a Reviser in the Language Services Section (LSS) at the International Criminal Tribunal for Rwanda (ICTR). He serves on a fixed-term appointment at the P-4/13 level.

The Application and Procedural History

2. On 3 January 2014, the Applicant filed an Application before the United Nations Dispute Tribunal (UNDT) in Nairobi challenging the decision of the Registrar of ICTR to not select him for the position of Chief of LSS and the selection of an ineligible candidate for that position.

3. The Respondent filed his Reply to the Application on 10 February 2014.

4. On 18 February 2014, the Applicant filed a motion seeking leave to respond to the Respondent's Reply.

5. On 19 February 2014, the Tribunal granted the Applicant's motion and issued Order No. 030 (NBI/2014) to that effect.

6. The Applicant filed his response to the Respondent's Reply on 27 February 2014.

7. On 9 April 2014, the Tribunal issued Order No. 071 (NBI/2014) directing the parties to jointly submit on the agreed and disputed facts in this matter and to define the legal issues in contention. The parties were also asked to indicate whether this matter required an oral hearing.

8. On 2 May 2014, the parties filed their submissions as directed in Order No. 071 (NBI/2014), and informed the Tribunal that this matter can be decided on the basis of the parties' written submissions so that an oral hearing was not necessary.

9. On 1 October 2015, the Tribunal issued Order No. 311 (NBI/2015) seeking further information from the Respondent.

FACTS

10. On 16 February 2012, job opening No. 12-ADM-ICTR-21952-R-ARUSHA (O) was published on Inspira for the position of Chief of LSS at the ICTR. It required candidates to have the following competencies:

> (1) an Advanced University Degree (Master's or equivalent) in relevant modern languages or law and a Translation or an Interpretation Degree, Certificate from a recognized Translation or Interpretation Training School;
>
> (2) a minimum of twelve years of experience in translation and revision in the languages services of an international organization, a national administration or a large-scale private organization, with at least five years within the United Nations;
>
> (3) sound experience in the planning, coordination and supervision of translation services; and
>
> (4) demonstrated ability to interpret. The Vacancy Announcement also added that training skills and experience would be an asset.

11. On 16 March 2012, the Applicant applied for the position. The hiring manager, Mr. Pascal Besnier, rejected his application on grounds that he lacked the required ability to interpret. The job opening was cancelled on grounds that none of the candidates met all the eligibility criteria.

12. On 24 August 2012, ICTR published in Inspira a new Vacancy Announcement for a new job opening of Chief of LSS (12-ADM-ICTR-23993-R-ARUSHA (R)). The new vacancy announcement read as follows:

> (1) an Advanced University Degree (Master's or equivalent) in relevant modern languages or law and a Translation or an Interpretation Degree, Certificate from a recognized Translation or Interpretation Training School;
>
> (2) a minimum of twelve years of experience in translation and revision in the languages services of an international organization,

a national administration or a large-scale private organization, with at least five years within the United Nations;

(3) sound experience in the planning, coordination and supervision of translation services.

13. Whereas the March vacancy announcement (first vacancy) required a candidate to have **"demonstrated ability to interpret,"** the one published in August (second vacancy) listed the **"demonstrated ability to interpret" as being desirable**. The Vacancy Announcement also added that training skills and experience would be an asset.

14. It would appear that in the first vacancy, the desirability to interpret was a mandatory requirement whereas by the use of the word "desirable" in the August Vacancy Announcement this was no longer a mandatory requirement.

15. On 14 September 2012, the Applicant applied for the position again.

16. On 18 March 2013, in the absence of the Chief of LSS and the Officer-in-Charge (OIC) designated by her and at a time when interviews had not been scheduled, Mr. Oscar Tanifum, Head of the Interpretation Unit, issued an interoffice memorandum to designate himself as OIC.

17. The Applicant and two other revisers were interviewed.

18. On 5 July 2013, the hiring manager, Mr. Besnier, issued an interoffice memorandum to inform all ICTR staff members of "the appointment of Mr. Oscar Tanifum as Chief of Language Services Section in the Judicial and Legal Services Division with effect from1 August 2013".

19. On 22 August 2013, the Applicant submitted a request for management evaluation challenging the selection decision.

20. Four months later, on 19 December 2013, the Management Evaluation Unit (MEU) proposed a telephone discussion with the Applicant and the co-complainant on 23 December 2013 with a view to having the matter settled. The discussion took place on the designated date and was taken further by email.

21. On 30 December 2013, MEU requested the Applicant to complete and sign a release form, "agreeing to forego [his] rights to further pursue the case (e.g. at the UNDT) in exchange for accepting the settlement". Subsequently, MEU clarified that the settlement would constitute the Secretary-General's response to the Applicant's request for management evaluation and that no separate management evaluation letter would be provided.

22. On 31 December 2013, the Applicant and his co-complainant informed MEU of their unwillingness to sign the release form as drafted and requested the Secretary-General to provide a formal response to their management evaluation requests reflecting the outcome of the evaluation as provided for by staff rule 11.2 (d). They also informed MEU that as a result of the new developments and given the imminence of the expiry of his time limit to pursue the matter with the UNDT, the Applicant had started finalising an application to be lodged with the UNDT "by close of business on Thursday, 2 January 2014".

23. On 2 January 2014, after close of business, MEU wrote to the Applicant and his co-complainant advising them that the Under-Secretary-General for Management has approved the recommendation of MEU for a settlement subject to their signing of an appropriate release form.

24. The Applicant received the letter and the release form on 3 January 2014 when he had already entered his personal details and filled in the requisite form on the UNDT eFiling portal and was about to upload his scanned application and the annexes thereto.

SUBMISSIONS

Applicant

25. The hiring manager by changing the "ability to interpret" from being a required skill, to that of a desirable one, deliberately downgraded the requirements of the post.

26. The Respondent abused its authority and discretion to favour the selected candidate. It disregarded or failed to attach due weight to the work experience

required in the vacancy announcement and, as a result, violated the Applicant's right to full and fair consideration, his right to equal treatment and his due process rights. In this context, the selection process was tainted by arbitrariness, cronyism, favouritism, bias, prejudice, unfairness, improper motives, extraneous factors, mistakes of law and fact and numerous serious substantive and procedural irregularities.

27. The Applicant met all the educational, work experience and language requirements of the position. His educational qualifications included: a Bachelor's Degree in French and English languages and literature; a Bachelor of Laws Degree; an Advanced University Degree in French, English and German languages; an Advanced University Degree in law; and a Translation Diploma from a prestigious translation and interpretation school. The job opening only required one of the two advanced university degrees. By possessing both, the Applicant was more than qualified.

28. With regard to work experience, he had more than 23 years of experience in translation and revision when the job opening was published. At the time he applied for the position, he had been working at the ICTR as a reviser for more than 10 years. He also supervised the French Translation Unit in the LSS. As a former manager of the Unit, he had sound experience in the planning, coordination and supervision of translation services.

29. The Respondent abused his authority and discretion by ignoring the Applicant's actual qualifications and downgrading his professional status to assess him as a translator-interpreter, rather than a reviser. The Applicant had been working as a translator and a reviser for more than 23 years and had never been an interpreter. Surprisingly, Mr Besnier described him as a translator-interpreter in the letter of 10 July 2013 informing him of his non-selection. This suggests that Mr Besnier wilfully put him in the same category as the ineligible selected candidate and improperly assessed his suitability for the job not on the basis of his status as a reviser, but rather on the basis of a lower translator-interpreter status that he had never had.

30. Mr. Tanifum, the selected candidate, was ineligible in the light of the requirements of the position in the job opening and relevant Inspira rules, including section 5.4.4 of the Inspira manual for the hiring manager and section 4.1.2 of the Inspira manual for the applicant. He is a translator-interpreter with no revision experience. Mr. Tanifum did not even have any experience in self-revised translation, which normally prepares translators for reviser positions.

31. Mr. Tanifum's prior self-designation as OIC of the LSS was related to the selection process and caused the Applicant moral injury. In addition to the message it conveyed, the self-designation was undoubtedly planned or at least designed to shock and demoralise the other candidates before the interviews, with a view to impairing their performance at the interviews or prompting their refusal to participate therein, and to provoke them into ill-advised reactions which would be duly recorded and used against them as and when necessary to protect the contrived outrageous outcome of the selection process.

32. The self-designation of Mr. Tanifum as OIC, and its endorsement, subjected the Applicant to disillusionment with the Respondent and caused him, as a candidate, mental harm by also subjecting him to heightened emotional distress and anxiety. It was an egregious breach of his fundamental rights.

33. The selection of a candidate who lacked the required qualifications suggests that the Respondent secretly altered the eligibility criteria to fit Mr. Tanifum's individual circumstances and favour him, thus violating the principle of *tu patere legem quam ipse fecisti* which required it to comply with the rules it had itself created. By departing from the terms of the job opening to select an ineligible candidate, the Respondent committed fatal mistakes of law and fact and infringed the Applicant's right to full and fair consideration, his right to equal treatment and his due process rights.

34. The selection of an ineligible candidate who could not competently carry out mandatory functions of the post was a gross violation of the provisions of Article 101.3 of the Charter of the United Nations and staff regulations 1.1(d) and 4.2 which require that "[t]he paramount consideration in the employment of the

staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity".

35. Shortlisting an ineligible candidate was a fatal irregularity which irremediably vitiated and invalidated the shortlisting procedure. This procedure should therefore be declared null and void. The results of the interviews are irrelevant, and null and void, and cannot therefore be part of the case or relied upon.

36. There was collusion between the Respondent and the Central Review Board (CRB) in the interests of the selected candidate. Staff rule 4.15(b), section 8 of ST/AI/2010/3 (Staff selection system) and sections 9.1.4 and 9.1.5 of the Inspira manual for the central review body member required the CRB to ensure that the candidates were evaluated on the basis of the corresponding evaluation criteria and that the applicable procedures were followed. The fact that Mr. Tanifum did not meet the work experience requirements of the post as stipulated in the job opening was compelling evidence that the candidates were not evaluated on the basis of the corresponding evaluation criteria and that the applicable procedures were not followed. The CRB inexplicably disregarded this evidence. It can therefore be assumed that Mr. Tanifum was also the CRB's candidate and that the CRB wilfully breached the rules in collusion with the Respondent to ensure his selection.

37. The Applicant seeks the following remedies

a) The rescission of his non selection and Mr. Tanifum's selection; and
b) Compensation in the amount of two years' salary for the harm that the Respondent caused him by intentionally ignoring his actual qualifications in order to weaken his application; for the serious violations of his right to full and fair consideration, his right to equal treatment and his due process rights and damages for moral injury.

Respondent

38. The Application has no merit. The Applicant received full and fair consideration for the position but failed to demonstrate that he possessed the required competencies. He therefore has no standing to challenge the selection of another candidate. The Applicant has not proffered any evidence to show that the decision to not select him for the position was flawed.

39. Following the interviews, the selected candidate was the only candidate who demonstrated that he possessed the requisite competencies for the position. He scored over 60% in his evaluation. On 5 July 2013, the Registrar of the ICTR selected and appointed this candidate as Chief of LSS. The Applicant failed to demonstrate that he met the competencies required for the position. He scored 48.6%, which was well below the threshold for recommendation.

40. The Applicant failed to demonstrate to the interview panel that he met the competencies for the position; he could not have been recommended and ultimately selected for the position. Accordingly, the decision to select another candidate for the position had no impact on the Applicant. It did not result in any loss of opportunity to a fair chance of promotion for the Applicant. Therefore, the Applicant does not have standing to challenge that decision.

41. The Secretary-General has broad discretion in matters of appointment and promotion. The basis for the Secretary-General's broad discretion is found in the Charter of the United Nations, which establishes the framework for staff selection through a general grant of authority to the Secretary-General. Specifically, article 101.1 of the Charter provides: "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly". Staff regulation 4.1 confirms that "the power of appointment of staff members rests with the Secretary-General," and staff regulation 1.2(c) provides further that "[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations".

42. There is a presumption that official acts have been regularly performed. Following a minimal showing by the Respondent that the candidacy of a staff

member was given full and fair consideration, the burden of proof shifts to the candidate who must be able to show through clear and convincing evidence that he or she was denied a fair chance of appointment.

43. The record in this case shows that the Applicant was fully and fairly considered for the position. He was found not suitable for the functions as he failed to demonstrate that he possessed the required competencies for the position.

44. The Applicant has no standing to challenge the selection of another candidate. The Applicant as a staff member only has standing to challenge a decision affecting his own terms of appointment or contract of employment.

45. Under section 9.4 of the administrative instruction on staff selection, a candidate recommended for selection should be placed on a roster automatically. However, the Applicant was not recommended for selection because of how he performed at the interview. He therefore had no entitlement to be placed on a roster. The fact that he was not placed on the roster is not evidence of collusion – it is the consequence of an application of the appropriate rules and an acknowledgement that the Applicant failed to demonstrate to the interview panel that he possessed the requisite competencies of the position.

46. The Applicant has suffered no economic loss. He was not selected for the position because of his performance at interview. The decision to select another candidate for the position did not affect him. He has not been deprived of a fair chance for promotion and suffered no loss of opportunity, as he was not selected due to not meeting the competencies for the position. Accordingly, any chance he had of promotion must be assessed at zero, or less than ten percent, and therefore no damages for loss of opportunity can be paid.

47. The Applicant has provided no evidence of any harm, stress or anxiety. Compensation can only be awarded if the staff member actually suffered damages. A simple averment that he has suffered stress is not sufficient. The Applicant bears the burden of proving stress. Accordingly, in the absence of any evidence of damage in this case, no compensation should be awarded.

48. In his Application, the Applicant has made references to settlement negotiations, which took place between MEU and himself. This is in direct violation of art. 15.7 of the Dispute Tribunal's Rules of Procedure, which provide that: "No mention shall be made of any mediation efforts in documents or written pleadings submitted to the Dispute Tribunal or in any oral arguments made before the Dispute Tribunal".

49. Accordingly, the Respondent submits that the references to any informal conflict-resolution process or mediation in the Application should be struck out.

CONSIDERATIONS

50. Was the decision not to select the Applicant lawful?

51. It is well established in law that in civil litigation the burden of proving an assertion to the required degree of certainty (that is, the standard of proof) normally lies on the party bringing the matter or making the allegation. In civil cases, the standard of proof is on a "preponderance of the evidence" or on a "balance of probabilities". In the celebrated case of *Miller v Minister of Pensions*[1], Judge Denning, as he then was, had this to say regarding standard of proof in civil case:

> That degree is well-settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "we think it more probable than not," the burden is discharged but, if the probabilities are equal, it is not.

52. One of the mandatory competencies in the first Vacancy Announcement for the position of CLSS was "demonstrated ability to interpret" whereas in the second vacancy announcement the ability to interpret had been reduced to a desirable requirement.

53. The Applicant is fluent in both English and French. He holds the following tertiary academic qualifications: (a) A diploma in International Negotiations in English and French from the United Nations Institute for Training and Research

[11][1947] 2 All ER 372.

(UNITAR) Geneva, Switzerland; (b) A *Maîtrise en droit* [Masters in Law] as well a *Licence en Droit* (320 [Degree] from the Université de Yaoundé II, Cameroun; (c) A *Maîtrise de Langues Étrangères Appliquées* [Humanities/ Other Humanities/ applied Foreign Languages] from the Université Sorbonne Nouvelle (Paris 3); A *Diplôme de Traducteur* [Diploma in Translation] from the Université Sorbonne Nouvelle (Paris 3); (d) A Degree in English and French language and Literature from the Université de Yaoundé I, Cameroun.

54. In matters of selection of staff, the role of the Dispute Tribunal is to review the challenged selection process to determine whether a candidate has received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration[2].

55. The United Nations Appeals Tribunal (Appeals Tribunal) has held that:

> There is always a presumption that official acts have been regularly performed. But this presumption is a rebuttable one. If management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands 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[3] (emphasis added).

56. The presumption of regularity is rebutted by evidence of a failure to follow applicable procedures, bias in the decision-making process, and consideration of irrelevant material or extraneous factors.

57. Following careful review of the facts as they appear in the pleadings, and the accompanying documentary evidence, the Tribunal is unable to conclude that the presumption of regularity in the selection process has been or should be rebutted. There is nothing to suggest that the Respondent was motivated by any of the factors referred to in the preceding paragraph in selecting a candidate other than the Applicant.

[2] *Rolland* 2011-UNAT-122; *Aliko* 2015-UNAT-540.
[3] *Rolland* 2011-UNAT-122. See also *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

58. This Tribunal does not agree that a party, in a civil case, should establish his/her case by clear and convincing evidence as has been held in *Rolland* referenced above. The standard of proof should be one of preponderance of evidence. By placing the higher standard of clear and convincing evidence on a party, a Tribunal would be placing the burden applicable in disciplinary cases. In the present matter, the Applicant has not, even on a preponderance of evidence, established that the selection process was not fair.

59. The Applicant has also raised the issue of discrimination. In the majority of discrimination cases, it is difficult to obtain clear cut evidence that the alleged discrimination took place. The Tribunal will here refer to the case of *Igen Ltd & Others v Kay Wong*[4] where the Court developed a two-stage approach test to prove discrimination. First, the party making the allegation must establish a *prima facie* case or a case that, on its face, amounts to discrimination. As a general rule it is very difficult to obtain confirmatory evidence of discrimination and the Tribunal is bound to make reasonable inferences from the totality of the evidence presented. If the applicant is able to establish a *prima facie* case, then the burden of proof shifts to the other party to show, on the balance of probabilities, that its actions were not discriminatory.

60. In the case of *Mashhour*[5], the Appeals Tribunal held that evidence must clearly be established without giving any further indication of the standard of proof. Suffice it to say, the Appeals Tribunal must be presumed to have decided that the standard of proof cannot be more than the civil standard.

61. The Discrimination (Employment and Occupation) Convention, which entered into force in 1960 defines "discrimination" as including:

> … [A]ny distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
>
> …[S]uch other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by

[4] [2005] 3 All ER 812 or [2005] EWCA Civ 142.
[5] 2014-UNAT-483.

> the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.
>
> …Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

62. In *Ibekwe*[6], the Appeals Tribunal held that a staff member who is challenging his or her selection cannot base the claim on general discrimination but must demonstrate specific discrimination when he or she was denied appointment to a specific post for which he or she had competed.

63. On the evidence before it, the Tribunal cannot conclude that the Applicant was subjected to any discrimination or that the selection exercise was tainted.

Conclusion

64. The Application is accordingly dismissed in its entirety.

(signed)
Judge Vinod Boolell
Dated this 22nd June 2016

Entered in the Register on this 22nd day of June 2016

(signed)

Abena Kwakye-Berko, Registrar, Nairobi

[6] 2011-UNAT-179.