



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 20 October 2017, the Applicant contests his non-consideration and eventual non-selection for the position of Russian Reviser/Self-Revising Translator (P-4), United Nations Office at Vienna (“Russian Reviser/Self-Revising Translator-Vienna”), advertised under Job Opening Number 63349 (“JO 63349”).

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

Facts

3. The Applicant is a Russian Translator (P-3), holding a permanent appointment at the Economic and Social Commission for Asia and the Pacific, based in Bangkok.

4. On 5 August 2016, he applied for JO 63349 and on 1 May 2017, he was notified of his non-selection.

5. On 18 May 2017, the Applicant requested management evaluation of the decision not to select him for the job opening in question and on 25 July 2017, the Under-Secretary-General for Management replied to the Applicant upholding his non-consideration and non-selection.

Procedure before the Tribunal

6. By Order No. 164 (GVA/2018) of 5 October 2018, the Tribunal brought to the parties’ attention UNAT recent rulings in *Kallon* 2017-UNAT-742 and *Auda* 2017-UNAT-787 concerning remedies and requested their views about the need, if any, of holding a hearing limited to the question of remedies.

7. By filings made on 10 October 2018, the parties responded that no hearing was necessary and that the matter could be adjudicated on the papers.

Parties' submissions

8. The Applicant's principal contentions are:
 - a. The recruitment process for the job opening was marred by bias and the persistent discrimination against him. The Organization incorrectly assumed that he did not meet the requirement of a first level university degree, or any higher degree at the Master's or Doctorate level; and
 - b. The Organization has had knowledge of his academic qualifications since 1990 when he joined the United Nations; furthermore, he was considered and rostered for a P-4 Russian reviser post based on the same educational qualifications in his Personal History Profile ("PHP"), in September 2015, although he had been on a P-4 roster since 2008.

9. The Respondent's principal contentions are:
 - a. The Applicant was fully and fairly considered for JO 63349 and ST/AI/2010/3 on Staff Selection System was properly applied;
 - b. The Applicant incorrectly entered his education details and, consequently, *Inspira* automatically screened him out as not meeting the minimum educational requirements for the job opening, namely to possess a first level university degree;
 - c. The Applicant did not establish an error in the selection process or that it was tainted by extraneous considerations; and
 - d. On the basis of *Zillner* UNDT/2015/079, the Tribunal must find that certificates or diplomas are not considered first level university degrees.

Issue

10. The only issue for determination is whether the Applicant's candidature was fully and fairly considered during the recruitment process for JO 63349. If it was not, a resulting issue to examine would be what remedy, if any, he is entitled to.

Consideration

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

11. 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 of 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 a selection exercise, then the presumption of regularity is satisfied (*Rolland* 2011-UNAT-122).

12. In the "Education" section of the PHP that the Applicant submitted for his application to JO 63349, one reads the following in connection with his "University/Tertiary" learning:

- a. "Degree obtained: Certificate/Diploma";
- b. "Main course of Study/Field of Study/Specialization: Business & Administration/Business and Commerce"; and
- c. "Title in English or French": MASTER'S DEGREE, Diploma in Economics".

13. The main issue for decision is whether the Applicant, in responding to the relevant question on his PHP that he had obtained a "Certificate/Diploma" from a University/Tertiary institution with the title "Master's Degree, Diploma in Economics", failed to indicate that he possessed a first level university degree, as required by JO 63349.

14. *Inspira* provides only five options to candidates to vacancy announcements when selecting the "Degree/Diploma" awarded, to wit: Bachelor's Degree, Certificate/Diploma, Doctor's Degree, Master's Degree and Postgraduate Diploma.

15. The Applicant indicated in his PHP that he had a Certificate/Diploma and provided the title thereof in English as "Master's Degree, Diploma in Economics".

He also provided in his PHP the exact title of his degree in the original language, namely Russian.

16. The Applicant attended a University/Tertiary institution during the former Soviet era and upon his graduation was awarded a *Master's Degree, Diploma in Economics*, which in the Soviet Union was popularly referred to as a "Diploma". The Organization cannot limit staff members to refer to their attainments under one of the five options offered by *Inspira*, thereby determining whether or not they meet the requirements for a job opening. The system ought to provide sufficient options to reflect the variety of educational systems of all its Member States equally.

17. In *Westberg* UNDT/2013/119 the Tribunal at para. 54 noted that:

[T]he United Nations Member States have different education systems, educational qualifications must be subject to equivalence and validation in order to ensure consistency since titles and contents of academic degrees differ between countries. Certification and clarification regarding the equivalence of qualifications to a university degree must however be undertaken by the relevant authorized institution in charge of Higher Education Programs or an accredited University or College.

18. If the Applicant had referred to his academic achievement by something other than its actual name/title, he would have taken the risk to misrepresent to the Organization his academic qualifications, which is an offence capable of being sanctioned.

19. The Applicant applied for the position in *Inspira*, the online application portal for United Nations Secretariat positions. *Inspira*, though being a partially automated system, just like any other application, runs on parameters fed into it by human beings, who are staff members of the United Nations. There is no evidence to indicate that the questions asked in respect of education are in fact machine read, although the Respondent has asserted that the candidature of the Applicant was "automatically" excluded.

20. The Respondent does not dispute the fact that the Applicant had previously applied for a similar position (Russian Reviser P-4) within the United Nations Secretariat, at the United Nations Office at Geneva, where the same *Inspira* system for recruitment is used, and that he had been placed on a roster of pre-approved candidates at the P-4 level in September 2015, i.e., almost a year before applying for JO 63349.

21. The Tribunal notes that the Applicant has for a considerable period of time indicated his educational qualifications in the same way he did when applying to JO 63349 for which he was “screened out” and, as noted above, he had been rostered on several occasions. It is thus surprising, and inconsistent, that the same system now “screened out” the Applicant for failure to meet the first level degree qualification, on the basis of the same information contained in his PHP.

22. The Applicant’s description of his University/Tertiary institution attainment under the heading of “Certificate/Diploma” has been accepted by the Organization for a very long period of time. Therefore, the fact that he is now no longer considered as meeting the educational requirements for the same category of post and on the basis of the same information that he has constantly provided, raises doubts as to what has changed, and makes it more likely than not that a Human Resources Officer erroneously decided to pre-screen the Applicant’s candidature as not meeting the minimum educational requirement.

23. The Tribunal finds that the Respondent’s reliance on *Zillner* is erroneous as, in that case, Mr. Zillner claimed that he had a Graduate Certificate that was equivalent to a master’s degree apparently relying on the reference list issued by the International Association of Universities and the United Nations Educational, Scientific and Cultural Organization on higher education systems and credentials. In that case, the Tribunal found that the Office of Human Resources Management correctly determined that there was no equivalency.

24. The Respondent does not dispute that the Applicant does in fact possess the requisite educational qualification. Rather, according to the Respondent, the alleged “error” consists in how the Applicant referred to his “first level degree” in his PHP, since he called it a Certificate/Diploma and not a “Bachelor’s degree” or “Master’s Degree”.

25. This Tribunal will not attempt to become an academic specialist of the Russian education system, or of the Soviet era education system for that matter. However, it will take note of the fact that the education system in the Soviet era has changed since the break-up of the Soviet Union and the formation of the Russian Federation. More evidently, the Russian Federation has moved from a one-tier system of education to a two-tier system. The Applicant attended University during the one tier system when the attainment was referred to as a “Diploma”, which does not necessarily have the same interpretation and meaning as a “Diploma” in the Anglo-Saxon education system.

26. Therefore, if during the Soviet era, when the Applicant went to University, or its equivalent, his attainment was referred to as a “Diploma”, how could he be expected to change this on his own accord and call it a “Degree” or a “Masters” in his PHP, well knowing that that would be incorrect? Rather, and correctly so, the Applicant provided in his PHP a translation of his attainment in English to “Master’s Degree Diploma in Economics”. There is no explanation as to why the translation of the title of his level of academic attainment was not taken into consideration by the Administration despite it being quite specific.

27. As an international multilateral organization with Member States having different descriptions in respect of academic qualifications, the Organization has a contractual obligation, a duty of care and of due diligence towards its staff members to ensure that their candidatures are fairly and properly considered. The use of Anglo-Saxon terms to the apparent exclusion of the terminology used by other educational systems is not consistent with the proper exercise of that duty of care, or of the fair consideration of the Applicant’s candidature.

28. This Tribunal notes that the Applicant joined the United Nations in 1990 and that he currently holds a permanent appointment at the P-3 level, for which a first degree is required. He was furthermore placed on a P-4 roster in 2008 and 2015. For staff members to be rostered, they undergo a full review by the Central Review Body (“CRB”) and part of the functions of the CRB is to confirm that candidates being recommended meet the minimum qualifications for the positions, including educational requirements.

29. In the *Inspira* system, rostered candidates are clearly identified. Furthermore, the fact of being a rostered candidate when applying for a position is a patent and clear indication that the candidate had *inter alia* his educational attainment verified and cleared by the Organization. The Respondent has not proffered an explanation as to why the same *Inspira* system had previously accepted the Applicant’s academic qualifications as meeting the same minimum educational requirements, while it was rejected as not meeting them for the purpose of his application to JO 63349. Also, it is accepted by the Tribunal, on the evidence before it, that the Applicant had not altered the description of his academic qualifications during the relevant period under consideration.

30. Finally, the Respondent does not assert that the Applicant’s actual academic qualifications, obtained in the former Soviet era, are less than a first level degree or a Master’s degree.

31. The Tribunal therefore finds that the Applicant’s candidature was not afforded full and fair consideration and that, as a result, his exclusion from the recruitment process for the position of Russian Reviser/Self-Revising Translator-Vienna was unlawful.

Is the Applicant entitled to any remedy?

Rescission of the contested decision

32. Having found that the Applicant's candidature for JO 63349 was unlawfully excluded, the Tribunal rescinds the contested decision and, therefore, will now look at the amount of compensation to be set that the Respondent may elect to pay as an alternative to rescission of the contested decision, pursuant to art. 10(5)(a) of the Tribunal's Statute.

33. Concerning the determination of the amount of compensation in lieu of rescission, the Appeals Tribunal has held that the Dispute Tribunal should be guided by two elements: first, the nature of the irregularity that led to the rescission of the contested administrative decision and, second, an assessment of the chances that the staff member would have had to be selected had those irregularities not been committed (see *Ardisson* 2010-UNAT-052, *Lutta* 2011-UNAT-117, *Muratore* 2012-UNAT-245, *Appleton* 2013-UNAT-347). However, the determination of the "compensation in lieu" must be done on a case-by-case basis (see *Valentine* UNDT/2017/004) and ultimately carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265).

34. In respect of decisions denying promotions, the Appeals Tribunal has 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" (*Sprauten* 2012-UNAT-219, para. 22; see also *Niedermayr* 2015-UNAT-603). The Appeals Tribunal has 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, and that the period of the difference in salary between an Applicant's grade and that of the contested post that can be taken into account should be limited to a maximum of two years (*Hastings* 2011-UNAT-109).

35. The Applicant has over 25 years of work experience as a Russian Translator, Reviser and Interpreter with the United Nations; he has worked at three different duty stations, to wit Nairobi, New York and Bangkok; he has continuously received positive performance appraisals, including exceeding performance expectations; has been on the roster of pre-approved candidates for the post of Russian Reviser at the P-4 level since 2008 and was rostered again in September 2015, less than a year before he applied for JO 63349.

36. Furthermore, as per the Respondent's reply, three pre-approved *roster* candidates were released to the hiring manager, and one of them was recommended and selected for the advertised position.

37. From the above, the Tribunal is of the view that the Applicant, as a rostered candidate, would have been released to the hiring manager had his candidature not been unlawfully screened out. The Tribunal finds that, consequently, the Applicant would have had a 25% chance of selection for JO 63349 and finds it appropriate to direct the Respondent to pay the Applicant 25% of the difference in net base salary, over a period of two years, between the Applicant's net base salary at his grade and step at the time of the contested decision and the net base salary that the Applicant would have received had he been selected to the advertised P-4 position.

Compensation for harm

38. In his application, the Applicant requests any "customarily relief" awarded by the Tribunal in view of "[the] irreparable damage to [his] career, a guaranteed lack of career development/promotion/mobility opportunities due to the vicious circle of long-lasting and system-wide practice on P[-]4 Russian reviser posts" as well as "lateral transfer provisions for P3/4 language [and] long term discrimination, humiliation, frustration, mental anguish and moral sufferings".

39. Under art. 10.5(b) of its Statute, the Dispute Tribunal may award compensation for the Administration's breaches of an Applicant's rights under her/his employment contract. The objective of such compensation is to place an Applicant in the position he or she would have been in had the breach not occurred (see *Mmata* 2010-UNAT-092).

40. It is established jurisprudence that the Dispute Tribunal has authority to order compensation to a staff member for violation of the staff member's legal rights under art. 10.5(b) of the Statute. Furthermore, compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury (see *Nyakossi* 2012-UNAT-254).

41. In the case at hand, the Tribunal finds that the Applicant's claim for compensation for loss of opportunity is fully compensated by its decision above under art. 10.5(a) of its Statute.

42. With respect to the Applicant's claim for moral damages related to alleged discrimination, humiliation, frustration, mental anguish and moral suffering, he did not submit or suggest any supporting evidence. Furthermore, when explicitly asked by the Tribunal whether in light of the jurisprudence of the Appeals Tribunal on the issue of remedies he wished to have a hearing in this matter, the Applicant responded that he did not require a hearing.

43. In light of all of the foregoing, the Tribunal finds that the standard of proof required by the Appeals Tribunal (cf. *Kallon* 2017-UNAT-742 and *Auda* 2017-UNAT-787) is not met and, therefore, that it will not grant damages under art. 10.5(b) of its Statute.

Conclusion

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

- a. To rescind the decision to exclude the Applicant's candidature from consideration for the position of Russian Reviser/Self-Revising Translator-Vienna;

- b. That should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant an amount equal to 25% of the difference in net base salary, over a period of two years, between the Applicant's net base salary at his grade and step at the time of the contested decision and the net base salary that the Applicant would have received had he been selected to the advertised P-4 position;
- c. That the above compensation 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 per cent shall be added to the US Prime Rate until the date of payment; and
- d. That all other claims are rejected.

(Signed)

Judge Rowan Downing

Dated this 17th day of October 2018

Entered in the Register on this 17th day of October 2018

(Signed)

René M. Vargas M., Registrar, Geneva