



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AKTASH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Introduction

1. At the time of the application, the Applicant served as a Field Security Coordination Officer with the United Nations Department for Safety and Security (“UNDSS”). He holds a fixed term appointment at the P3 level and is based in Bossaso, Somalia.

2. On 17 July 2019, the Applicant filed an application to challenge the Respondent’s decision to not roster him for a post at the P4 level, following his application to Generic Job Opening 92358 bearing post title P4 Field Security Coordination Officer.

3. The Respondent filed his reply to the application on 19 August 2019.

Facts and Submissions

4. The following facts are uncontested.

5. The Applicant began service with the United Nations on 18 July 2011 as a Security Officer at the P3 level. For three consecutive performance cycles, from 2015 through 2018, the Applicant has been rated as exceeding performance expectations.

6. The Applicant applied to two generic vacancy postings JO 92358 (P4) and JO 92359 (P3) on 15 February 2018. In response to these applications, the Applicant was invited to sit a Job Fit Questionnaire on 6 April 2018, and a Multiple Choice Questionnaire with a Situational Judgment Test on 27 June 2018. These tests were for both the P3 and P4 posts.

7. The Applicant was subsequently invited to a competency based interview. UNDSS established two panels to conduct interviews for each of the generic vacancies. The panels interviewed internal and external candidates between 14 November and 14 December 2018, with the candidates being able to select the date. The Applicant was interviewed on 21 and 22 November 2018, for the P4 and P3 post respectively. He was

one of 172 candidates who had been shortlisted for the interview. Applicants were allocated 45 minutes for each of the interviews.

8. According to the Applicant, the questions for the P3 and P4 posts were the same and covered the same competencies. The P4 interviews, however, also included a question on managerial skills.

9. The Applicant attended the P4 interview on Skype from the UNDSS Office in Bossaso, Somalia. The internet connection was weak, and the panel had to switch between using Skype and a mobile phone line more than once. Switching between these two media took approximately 10-15 minutes off the 45-minute interview.

10. On 22 November 2018, the day after his P4 interview, the Applicant wrote to UNDSS asking that he be interviewed again because the poor communication lines during the first interview caused him to be stressed and distracted, thus affecting the quality of his answers. This request was denied. The Applicant was told that the Panel heard his responses to their questions.

11. On 31 January 2019, UNDSS informed the Applicant that he had passed the P3 interview, but was not successful in the P4 selection exercise.

12. On 20 March 2019, the Applicant sought review of the selection decision of the P4 post by the Management Evaluation Unit (“MEU”).

13. On 17 May 2019, MEU informed the Applicant that he was unsuccessful in the P4 selection because he fell short in his answer on the Planning and Organising competency, and was rated partially successful by the Panel. The Applicant argues that the Panel did not ask him for “another example” on this competency “if they were unsatisfied with my initial example.”

14. The Applicant argues that the Respondent/Organization must be cognizant of a staff member’s “rightful expectation” to “regular FCRB clearance exercises.” The Applicant awaited this opportunity since 2012. The Applicant cannot be held

responsible for the quality of communication lines and the mobile network in Somalia. When it became apparent that communication was impaired, the Panel could and should have suggested that the interview be rescheduled, but it did not.

15. Moreover, the Applicant takes issue with the regulatory framework, which leaves broad discretion in shaping the criteria for the evaluation, and on this basis posits that it was incumbent upon the Respondent to take his performance records into account when evaluating internal candidates.

16. The Applicant requests the Tribunal to order that the record of his interview be re-evaluated by a Central Review Body together with his performance records over the last three performance cycles, as well as a remedy for stress and anxiety due to unjust treatment.

17. The Respondent submits that the impugned decision was lawful. The Applicant was given full and fair consideration, and was eventually not selected or rostered for the P4 position because he did not pass the interview. He demonstrated competence in only three of the four assessed competencies listed for the position. Of the 172 candidates who were interviewed, 109 were recommended to the Field Central Review Body for the roster.

18. UNDSS made sure that all candidates were advised of the interview dates well in advance, to allow adequate time for arrangements to be made with reliable communication lines. The Applicant, like other candidates, had more than three weeks to make the necessary arrangements for his interview before the 21 November 2018 interview date that he selected. The Panel clearly heard the Applicant and understood his responses to their questions. At no point during the interview did the Applicant complain that he was not able to hear the questions being asked by the Panel. The Applicant's responses on the Planning and Organising competency simply did not satisfy the Panel, despite the Panel probing the Applicant's answer.

19. There is no basis for the Applicant's suggestion that the results from his interview for the P3 position, should have been combined with his interview for the P4 position.¹ They were two separate interviews for two different positions.

20. The Respondent submits that the Applicant is not entitled to have the records of his interview re-evaluated alongside his last three performance evaluations and that the Applicant has not demonstrated a breach of any of his rights in the selection process.

Considerations

21. The question before the Tribunal is whether the Respondent acted lawfully when he declined to recommend the Applicant for JO 92358.

22. The Tribunal recalls that the recruitment for roster is governed by the rules for staff selection. The paramount consideration is the necessity of securing the highest standards of efficiency, competence and integrity², and, for this purpose, competitive processes are to be applied.³ On the technical side, as indicated by the Respondent, to the selection process in question, applicable was ST/AI/2010/3 on the Staff Selection System.

23. Jurisprudence developed based on these rules underlines that the Secretary-General has broad discretion in matters of staff selection. This includes the choice of the best evaluation method to assess the job candidates' qualifications.⁴ In its review of such matters, the role of the Dispute Tribunal is to review the impugned selection process to determine whether a candidate has received fair consideration in accordance with the applicable legal framework, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration.⁵ The Dispute Tribunal will not substitute its own judgment for that of

¹ Application, paragraph 2(iii).

² Article 101.3 of the United Nations Charter, staff regulation 4.2.

³ Staff regulation 4.2.

⁴ *Riecan*, 2017-UNAT-802, para. 22.

⁵ *Roland* 2011-UNAT-122, *Aliko* 2015-UNAT-540; *Abbassi* 2011-UNAT-110; *Majbri* 2012-UNAT-200; *Ljungdell* 2012-UNAT-265.

the Secretary-General.⁶

24. The Appeals Tribunal further ruled in *Rolland*⁷ that official acts are presumed to have been regularly performed. Accordingly, in a recruitment procedure, if the Administration is able to even minimally show that a staff member's candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must then be able to show through clear and convincing evidence to have been denied a fair chance.⁸

25. Following review of the facts as they appear in the pleadings, the Tribunal finds that the Applicant has not rebutted the presumption of regularity in the selection process. There is nothing to suggest that the Respondent acted outside the scope of lawful discretion in designing and conducting the process and when he declined to forward the Applicant's candidature to the Field Central Review Body for rostering.

26. The Applicant impugns the procedure on the score of fairness because of disruption of communication lines during the first interview. Regarding the complaint of the shortening of the time allotted for the interview, the Tribunal shares the views of the Management Evaluation Unit that the objective of the Competency Based Interview is to give a candidate the opportunity to demonstrate the competencies for the position and that one could reasonably anticipate that the duration of the exercise would vary from candidate to candidate, depending on the responses and the amount of probing the panel deems necessary. There is, however, no basis to consider the allotted 15 minutes per competency as a mandatory timeframe. In this connection, the Applicant does not posit that he had no time to develop his answers, nor did he request additional time during the interview. Notwithstanding the interruptions, the time was, apparently, sufficient. Neither did the Applicant complain that he could not hear or

⁶*Toure* 2016-UNAT-660; *Riecan* 2017-UNAT-802. See also: *Kuchеров* 2016-UNAT-669; *Nikolarakis* 2016-UNAT-652; *Nwuke* 2015-UNAT-508; *Ljungdell* 2012-UNAT-265.

⁷ *Rolland* 2011-UNAT-122.

⁸ *Rolland*, *ibid.*, see also *Lemonnier* 2017-UNAT-762; *Ibekwe* 2011-UNAT-179; *Niedermayr* 2015-UNAT-603; *Survo*, 2015-UNAT-595; *Simmons* 2014-UNAT-425; *Zhuang Zhao and Xie* 2015-UNAT-536; *Tintukasiri* 2015-UNAT-526, *Landgraf* 2014-UNAT-471.

understand the questions. While it transpires from the pleadings that there were other cases where the communication was impeded to the degree that interviews could not proceed and had to be rescheduled, the Applicant's interview record demonstrates that his answers were registered and evaluated by the panel. As such, the Applicant does not demonstrate that in his evaluation any relevant material has not been taken into consideration.

27. The Applicant's principal contention is that the disruptions caused him to be stressed and distracted, and thus affected the quality of his answer. In this respect, the Tribunal notes the Respondent, in designing selection processes, is expected to act reasonably in making these processes reliable, fair and transparent, just in the interest of the candidates as in the interest of the Organization. The depth and conditions of probing may vary dependent on the rank and significance of the posts; the qualifying processes, however, cannot be expected to guarantee the optimal conditions for all individual candidates to present themselves. Selection for the roster of candidates, albeit being in the interest of the candidates, does not confer any rights *per se*⁹, and remains, principally, a management tool. Moreover, the conditions of probing have to adjust to the fact that it is conducted for a large platform. As such, there will always be those who are unwell, stressed for whichever reason and those for whom the time is inconvenient, whereas telecommunication problems for candidates staying in Missions is commonplace. In the end, as noted by this Tribunal in *Ross*, success in an interview is also a question of luck.¹⁰ To the extent the Applicant suggests that the appropriate remedy would have been rescheduling the interview to another date at a location with better internet connectivity, it is noted that advanced notice and a significant flexibility in selecting the date of the interview had given the candidates time for preparation but also for preempting, to the extent possible, external interfering factors. The interview, however, cannot be repeated in case of any interference that causes a candidate

⁹ *Megerditchian* 2010-UNAT-088, at para. 28; See also *Charles* 2012-UNAT-242, at para. 33.

¹⁰ UNDT/2019/005.

discomfort. In conclusion, the Tribunal finds no unfairness in the refusal to repeat the interview.

28. Regarding the Applicant's claim that the panel should have relied on his performance evaluations, the point at issue is whether the selection panel was entitled to take into account a matter that was not before them during the selection interview and whether the panel members' knowledge gleaned outside the interview process could legitimately be taken into account.

29. In this regard, the answer is in the negative. As explained by the Respondent, performance records are not irrelevant and are used for the creation of a shortlist of candidates who qualify for the next stages of the process. Subsequently, decisive are the written and oral test. While combining the score from the performance records with the score from the written and/or oral tests could be an option *de lege ferenda*, the Tribunal sees no basis to impeach the model adopted by the Respondent. On this point, it is recalled that in *Nikolarakis*, the Dispute Tribunal held that although the Applicant scored a low mark for "teamwork" in the competency based interview, the selection panel ought to have taken into account that in two successive performance appraisal reports, the applicant was rated as "outstanding" and "the ultimate team player".¹¹ This analysis by the first instance Tribunal was rejected on appeal. The Appeals Tribunal held that the UNDT "improperly relied on "logic" to insert a step into the assessment process that is not required under the staff selection system established under the Staff Regulations and Rules.¹² As such, the panel should not have substituted the results of an interview with the Applicant's performance records, or consider his performance appraisals alongside the answers that he gave them, as it would have compromised fairness of the selection processes, which requires that the criteria for evaluation of the candidates be applied in the same manner.

30. For the same reason, therefore, it would have been improper for the interview Panel in the P4 selection to consider the Applicant's answer on Planning and

¹¹ UNDT-2015-571.

¹² *Nikolarakis* 2016-UNAT-652; see also *Riecan* 2017-UNAT-802.

Organising in the P3 interview, and grade him as having satisfactorily met the requirements for that competency based on the latter interview.

31. In conclusion, the impugned decision was lawful.

Judgment

32. The application is dismissed in its entirety.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 6th day of April 2020

Entered in the Register on this 6th day of April 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi