



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

HOSANG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Nicholas C. Christonikos

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 18 March 2016, the Applicant, a Records Clerk in the Field Personnel Division (“FPD”), Department of Field Support (“DFS”), filed an application contesting his “[n]on-selection for position” of a G-5 level Records Assistant, DFS. The Applicant submits, *inter alia*, that the selection process was unduly delayed and that he did not receive full and fair consideration, which resulted in the unequal treatment of his candidature. He seeks “compensation for emotional distress arising from the administrative delay and the moral injury caused by the unequal treatment in the selection process that resulted in denying him the position.”

2. On 21 April 2016, the Respondent replied to the application, submitting, *inter alia*, that the Applicant received full and fair consideration for the post in accordance with the Organization’s rules on staff selection. The Respondent also submits that the length of the recruitment process was reasonable and caused no harm to the Applicant.

Procedural history

3. On 31 August 2016, the Tribunal issued Order No. 209 (NY/2016), directing the parties to file their final submissions by 9 September 2016. The Tribunal noted that the parties filed concise and clear submissions and that the material facts did not appear to be in dispute, and that neither the application nor the reply contained any requests for a hearing or proposed any witness testimony. The Tribunal also noted that, should the parties decide to seek an oral hearing, they could include such a request in their final submissions, identifying the witnesses they sought to introduce at the hearing, providing brief statements of the evidence they intended to elicit from them and explaining the relevance of their proposed testimony to the present case.

4. On 9 September 2016, the parties filed their final submissions. Neither party requested a hearing nor proposed any witness testimony. Accordingly, the Tribunal proceeded to consideration of the case on the merits on the papers before it, including the parties' submissions of 9 September 2016.

5. The Tribunal notes that the Applicant has other pending and closed cases before this Tribunal. However, the present judgment concerns only Case No. UNDT/NY/2016/010, relating to the decision not to select the Applicant for the G-5 level post of Records Assistant, DFS.

Factual background

6. On 22 June 2012, a job opening vacancy was issued for the contested G-5 level position, with a closing date for applications of 21 July 2012. The Applicant applied on 17 July 2012.

7. The Respondent submits that, as a result of the initial pre-screening process, 46 candidates were released to the hiring manager for assessment. Eight job applicants withdrew from the process. A preliminary review was conducted of the remaining 38 job applicants. As a result, four candidates, including the Applicant, were found suitable for the position and were invited for a competency-based interview.

8. Approximately two years later, on 3 July 2014, the first round of competency-based interviews was completed. On 21 July 2014, the interview panel's assessment was sent to DFS for transmittal to the Central Review Board ("CRB"). The CRB found that there had been a procedural error with regard to the composition of the interview panel and that one of the screened-out job applicants should have been invited to an interview. The CRB remanded the exercise to DFS for correction.

9. Another round of competency-based interviews was conducted on 10 February 2015. The candidates, including the Applicant, were interviewed and assessed in reference to the competencies of client orientation, communication, and professionalism. The interview panel assessed the Applicant and the ultimately successful candidate as follows:

Criteria	Applicant	Successful candidate
Academic requirements	successfully met	successfully met
Experience requirements	exceeded	exceeded
Language requirements	successfully met	successfully met
Competency of Client Orientation	<i>successfully met</i>	<i>exceeded</i>
Competency of Communication	<i>successfully met</i>	<i>exceeded</i>
Competency of Professionalism	<i>successfully met</i>	<i>exceeded</i>

10. Thus, the interview panel gave the successful candidate a higher rating than the Applicant with respect to each of the three competencies. The panel recommended only two candidates—the Applicant and the successful candidate—noting that the successful candidate “*exceed[ed]* the requirements”, whereas the Applicant “*successfully me[t]* the requirements” (emphasis added).

11. The Respondent submits that, on 1 May 2015, a final recommendation in regard to the recruitment process was sent to the CRB confirming that the Applicant and the successful candidate had met all the evaluation criteria for the position and had been placed on the recommended list. The CRB approved the recommendation on 8 May 2015.

12. On 7 July 2015, the hiring manager provided a written recommendation in respect to the selection decision. The recommendation noted that the interview panel had found that:

During the interview it was clear to the panel that [the successful candidate] consistently provided more compelling answers and

demonstrated more successfully the different competencies. He received outstanding [ratings] in all the competencies. In addition, he has an excellent ePAS [electronic performance appraisal system] record (“[e]xceeds expectations” in both the ePAS [reports] provided).

13. By memorandum of 11 September 2015, the selection process was finalized, with the recommendation to select the successful candidate and to place the Applicant on the roster of eligible candidates for relevant G-5 posts.

14. The Applicant was first informed of the outcome of the selection process verbally on 22 September 2015, and then in writing on 23 September 2015.

15. On 19 November 2015, the Applicant submitted a request for management evaluation of the decision not to select him for the position. On 24 December 2015, the Applicant received the outcome of the management evaluation, confirming that the Secretary-General had decided to uphold the contested decision.

Consideration

Unequal treatment

16. As the United Nations Appeals Tribunal stated in a number of cases, the Secretary-General has broad discretion and it is not the role of the Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process. Rather, the Tribunal will examine whether the selection procedures were followed and whether the applicant was given fair and adequate consideration (*Abbassi* 2011-UNAT-110; *Majbri* 2012-UNAT-200; *Hersh* 2012-UNAT-243).

17. In his final submission of 9 September 2016, the Applicant provided the following clarification regarding the scope of his claims:

The Respondent incorrectly raises and dwells on a point alleging that the Applicant claims the contested decision is unlawful ... There is no such claim anywhere in the application. Excluding the 2000–2012 period [i.e., prior to the publication of the job opening], on the surface it appears that lawful steps in the selection process were eventually followed. The Applicant’s arguments concern administrative delay and unequal treatment.

18. The Applicant’s claim of “unequal treatment” appears to be based primarily on his submission that the Respondent had failed to take into account that the Applicant performed the functions of the advertised post based on his “assignment to the position for more than 18 years,” which “far outweighs this extraneous consideration [possible reference to interview marks or performance evaluations] and advantage given to the successful candidate.”

19. One of the basic principles of the recruitment system in the United Nations is the competitive nature of the selection process. The Applicant has not referred to any administrative issuances that would suggest that, as an incumbent of the advertised position, he was to be afforded any preferential treatment. Nor does the Applicant allege that it was improper to advertise the job opening and carry out a competitive selection process. The Tribunal finds no evidence of unequal treatment of the Applicant in relation to his candidature for the contested post.

20. In view of the above, the Tribunal finds that the Applicant was given full and fair consideration for the contested post. It is a matter of record that his non-selection was due to the successful candidate’s stronger interview performance.

Delay

21. The job opening for the contested post was published in June 2012 and the selection process was completed in September 2015. It thus took more than three years for this recruitment process to be finalized.

22. The Respondent submits that there was no unreasonable delay and that there is no legal right to the completion of a recruitment processes within a certain period of time and that delays in recruitment do not amount to a violation of an applicant's terms of appointment (*Kamal* 2012-UNAT-204; *Zeid* 2014-UNAT-401; *Kucherov* 2016-UNAT-669; *Krioutchkov* UNDT/2016/066). The Respondent further submits that the delay in the completion of the selection exercise was due to a number of "unavoidable factors." First, the requirement for a second round of competency-based interviews to address the issues raised by the CRB. Second, the hiring manager left his position before the recruitment process was complete, and it took approximately six months to find a replacement. The new hiring manager had an extensive backlog of work to complete as well as preparation for the roll-out of the new management system, Umoja. The Respondent also submits that the Applicant benefitted monetarily from the duration of the recruitment process because he was paid a special post allowance ("SPA") at the G-5 level throughout the recruitment process.

23. The Applicant submits that the selection exercise was unduly delayed, which caused him "severe psychological distress due [to] the uncertainty of his fate." The Applicant further submits that the Respondent's assertion that he had received a SPA throughout the recruitment process was not true, as the contested decision was taken in September 2015 and the Applicant received the equivalent of an SPA six months later, in March 2016.

24. The Tribunal finds that the duration of the selection process was unreasonable, particularly in view of the reasons offered by the Respondent, which are entirely attributable to the Administration. Notably, even before the initial selection process was remanded by the CRB for corrections, there already was a two-year delay from July 2012, when the job opening was published, to July 2014, when the initial papers were sent to the CRB. To put things in perspective, the typical duration of a standard fixed-term contract in

the Organization is two years. Thus, some staff members started and finished their careers with the Organization while this recruitment exercise for this General Service-level post was still ongoing. The Tribunal also notes that this case is distinguishable from the cases referred to by the Respondent, due to its particular circumstances, including the sheer extraordinary length of the delay, the reasons for it, which were attributable to the Administration, and the actual effect on the Applicant, as explained below.

25. As a result of the selection exercise, the Applicant was placed on a roster of pre-approved candidates for relevant G-5 level posts. Therefore, although the Applicant was not selected for the post, the delay in the selection exercise had a direct impact on him because, had this exercise been finished sooner, the Applicant would have been placed on the roster earlier, which would have opened up additional employment opportunities that would have been available to him as a roster candidate (see, e.g., *Marsh* 2012-UNAT-205, stating that loss of a chance to be included on the roster may have material consequences).

26. Accordingly, the Tribunal finds that the Applicant is entitled to compensation for the significantly delayed recruitment exercise and for the loss of additional employment opportunities in connection with the delayed placement on the roster of pre-approved candidates for relevant G-5 posts. As such, the Tribunal finds it appropriate to award the Applicant the sum of USD3,000.

Compensation for emotional distress

27. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows: "As part of its judgement, the Dispute Tribunal may *only* order one or both of the following ... (a) [r]escission ... [or] (b) [c]ompensation for harm, *supported by evidence*" (emphasis added). (See also

Antaki 2010-UNAT-095, stating that “compensation may only be awarded if it has been established that the staff member actually suffered damage.”)

28. Having examined the case record, the Tribunal finds that the Applicant has not established the evidentiary basis for his claim for compensation for emotional distress. As the Appeals Tribunal stated in *Hasan* 2015-UNAT-541, moral damages may not be awarded without specific evidence to support the claim for such relief. Accordingly, the claim for moral damages is dismissed (see also *Kozlov and Romadanov* 2012-UNAT-228).

Orders

29. The application succeeds in part.

30. The Respondent shall pay the Applicant the sum of USD3,000. This sum is to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as of that date shall apply. If this sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 16th day of September 2016

Entered in the Register on this 16th day of September 2016

(Signed)

Hafida Lahiouel, Registrar, New York