



Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DANYLENKO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Nusrat Chagtai, AAS/ALD/OHR

Introduction

1. The Applicant, a former FS-5 Movement Control Section (“MOVCON”) Assistant with the United Nations Mission in Liberia (“UNMIL”), filed this application contesting the Administration’s decision not to clear him for the position of FS-6 MOVCON Officer during two rostering exercises in Generic Job Opening (“GJO”) No. 425940 in 2013/2014 and GJO No. 76109 in 2017/2018.¹ The Respondent argues that in relation to the 2013/2014 position, the application is irreceivable and that the 2017/2018 decision is without merit and should be dismissed. The Tribunal agrees with the Respondent in both respects.

Facts and Procedure

2. The Applicant joined UNMIL on 29 April 2006, at the FS-4 level, on a fixed term appointment, serving as a Movement Control Assistant.² On 30 September 2014, his appointment was converted to a continuing appointment.³ He was separated from the service of the Organization on 30 June 2018.⁴

3. The Applicant applied for the post GJO 425940, for FS-6, Movement Control Officer, Multiple D/S, that had been advertised on 7 February 2013.⁵

4. On 28 May 2013, the Applicant participated in a competency-based interview (“CBI”) for the post. On 19 February 2014, the Applicant was informed by the Department of Field Support, Recruitment Unit (“DFS-RU”), that his application was not successful.⁶

5. On 31 March 2017, another job opening GJO 76109, FS-6, Movement Control Officer, Multiple D/S, was also advertised. The Applicant applied for this post on 24

¹ Application, section V.

² Reply, annex R/2.

³ Application, annex 4.

⁴ Application, section I.

⁵ Application, annex 4.

⁶ Reply, annex R/1.

April 2017.⁷

6. On 7 May 2018, the Applicant participated in the CBI by telephone for the post of GJO 76109 and on 7 June 2018, he was informed that his application was unsuccessful.⁸

7. On 21 June 2018, the Applicant requested management evaluation challenging the decisions not to roster him for both posts, namely GJO 425940 and GJO 76109.⁹ On 3 August 2018, the Management Evaluation Unit (“MEU”) informed the Applicant that he had not challenged the decision not to roster him for the GJO 425940 post within 60 calendar-days and as such his request was not receivable. With regard to GJO 76109, the Applicant was informed that the Secretary-General had decided to uphold the contested decision.¹⁰

Receivability

Respondent’s submissions

8. The Respondent contends that the Applicant’s challenge to the decision relating to GJO-42940 is not receivable *ratione materiae*. He did not timely request management evaluation in accordance with staff rule 11.2(c). On 19 February 2014, DFS-RU notified the Applicant that his application for the post had been unsuccessful. The Applicant did not request management evaluation of the decision until four years later.

Applicant’s submissions

9. The Applicant submits that he did not receive the email notifying him of his non-selection.¹¹ He avers that he only received the information on 3 August 2018 from

⁷ Application, annex 4.

⁸ Ibid.

⁹ Application, annex 3.

¹⁰ Application, annex 4.

¹¹ Applicant’s response to Order No. 019 (NBI/2019), filed on 25 February 2019.

the MEU notifying him that his application for GJO 425940 was not successful.¹²

10. On non-receipt of the email by the Applicant, the Respondent submits that job applicants must register in the United Nations online careers' portal, which includes providing a primary email address to be used for all notifications regarding the job application. The Applicant applied for GJO 425940 through the Galaxy online recruitment system, which was in use at the time. Galaxy was subsequently replaced by the Inspira system. The Applicant's personal information appears on top of the document and includes his personal email address. It appears that the Applicant used his personal email address as his primary email address when registering in Galaxy and the notification for his non-selection was sent to that address.¹³

Considerations

11. The Respondent urges the Tribunal to find that in relation to the appeal against the Applicant's non-selection for GJO 425940, the application is not receivable because it was not filed in accordance with staff rule 11.2(c) which in relevant parts provides that, "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".

12. The relevance of this staff rule to this application before the Dispute Tribunal is that it is the first step that 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) must take before bringing the application to the Tribunal.¹⁴

13. It is documented that the Applicant was notified on 19 February 2014, by DFS-RU that his application for GJO 425940 had been unsuccessful. The Applicant did not

¹² Application, section VII, para. 1.

¹³ Respondent's response to Order No. 184 (NBI/2019), filed on 13 December 2019.

¹⁴ Staff rule 11.2(a).

request management evaluation of that decision until over four years later.

14. The Respondent argues that they used the Applicant's primary email address that was on his official record to transmit the message. He further avers that this is the practice of notifying staff members of results from job applications. He contends that the email was sent and was not returned as undelivered therefore he assumes that the email was received by the Applicant, but he chose not to contest the decision.

15. The Applicant on the other hand states that he did not receive the email and he feels that the Operational Group Manager ("OGM")¹⁵ had deliberately withheld this information from him. He has not provided any evidence to substantiate this allegation. He has not shown the motive that could have caused the OGM to behave contrary to section 10 of ST/AI/2010/3 (Staff selection system), on notification and implementation of the decision.

16. The Appeals Tribunal has held that the lack of notification of a non-selection decision may have serious impact on the future career development of a staff member by delaying preparation for seeking other positions.¹⁶ However, in order to constitute a reviewable administrative decision, the Applicant must show that the failure to get notification has a direct negative legal consequence on his terms of appointment or contract of employment.¹⁷ The Applicant has not provided any evidence to this effect.

17. Further, the burden of proving the date of receipt of notification for purposes of complying with the requirement under art.8.1(i)(a) of the UNDT Statute is on the Applicant. According to the provision, it is the Applicant who must show that he has complied with the requirement and not the Respondent.¹⁸ The provision reads:

An application shall be receivable if; (i) in cases where a management evaluation of the contested decision is required (a) within 90 calendar days of the applicant's receipt of the response by management to his or

¹⁵ This position encompasses the functions of a recruiter and the hiring manager. Mr. Ronved's testimony of 17 March 2020.

¹⁶ *Rolland* 2011-UNAT-122, para. 31.

¹⁷ *Fairweather* 2020-UNAT-1003 para. 37.

¹⁸ *Amineddine* UNDT/2020/029, para. 15.

her submission.

18. Furthermore, a staff member has a responsibility to proactively follow up on matters that affect her or his terms of appointment or contract of employment. In the instant application, the Applicant has not shown that he made any such follow up although he was aware that he was entitled to a notification based on section 10.1 of ST/AI/2010/3 and based on his own averments.¹⁹

19. Failure to challenge an administrative decision in a timely manner bars the Applicant from accessing the internal justice system. Further, an allegation that the Administration did not provide a notification will be receivable only in cases where such failure results in direct negative legal consequences. Consequently, the claim relating to GJO 425940 is not receivable *ratione materiae*. It is dismissed.

Merits GJO No. 76109

20. The issue before the Tribunal is whether the Applicant's failure to obtain Field Central Review Panel ("FCRP") clearance for the position of FS-6 MOVCON Officer during the rostering exercise of GJO No. 76109 in 2017/2018 is unlawful.²⁰

Applicant's submissions

21. The Applicant submits that he was successful in the written test of the post. He also strongly believes that he was successful in the CBI and met United Nations standards on core competencies. He presents his case on a two-pronged argument: First, the interview panel did not inform him that the question being asked was about client orientation. The panel did not clarify what they were asking or rephrase the question or at least ask additional questions. Second, the interview was concluded in half an hour without any indication that the Panel was unsatisfied with the answers he provided.²¹

22. The Applicant contends that the hand-written interview notes for the question

¹⁹ Applicant's testimony, 18 March 2020.

²⁰ Application, section V.

²¹ Application, section VII.

on client orientation do not correspond with his answer given during the interview on 7 May 2018 or to his written explanation sent to the Office of Human Resource Management (“OHRM”) on 20 June 2018.²² The Applicant maintains that the interview handwritten notes, especially for Ms. Troughton²³, do not provide any clarification and they are too short, incomplete and not informative.²⁴

23. As a remedy, the Applicant requests for clearance to be appointed to the post based on both the written test and the CBI which he believes that he passed.²⁵

Respondent’s submissions

24. The Respondent submits that the contested decision was lawful. The Applicant was screened as eligible and passed the written test. The Applicant was invited for the CBI. However, he did not meet all the competencies and therefore was not recommended for rostering.

25. Regarding whether the Applicant was informed that the question was about client orientation, the Respondent submits that the Panel fully informed the Applicant. The Interview Worksheet shows that the Panel informed all the candidates of the three core competencies on which they would be assessed. The final question was on client orientation. The Talking Notes for the Chairperson of the Panel also indicate that the Chairperson informed the Applicant that the third question related to client orientation.²⁶

26. On the Applicant’s claim that the interview was completed in half an hour without any indication that the Panel was unsatisfied with his answers, the Respondent explains that there is no requirement for the duration of an interview or for feedback regarding the performance of a candidate. The maximum duration of the interview was 45 minutes, with a maximum of 10 minutes allocated to each question. The remaining

²² Applicant’s response to Order No. 007 (NBI/2020), filed on 13 February 2020.

²³ Ms. Troughton is the panel member who asked the question on client orientation.

²⁴ Applicant’s testimony of 18 March 2020.

²⁵ Application, section IX.

²⁶ Reply, annex R/10.

15 minutes were to allow for an introduction by the Panel and any questions from the candidates at the end of the interview.

27. The Respondent maintains that despite probing by the Panel, the Applicant only partially met the indicators for the competency of client orientation and therefore, was not recommended. In his example on client orientation, the Applicant had described the opposite of the three expected indicators of the competency-namely (a) to see things from the client's view; (b) establishing and maintaining a productive partnership with the client by gaining his trust and respect; and (c) identifying the client's need and matching it with an appropriate solution, which was a cargo movement request.²⁷

28. The Respondent contends that the Applicant has not demonstrated any procedural or substantive breach of his rights. Accordingly, he is not entitled to the roster membership for FS-6 MOVCON Officer as requested.

Considerations

29. Article 101 of the United Nations Charter states that the paramount consideration in the employment of staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity.

30. The Respondent would have acted regularly if in his decision making he was guided by these principles and the relevant procedures.

31. The Tribunal bears in mind that the starting point when considering administrative decisions is the presumption that official functions have been regularly performed. This presumption is satisfied where management minimally shows that the staff member's candidature was given fair and adequate consideration. Once management satisfies this initial requirement, the burden shifts to the Applicant to show

²⁷ Mr. Ronved's testimony, 17 March 2020.

through clear and convincing evidence that he was not given fair and adequate consideration.²⁸

32. The Tribunal's role in reviewing a staff selection decision, is well settled by UNAT jurisprudence that:

Judicial review of a staff selection decision is not for the purpose of substituting the Dispute Tribunal's selection decision for that of the Administration. Rather, the Dispute Tribunal's role in reviewing an administrative decision regarding an appointment is to examine: "(1) whether the procedure laid down in the Staff regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration". The role of the UNDT is to "assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner".²⁹

33. The Respondent has outlined the procedure that he followed in arriving at the impugned decision. He says the Applicant was invited to a CBI. The record shows that the invitation to the interview indicated that the Applicant would be asked three competence-based questions and they were expressly mentioned in the interview work sheet.

34. During the interview, the Applicant did not raise any objection to the composition of the three-member Panel. The Chairman of the Panel introduced the members of the Panel and informed the Applicant that he would be tested on three competencies. The record does not show that the Applicant was promised that the Panel members would record his answers verbatim. The record does not show that the Applicant asked to be given more time to answer the questions or to clarify his answers. The record does not show that he was in any doubt as to what competencies he was being tested on by the first two panelists. The third and last panelist asked questions on client orientation. The record does not show that the Applicant was confused by questions in relation to this competence. At the end of the interview, the Applicant did not ask any question or request for clarification. The panelists compiled the results and

²⁸ *Mohamed* 2020-UNAT-985, para. 38 citing *Lemonnier* 2017-UNAT-762, paras. 31 and 32.

²⁹ *Ibid.*

determined unanimously that the Applicant had passed only two of the three competencies. Based on this result he was not approved for rostering on the GJO No. 76109.

35. In an application challenging the conduct of an interview, this Tribunal is guided by UNAT's authority holding in *Mahmoud* that;

“Interviews by nature will vary depending on the responses elicited from different candidates...[i]nterview panels should be accorded some leeway and flexibility to meaningfully direct the engagement, including the interrogation of a candidate's specific responses, in order to elicit relevant information that will assist in making the ultimate decision”.³⁰

36. The Tribunal finds that the Respondent has satisfied the minimum standards of regularity requiring the Applicant to show through clear and convincing evidence that his candidature was not given fair and adequate consideration.

37. The Applicant alleges that he was not given notice that the last panelist's question was on client orientation. The Respondent submits that the Panel fully informed the Applicant. The Interview Worksheet shows that the Panel informed all the candidates of the three core competencies on which they would be assessed. The final question was on client orientation. The Talking Notes for the Chairperson of the Panel also indicate that the Chairperson informed the Applicant that the third question related to client orientation.³¹ The Applicant has not demonstrated why the Tribunal should not believe that this is what actually happened. The Tribunal finds that the Applicant was aware that the last question was on client orientation or ought to have known having already answered to the two competence questions.

38. The Applicant claims that the interview was completed in half an hour without any indication that the Panel was unsatisfied with his answers. The Respondent explains that there is no requirement for the duration of an interview or for feedback regarding the performance of a candidate. This Applicant has not shown that he was

³⁰*Mahmoud* 2019 UNAT-964, para. 35.

³¹ Reply, annex R/10.

entitled to or that he requested for more time for the panelists to clarify the questions or for him to clarify his answers.

39. The Applicant argues that the panelists did not ask follow up questions in order for him to clarify his answers. The Respondent maintains that despite probing by the Panel, the Applicant only partially met the indicators for the competency of client orientation. The Tribunal is not convinced by the Applicant's arguments that the panelists were obliged by any rule or procedure to conduct the interview in the manner suggested by him. The Tribunal is however, convinced that the Applicant was not barred from asking the Panel to give him more time to clarify his answers.

40. The Applicant argued at trial that the panelists did not record his answers, that their notes did not reflect his answers and that therefore the notes were unreliable. The Tribunal invoked art. 18.2 of its Rules of Procedure for the Respondent to produce original copies of the panelists' notes from the archives in New York. The scanned notes were submitted to the Tribunal. They are a true reflection of the photocopies that the Applicant objected to at trial. The Tribunal finds that the notes were not tampered with. The Applicant has not shown why the Tribunal should believe that the panelists tampered with the notes. There is no motive. Further, the Applicant has not shown which rule or regulation or procedure was breached by the failure to record his answers verbatim. The Appeals Tribunal has held that a lack of documentation, by panel members, of the considerations that informed their scoring of the candidates did not affect the staff member because "the Dispute Tribunal explained, on reasonable grounds, why the allegations of collusion were to be excluded in the present case".³²

41. In the case at bar, the Applicant has not provided any evidence of improper motive to substantiate his allegations that the panelists did not record his responses for improper reasons.

42. The Applicant argues that one of the witnesses, Mr. Ronved's testimony, was inconsistent with what transpired at the interview. In particular, Mr. Ronved said that

³² *Mohamed* 2020 UNAT-985, para. 42.

the Applicant had a confrontation with a client who had to be removed from the plane by security. The Tribunal finds that this evidence was not relevant to the outcome of the interview because Mr. Ronved did not score the Applicant having not been a member of the Panel responsible for the assessment. Therefore, this piece of evidence did not affect the decision.

Conclusion

43. The Applicant has not satisfied his burden of proof to show through clear and convincing evidence that the Administration did not give his candidacy fair and adequate consideration. He has not proved that any rules or regulations or procedures were violated. Instead he urges this Tribunal to find that he passed the CBI by creating standards for the Administration's selection process, not found in any legal framework. This would be acting *ultra vires*.³³ The Tribunal agrees with the Respondent that it is not the role of the Tribunal to examine the answers the Applicant gave during the interview and come to its own conclusions on whether he demonstrated the competencies. To do so would exceed the Dispute Tribunal's jurisdiction.³⁴

JUDGMENT

44. The Application is accordingly dismissed.

(Signed)

Judge Rachel Sophie Sikwese
Dated this 13th day August 2020

³³ See *Lemonnier* UNAT-2017-762, para. 41.

³⁴ Reply, para. 18 citing *Abassi* 2011-UNAT-110, para. 24, upheld in *Rolland* 2011-UNAT-122, para. 20.

Entered in the Register on this 13th day of August 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi