



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MASHAYEKHI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jérôme Blanchard, HRLU/UNOG
Cornelius Fischer, HRLU/UNOG

Introduction

1. By an incomplete application filed via email on 13 December 2016 and completed on 31 March 2017, the Applicant, former Head, Trade and Negotiations and Commercial Diplomacy Branch (D-1), United Nations Conference on Trade and Development (“UNCTAD”), challenged the decision not to select her for the position of Director, Division on Technology and Logistics (D-2), UNCTAD, advertised under Job Opening No. 15-ECO-UNCTAD-47089-D-Geneva (R) (“JO 47089”).

2. The application was served on the Respondent who filed his reply on 22 May 2017.

3. On 20 April 2018, the Tribunal issued Order No. 80 (GVA/2018) ordering the parties to inform it if a hearing was required in the matter, to provide it with information on witnesses to be called and to advise if the parties wished to file any additional submissions before the Tribunal.

4. The Respondent was of the view that the matter could be determined on the basis of the submissions already filed, while the Applicant requested the Tribunal to hold a hearing and to have access to additional documents.

5. On 5 June 2018, the Tribunal issued Order No. 99 (GVA/2018) inviting the parties to a Case Management Discussion (“CMD”), which was held on 19 June 2018.

Facts

6. JO 47089 was advertised in Inspira from 11 September 2015 to 25 November 2015.

7. On 26 May 2016, the Applicant was informed of her non-selection over the telephone by the Hiring Manager, namely the Deputy Secretary-General of UNCTAD.

8. She requested management evaluation of her non-selection on 1 August 2016 and received a response on 16 September 2016.

9. The Applicant filed an incomplete application by email on 13 December 2016. The UNDT Geneva Registrar responded by return email on 29 December 2016, informing her that the application was deemed incomplete as she had failed to provide a copy of the contested decision.

10. By email of 23 March 2017, the UNDT Geneva Registrar informed the Applicant that failure to complete her electronic case file by 31 March 2017 could result in the dismissal of her case for want of prosecution. By email of 31 March 2017, the Applicant filed an updated and amended application. She stressed in her email that she had not received a written communication informing her of her non-selection.

Parties' submissions

11. The Applicant's principal contentions are:

a. The application is receivable; as Judge Halfeld held in a partial dissent in *Auda* 2017-UNAT-746, a "staff member's knowledge of a decision is not necessarily the same thing as a staff member receiving notification of a decision." Additionally, though staff rule 11.2(c) does not preclude the notification of an administrative decision verbally, administrative decisions should be notified in writing and with some degree of gravitas;

b. This was not the case in the notification to her of her non-selection, since she merely received a phone call from the Hiring Manager, who was away on mission; she asked for a meeting with the Secretary-General of UNCTAD regarding the subject;

c. On the selection procedure, the Applicant argues, *inter alia*, that the panel lacked impartiality and objectivity as one of its members (the Director, DITC) had constantly discriminated and retaliated against her; and

d. The written assessment was not correctly done and it should not have been eliminatory. Lastly, the UN Women focal point was not involved in the selection exercise, as it should have been.

12. The Respondent's principal contentions are:

a. The application is not receivable *ratione temporis*, since the Applicant did not file it within the deadline of 90 calendar days from the date she received the outcome of the management evaluation as per staff rule 11.4, since the e-mail sent by the Applicant to the Tribunal containing an incomplete application does not meet the requirements of an application according to the Rules of Procedure of the Tribunal;

b. The written assessment was done according to the job opening and it's a proven tool used by the Administration to narrow down a large pool of candidates;

c. The written test was conducted for the purpose of evaluating technical skills and the panel members were provided with anonymous tests to evaluate;

d. The passing grade for the written test was set at 70/100 and the Applicant scored 60.3. Therefore, she was not successful in advancing to the next stage of the selection process; and

e. The Senior Review Group was satisfied that the applicable procedure was followed.

Consideration

Preliminary matters

13. The Tribunal notes that in his reply, the Respondent filed some documents on an *ex parte* basis. Since the Tribunal did not make use of these documents for its adjudication, it decides that they shall remain *ex parte*.

14. While the Applicant informed the Tribunal that she wished to have an oral hearing, the Tribunal decided that, in light of its below conclusions, the fact that the Applicant failed to pass the written test and that she did not provide any substantial reasons in support of a hearing, the material on file was sufficient to decide the matter on the papers.

*Time limits for filing an application before the Tribunal (receivability *ratione temporis*)*

15. In his reply, the Respondent argues that the application is not receivable *ratione temporis*, since the Applicant did not file it within 90 calendar days from the date she received the outcome of the management evaluation as per staff rule 11.4.

16. The Respondent submits that the e-mail sent by the Applicant to the Tribunal containing an incomplete application does not meet the requirements of an application according to the Rules of Procedure of the Tribunal.

17. The Tribunal recalls that the Applicant filed an incomplete application by attaching it to an email of 13 December 2016, which identified the contested non-selection decision. The Geneva Registry allowed her to complete her application, and she made an additional filing within the deadline she had been given, that is by 31 March 2017. In that submission, the Applicant reiterated that she had not been notified in writing of her non-selection.

18. While time limits need to be strictly enforced, the Tribunal is of the view that by filing an incomplete application on 13 December 2016, the Applicant complied with the statutory time limit pursuant to staff rule 11.4. For the purpose of the determination of the receivability *ratione temporis* of the application, the Tribunal notes that the email complied with the requirements for an application pursuant to the Tribunal's Statute and Rules of Procedure.

19. Upon receipt of the email, the Geneva Registry provided the Applicant with a deadline to file a complete application, with which she complied. As indicated in the Registrar's email of 23 March 2017, the deadline set to complete the application was relevant for any potential dismissal for want of prosecution had the Applicant failed to respect it. It was however irrelevant for a determination of the receivability *ratione temporis* of the application.

Time limits for requesting management evaluation (receivability ratione materiae)

20. Having reviewed the application, the Tribunal finds it necessary to address on its own motion the issue of the application's receivability *ratione materiae*.

21. Staff rule 11.2 sets out the requirements for management evaluation requests as follows:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

22. In the instant case, the Applicant confirmed that she was notified of her non-selection by a phone call from the Hiring Manager on 26 May 2016. Nonetheless, she only requested management evaluation on 1 August 2016, which was 67 calendar days later.

23. In *Auda* 2017-UNAT-746, while dealing with a matter on receivability of an application, the Appeals Tribunal held:

30. The fact that the original decision was made verbally is, by itself, of no consequence since there is no explicit requirement in law for such notification to be in writing. Staff rule 11.2(c) does not require a written notification as a prerequisite to contest an administrative decision.

24. In *Auda*, the Appeals Tribunal reiterated its previous understanding concerning the decisive moment of notification for the purpose of staff rule 11.2(c), to wit, when “all relevant facts ... were known, or should have reasonably been known” by the staff member.

25. The foregoing notwithstanding, the Tribunal notes that sec. 10.1 of ST/AI/2010/3 (Staff selection system) provides as follows (emphasis added):

The executive office at Headquarters, the local human resources offices or the Division of Field Personnel of the Department of Field Support shall inform the selected candidate of the selection decision within 14 days after the decision is made. Candidates endorsed by the central review body and placed on a roster shall be informed of such placement within 14 days after the decision is made by the hiring manager or occupational group manager and be advised that they may be selected from the roster for similar positions that may become available within the stipulated time frame as described in sections 9.3 and 9.4. Other candidates convoked for assessments but not selected or placed on a roster shall be so informed by the hiring manager or the occupational group manager within 14 days after the selection decision is made **in writing**.

26. The Tribunal thus notes that while staff rule 11.2(c) does not explicitly require written notification, the above-referenced administrative instruction does so in cases of non-selection for candidates that had been convoked for assessment. Since the Applicant was convoked for assessment— i.e. she was invited to take the written test—and she was not successful, she had to be notified in writing. In light of the specific provision in ST/AI/2010/3 with respect to the requirement of a written notification, failure by the Administration to comply with this duty cannot be held against her.

27. Therefore, and while the Applicant became fully aware of her non-selection on 26 May 2016, the statutory time limit for the request for management evaluation did not start to run on that day and the application is receivable, *ratione materiae*.

Merits

28. On the merits, the Tribunal has to evaluate if the selection process for JO 47089 was done in accordance with the established procedures.

29. The Tribunal first recalls that in selection and appointment matters, the Administration enjoys broad discretion and that it is not the role of the Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of a selection process (*Fröhler* 2011-UNAT-141, *Ljungdell* 2012-UNAT-265).

30. The Tribunal's examination is limited to whether the procedure laid down in the Staff Regulations and Rules was followed, and whether the staff member was given full and fair consideration (*Abbassi* 2011 UNAT-110).

31. The Tribunal underlines that it cannot replace the Administration by doing its own technical assessment regarding the content of the test.

32. Further, the Appeals Tribunal has clarified that in non-selection cases, official acts are presumed to have been regularly performed. It stressed in *Rolland* 2011-UNAT-122 that:

[t]here is always a presumption that official acts have been regularly performed. This is called the presumption of regularity, but it is a rebuttable presumption. 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 be able to show through clear and convincing evidence that [she/he] was denied a fair chance of promotion.

33. The Appeals Tribunal further has constantly held that "the burden of proving improper motives such as abuse of authority, discrimination, retaliation or harassment rests on the person making the allegations" (see *Nwuke* 2015-UNAT-056 and also *Jennings* 2011-UNAT-184).

34. The Tribunal notes that the Applicant failed to successfully pass the written assessment test. Hence, she was not convoked for a competency-based interview. She questions, *inter alia*, the fact that a written assessment was conducted for a D-2 level post at UNCTAD as well as the content of the test. She also contests the content of the job opening where, she argues, two core competencies were not included.

35. In this respect, the Tribunal cannot but recall the broad discretion of the Administration in determining the content of a job opening, as well as the relevant assessment tools, including the conduct of a written test, if any. Absent any element of flagrant unreasonableness, the Tribunal will not interfere with such choices and the content of an assessment.

36. Moreover, the Applicant does not contest the relevance of the questions asked in the written test but, rather, that they only covered technical knowledge relating to one element in the “Professionalism” competency, while they did not cover core responsibilities such as leadership and management skills for the D-2 level, as stated in the vacancy notice.

37. However, according to the evidence on file, the Tribunal recalls that the assessment tools used in the present selection exercise were two-fold: a written assessment and a competency-based interview.

38. Only shortlisted candidates were invited for a written assessment, followed by a competency-based interview for those candidates who passed the pre-established threshold of 70% in the written assessment.

39. As a matter of principle, the Tribunal notes that it is appropriate to test technical skills through a written assessment, and to test core/managerial competencies through a competency-based interview. This is reflected in sec. 7.5 of ST/AI/2010/3, which provides that:

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.

40. Although mindful of its extremely limited scope of judicial review in selection matters and of the fact that it cannot substitute itself to the Administration, the Tribunal, nonetheless, reviewed the questions of the written test and sees no reason to find unreasonable the Respondent's submission that they were directly relevant to the skills expected for the position.

41. The Applicant also questions the composition of the assessment Panel and notes that the three of its members who were staff members of UNCTAD were biased against her. The Tribunal recalls that sec. 1(c) of ST/AI/2010/3 provides the following (emphasis in original):

Assessment panel: a panel normally comprised of at least three members, with two being subject matter experts at the same or higher level of the job opening, at least one being female and one being from outside the work unit where the job opening is located, who will undertake the assessment of applicants for a job opening. For D-2 level job openings, the panel shall normally be comprised of at least three members, with two being from outside the department or office, and at least one female.

42. The Tribunal notes that the Panel was composed of four members—instead of the minimum suggested, i.e., three—all of which were at the D-2 level or above, and three of which were from outside the Division on Technology and Logistics. The one female member was external not only to the particular division, but to UNCTAD. The Tribunal is satisfied that the Panel composition complied with the above referenced rule.

43. Further, and relevantly, the Tribunal recalls that the candidates' tests were provided to the Panel members anonymously and finds that the Applicant did not provide any element allowing to conclude that the anonymity of the tests was not respected and/or compromised.

44. On the contrary, the documentary record shows that measures were taken to ensure the anonymity of the tests, which was monitored by the Chief, Human Resources Management Section ("HRMS"), UNCTAD. Indeed, once the tests were received by HRMS, UNCTAD, each of the candidates' first and last name as well as the respective IP address were removed and a process number was assigned to

each candidate. The anonymous copies were then sent to the Hiring Manager, who dispatched them to the Panel members. The Tribunal sees no reason to question the Respondent's statement that the anonymity was upheld throughout the whole assessment process of the written tests and that the identity of the candidates was disclosed only after the Hiring Manager provided the scores to HRMS, UNCTAD.

45. While the Applicant argues that the Panel members from within UNCTAD could have recognized her writing style, the Tribunal cannot but note that the Applicant was rated below the passing threshold of 70% by all of the Panel members, and obtained an average score of 60.3%. Further, the consolidated evaluation matrix shows that the Applicant received the lowest mark (44.2%) from the external Panel member that was not part of UNCTAD, that is the one who could not have recognized her writing style. This Panel member gave ratings ranging from 6.7% to 85.4%.

46. The Tribunal further notes that the Administration provided it with a document containing the "proposed evaluation criteria" for the written test, which gave guidance to the Panel members on how to evaluate and weigh different elements of the written test.

47. The Tribunal is thus satisfied that the tests of all candidates were evaluated in accordance with pre-established criteria applied by all the Panel members. While the Applicant also questions the determination of the passing threshold at 70%, such is not subject to judicial review but falls entirely under the Administration's discretion. What is determining is that the threshold, as well as the evaluation criteria, had been pre-established and were applied by the Panel members.

48. In light of the foregoing, the Tribunal is satisfied that the recruitment process was conducted in accordance with ST/AI/2010/3 and that the Applicant's candidature was given full and fair consideration.

49. The Tribunal recalls that the burden of proving any allegations of ill motivation or extraneous factors rests with the Applicant (*Asad* 2010-UNAT-021; *Jennings* 2011-UNAT-184; *Azzouni* 2010-UNAT-081; *Obdeijn* 2012-UNAT-201). The Tribunal finds that the Applicant failed to provide any element leading it to conclude that the assessment of her written test, which was provided to the Panel members on an anonymous basis, was not objective or was, otherwise, influenced by extraneous factors.

50. In light of the foregoing, the Tribunal does not need to examine any of the other arguments raised by the Applicant.

Conclusion

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

The application is rejected.

(Signed)

Judge Teresa Bravo

Dated this 20th day of September 2018

Entered in the Register on this 20th day of September 2018

(Signed)

René M. Vargas M., Registrar, Geneva