



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

KRIOUTCHKOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 13 December 2016, the Applicant contests the decision not to evaluate his candidature for, as well as his non-selection and the failure to inform him of his non-selection to, the position of Russian Translator (“P-3”), at the United Nations Office at Nairobi (“UNON”), advertised under job opening number 15-LAN-UNON-39481-F-NAIROBI (L) (“JO 39481”).
2. The application was served on the Respondent, who filed his reply on 13 January 2017.

Facts

3. The Applicant is a Russian Translator, holding a permanent appointment at the P-3, step XV, level, at the Economic and Social Commission for Asia and the Pacific (“ESCAP”), based in Bangkok.
4. On 21 May 2015, the Applicant applied for JO 39481 and later inquired on the status of his application. After several email exchanges with UNON Human Resources, he was informed by email on 1 July 2016 that his candidature was unsuccessful. The email read as follows:

Dear [Applicant],

This is to acknowledge and respond to your inquiry regarding your application to the subject JO 394481 (sic) of Russian Translator.

Please note that the Job Opening was only open to candidates available for placement from the existing Russian Language Exam Roster. All RfR (Recruit from Roster) JOs, including the subject JO, are only available to roster applicants who are already placed on pre-approved ro[s]ters, in this particular case Russian Language exam roster.

It is noteworthy that even applicants that are not on such rosters can apply without hindrance. However, during the screening process, the Inspira system automatically screens out applicants who don't meet the latter requirement of being on the roster, which was the case with you.

I hope the foregoing explanation clarifies the matter.

5. On 5 August 2016, the Applicant requested management evaluation, receiving a response upholding the contested decision on 30 September 2016. He filed the present application on 13 December 2016, and the Respondent filed his response on 13 January 2017.

6. After a case management discussion, the Respondent conveyed to the Tribunal that he was unwilling to mediate the matter and the Tribunal informed the parties that it would be decided on the papers.

Parties' Submissions

7. The Applicant's principal contentions are:

a. His application to JO 39481 was unfairly considered and he was discriminated against during the recruitment process for it. Indeed, the job opening did not have a notice that the recruitment was strictly from the roster, as alleged by UNON Human Resources; and

b. He remained in a limbo without notification of his non-selection, which is contrary to ST/AI/2010/3 (Staff selection system).

8. The Respondent's principal contentions are:

a. The Applicant's candidature for JO 39481 was fully and fairly considered. The job opening was restricted to candidates on the "Russian language exam roster";

b. The Applicant was not informed of his non-selection because the recruitment was done pursuant to ST/AI/2000/1 (Special conditions for recruitment or placement of candidates successful in a competitive examination for posts requiring special language skills), and not under ST/AI/2010/3.

Consideration

9. The main issue for determination in this matter is whether JO 39481 was a “recruitment from roster” position, thus barring the Applicant from competing for it. If it was not, a resulting issue to examine would be what remedies, if any, the Applicant is entitled to.

Was the Applicant’s candidature given full and fair consideration?

10. The burden of proof in matters of non-selection rests on the Applicant, who has to show through clear and convincing evidence that he was denied a fair chance at promotion. The Respondent is presumed to have regularly performed official acts. Therefore, if the Respondent can minimally show that the Applicant was given full and fair consideration during the selection exercise, then the presumption of regularity is satisfied (*Rolland 2011-UNAT-122*).

Recruitment from Roster

11. The Tribunal notes that the job opening did not mention at all that only roster candidates were eligible. Rather, it had a special notice that read as follows (emphasis added):

Special Notice

1. **All applicants are strongly encouraged to apply** on-line as soon as possible after the job opening has been posted and well before the deadline stated in the job opening. On-line applications will be acknowledged where an email address has been provided. 2. If you do not receive an e-mail acknowledgement within 24 hours of submission, your application may not have been received. In such cases, please resubmit the application, if necessary. If the problem persists, please seek technical assistance through the Inspira “Need Help?” link.

12. The very first time that the Applicant was informed that the job opening was restricted to roster recruitment was by the email from UNON Human Resources, quoted in para. 4 above.

13. In his reply to the application and in support of the argument that JO 39481 was a “Recruit from Roster”, the Respondent filed an internal document with the following indication: “Job type: Recruit from Roster”.

14. During recruitment exercises, there is an obligation of transparency and fairness that behoves the hiring manager and the Organization as a whole to ensure that the vacancy announcement fully reflects the eligibility criteria to allow potential applicants to consider on an informed basis if they meet it.

15. Therefore, if the hiring manager decides to post a vacancy announcement and to apply unpublished eligibility requirements, such can be challenged by a candidate who is excluded from the selection exercise on that basis. In the case at hand, nothing in the vacancy announcement indicated that only candidates from the language or any other roster for that matter were eligible to apply. Therefore, the explanation by UNON Human Resources to the Applicant that “even applicants that are not on such rosters can apply without hindrance” cannot be entertained since, as also admitted by UNON Human Resources, “during the screening process, the Inspira system automatically screens out applicants who don’t meet the ... requirement of being on the roster, which was the case with [the Applicant]”.

16. The Organization cannot be permitted to post vacancy announcements and use eligibility requirements that are not divulged to the public therein to eliminate candidates who apply in good faith believing that they meet the requirements that appear on the published job opening.

17. The Tribunal has taken judicial notice of the fact that when a vacancy announcement is posted on *Inspira* and the intention of the hiring manager is to limit recruitment to candidates from a roster of pre-approved candidates, such vacancy announcements contain a notice akin to the following:

Special Notice

This “Recruit from Roster” job opening is only open to roster applicants who are already placed on pre-approved rosters, following a review by a United Nations Central Review Body. Only roster applicants who were placed on rosters with similar functions at the same level are considered to be eligible candidates. Eligible applicants receive an email inviting them to apply. Rostered applicants are encouraged to apply only if they are interested and available to take up the position at the duty station/s specified in the Job Opening. Applying to this job opening carries an expectation to accept the offer, if selected.

18. Thus, potential applicants who are not on the roster are made aware from the outset that they are not eligible to apply (see *Lemonnier* UNDT/2016/187; *Asomaning* UNDT/2016/025; *McCarthy* Order No. 41 (NY/2018); *Khattel* Order No. 219 (NY/2017); and *Hassouna* Order No. 249 (GVA/2016)).

19. The response to the Applicant’s request for management evaluation, while providing the Administration’s comments to the Applicant’s request, indicated in part as follows (emphasis added):

In its comments UNON noted that the [p]ost in question was **advertised in order to hire members of the language roster who are not already employed by the Organization** and who possess special language skills.

20. While it will not assess the legality of that additional unpublished eligibility requirement (i.e., “not already employed by the Organization”), the Tribunal finds it necessary to address this statement. Indeed, it begs the question of how were candidates supposed to know that the job opening was meant to hire (exclusively) persons on the language roster who are not yet employed by the Organization if it was not specifically indicated therein?

21. Further, in his reply the Respondent submitted that (emphasis added):

On 25 March 2015, UNON advertised the position **in order to obtain job applications from interested and available entry level candidates from the Russian language exam roster.**

22. Nothing in the job opening referred to it being an “entry-level” recruitment for candidates on the language exam roster. The Tribunal notes, once again, that had this been divulged and handled in a transparent and equitable manner, candidates like the Applicant would not even have submitted their applications for consideration and no expectation for selection consideration would have been created.

23. Furthermore, in his closing submission, Counsel for the Respondent submitted that (emphasis added):

2. The job opening was advertised to solicit expressions of interest from current members of the Russian language examination roster. The Applicant is not on the Russian language examination roster. **The Applicant is a currently serving Russian language professional. He was therefore ineligible to apply for the position.**

...

6. ST/AI/2000/1 does not require the advertisement of job openings. UNON, however, elected to advertise the job opening on the United Nations career portal to solicit expressions of interest from available and extant members of the Russian language exam roster.

...

9. At the case management discussion, the Dispute Tribunal requested the Respondent to address two procedural errors. Neither error vitiates the contested decision. There is no proximate connection between the alleged errors and the Applicant’s non-selection for the position.

10. First, the absence of an explicit statement limiting the job opening to members of the roster had no bearing on the Applicant’s chances of selection. The Applicant remained ineligible for selection as he is not a new language professional under ST/AI/2000/1. His membership on Russian language examination roster lapsed upon his successful recruitment over two decades ago.

24. The ruling in *Allen* UNDT/2010/009 relevantly states:

35. The Tribunal has already emphasized the Respondent's general obligation to abide by all pertinent legal instruments (see judgment UNDT/2009/084, *Wu*; UNDT/2009/095, *Sehraoui*). In the same vein, the former UNAT held that "formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own rules, the adherence of which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant's right to due process" (judgement No. 1122, *Lopes Braga* (2003), quoting judgement No. 1047, *Helke* (2002)). UNAT also stated "that the Organization has to respect and follow its procedures in keeping with what the world expects of the United Nations" (judgement No. 1371 (2008) quoting judgement No. 1058, *Ch'ng* (2002)).

25. The Applicant's eligibility was never assessed in a transparent manner but rather through unpublished requirements unknown to the candidates for JO 39481. Moreover, even entertaining that the Organization was not required to post a job opening in the case at hand, if it elects to do so, it is bound to respect and follow the applicable recruitment rules. The Respondent cannot claim, on the one hand, not to be required to advertise a vacancy and, on the other hand, that if he chooses to advertise, he should not be held to the same standards and rules of recruitment.

Language requirements

26. Although the job opening was for a Translator, Russian, at the P-3 level, it provided as follows regarding Languages (emphasis added):

Languages

English and French are the working languages of the United Nations Secretariat. **For the post advertised perfect command of Spanish, which must be the candidate's primary language, is required**, as well as an excellent knowledge of English and at least one other official language of the United Nations, as tested by the appropriate United Nations Competitive examination.

27. Since the contested post is one of Translator, Russian, the requirement for a command of Spanish, rather than Russian, as the candidate's primary language is perplexing, to say the least. The Tribunal notes that in the response to the Applicant's request for management evaluation, he was informed as follows (emphasis added):

The Administration added that it seems that those candidates known to have passed the Russian language exam and placed on the roster were not actually screened as such by Inspira. Accordingly, a manual review of the PHPs was conducted and six roster members were identified.

28. From the above, the Tribunal can only surmise that the reason why not a single candidate who had passed the Russian language exam and had been rostered was screened by *Inspira* is that Russian was not a required element, yet Spanish was. The Tribunal finds that Russian is indispensable for this position, while Spanish appears to have no significant importance for it. As admitted by the Respondent, the reference to Spanish instead of Russian was thus clearly an error.

29. Indeed, in his closing submission Counsel for the Respondent, *inter alia*, submitted that:

11. Second, the erroneous reference to a "Spanish" language requirement did not impact on the Applicant's chances of selection. It is clear from the entirety of the text that the reference to "Spanish" is a typographical error. The Applicant remained ineligible for selection.

30. The Respondent submits that the requirement of "perfect command of Spanish, which must be the candidate's primary language" is a mere typographical error. A typographical error is a "mistake" made in the typing of a document, that cannot be so fundamental as to completely change its actual content. In the case at hand, the "typographical error" changed the real requirements for the job opening. It, therefore, goes beyond it being a "mistake" and vitiated the entire recruitment process.

31. The Tribunal is concerned that the necessary care and attention to actually reflect the intended eligibility and language requirements for the job opening was not applied in the case at hand. The Respondent's actions in connection with the selection process were not aligned with the published eligibility and language requirements. This, in turn, vitiates the contested decision which must be rescinded.

32. In view of the above finding, the Tribunal will not look into other claims of the Applicant's application.

Remedies

33. As the contested decision concerns an appointment, the Tribunal is directed by art. 10.5(a) of its Statute to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision.

Compensation in lieu

34. According to the jurisprudence of the Appeals Tribunal, in determining the amount for compensation under art. 10.5(a) of its Statute in appointment or promotion cases, the Dispute Tribunal must take into account the nature of the irregularities on which the rescission of the contested decision was based, and the chances that the staff member would have had to be selected had those irregularities not been committed.

35. However, the determination of the "compensation in lieu" must be done on a case-by-case basis (see *Valentine* UNDT/2017/004) and it ultimately carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265). In respect of decisions denying promotions, the Appeals Tribunal held that "there is no set way for a trial court to set damages for loss of chance of promotion, and that each case must turn on its facts" (see *Sprauten* 2012-UNAT-219; see also *Niedermayr* 2015-UNAT-603). The Appeals Tribunal also held that in calculating such compensation, the Tribunal has to assess the probability for an Applicant to be appointed to a post but for the procedural breach.

36. In the case at hand, the Tribunal has rescinded the selection decision due to the application of unpublished requirements during the examination of the Applicant's candidature. This is a serious matter that not only impairs the selection process but also displays a lack of fairness towards the Applicant who had a legitimate expectation and was entitled to have his candidacy fully and fairly considered as per the published terms of JO 39481.

37. Had the above irregularity (i.e., assessment based on unpublished criteria) not occurred, the Applicant would have had a good chance of selection, given his experience and entirely satisfactory service for a period of more than twenty years as a Russian translator. The indication of "Spanish" as a required language would not have affected the Applicant's chances for selection since a manual review of the candidatures was conducted to identify Russian speaking candidates (see para. 27 above).

38. The Appeals Tribunal has held that compensation has to be assessed "in the round and arrive at a figure that [was] deemed by [it] to be fair and equitable, having regard to the number of imponderables" (*Niedermayr* 2015-UNAT-603).

39. It is noted in this instance that the job opening that the Applicant applied for was at the same grade and level as his current position. There is thus no potential loss of earning. However, the loss of opportunity to be selected for the position negatively impacted on the Applicant's meeting mobility requirements of the Organization, which is a matter directly related to career development. In view of the foregoing, the Tribunal finds it appropriate to set the amount for compensation in lieu at the equivalent of two months' net base salary.

Compensation for harm

40. Furthermore, the Tribunal may, pursuant to art. 10.5(b) of its Statute, award compensation for harm suffered as a result of a contested decision, if such harm has not been compensated by the rescission. For such compensation to be awarded, the Applicant must identify the harm suffered. The Tribunal notes that art. 10.5(b) of its Statute was amended by the General Assembly on 18 December 2014 to require that compensation for harm be supported by evidence.

41. The Applicant claimed damages in respect of his career development and mobility opportunities. He also requested damages for mental anguish and moral suffering. The Applicant has not adduced any evidence in respect of the mental anguish and moral suffering, although the Tribunal appreciates that this is most likely to have been suffered. However, the Tribunal requires direct evidence of it to order compensation for moral damages, if found to be at a compensable level. In the absence of direct evidence, no order for compensation for moral damages can be made (see *Kallon* 2017-UNAT-742).

42. Moreover, the Tribunal finds that the Applicant's claim for damages in respect of his career development and mobility opportunities is fully compensated by its decision above under art. 10.5(a) of the Tribunal's Statute.

Conclusion

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

- a. The decision to exclude the Applicant's candidature from consideration for the Russian Translator P-3 at UNON is rescinded; and
- b. The Applicant is awarded two months' net base salary as alternative to rescission of the contested decision, which shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Rowan Downing

Dated this 21st day of September 2018

Entered in the Register on this 21st day of September 2018

(Signed)

René M. Vargas M., Registrar, Geneva