



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/011
Judgment No.: UNDT/2021/025
Date: 19 March 2021
Original: English

Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

HILZINGER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Dorota Banaszewska, OSLA

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant contests the decision not to select him for the post of P-5 Senior Information Systems Officer (“the Post”) with the United Nations Joint Staff Pension Fund (“UNJSPF”).
2. The Respondent replies that the application is without merit.
3. For the reasons set out below, the application is rejected.

Facts

4. In January 2019, the job opening for the Post, namely “19-IST-UNJSPF-109389-R-NEW YORK (R)”, was advertised. The Respondent submits that the job opening was issued under ST/AI/2010/3 (Staff selection system), which the Applicant does not challenge.
5. The Applicant applied for the Post on 11 February 2019.
6. From 27 April 2019 to 24 May 2019, as a part of the assessment for the Post Job Opening, the Applicant participated in three written exercises, which he successfully passed.
7. On 31 May 2019, the Applicant participated in a technical interview. This interview was conducted by a panel consisting of three members: one UNJSPF’s representative and two other panel members, who were not United Nations staff members.
8. On 26 August 2019, the Applicant took part in a competency-based interview by a panel composed of different members than the technical interview panel. According to the panel’s interview record, the Applicant did not pass this interview.
9. On 25 September 2019, the Applicant was formally notified that he had not been selected for the Post.

Consideration

Issues of the case

10. The Appeals Tribunal has consistently held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

11. Based on the parties’ submissions, the issues of the present case are defined as follows:

- a. Did the Applicant receive a full and fair consideration for the Post, in particular:
 - i. Did he, as a matter of fact, pass the competency-based interview?
 - ii. Was the entire selection process void *ab initio* due to the participation of external experts on the technical interview panel?
 - iii. Was the contested selection decision tainted by bias against the Applicant?
- b. If not, what remedies is the Applicant entitled to? This also includes an assessment of whether any of the alleged irregularities are of “such a nature that, had [they] not occurred, [the Applicant] would have had a foreseeable and significant chance for promotion” (see para. 48 of *Ross* 2019-UNAT-926).

Did the Applicant's candidature for the Post receive a full and fair consideration?

Applicable law

12. The Appeals Tribunal has consistently held that the Dispute Tribunal's judicial review is limited and often refers to *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as that "the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate". The Appeals Tribunal further held that "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision".

13. The Appeals Tribunal further explained in *Sanwidi* (para. 40) that "[w]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate" and "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse". In this regard, "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him[,] [n]or is it the role of the Tribunal to substitute its own decision for that of the Secretary-General".

14. Specifically regarding promotion (and selection) cases, the Appeals Tribunal has adopted the principle of regularity by which if the Respondent is able "to even minimally show that [an applicant's] candidature was given a full and fair consideration, then the presumption of law stands satisfied" where after the applicant "must show through clear and convincing evidence that [s/he] was denied a fair chance of promotion" in order to win the case (*Lemonnier* 2017-UNAT-762, para. 32).

Did the Applicant, as a matter of fact, pass the competency-based interview?

15. The Applicant's submission may be summarized as follows:

a. From the report of the interview panel follows that the Applicant "in fact successfully passed the [competency-based interview] and fully met all the requirements for the Post". The competency-based interview "matrix indicators for the competencies of Accountability and Empowering Others, as applied in the selection procedure for the Post, are well known to the Administration and they are listed in the [United Nations] Competency Development Practical Guide ...". A "detailed comparison" of the Applicant's answers to the interview panel in those areas with the competency-based interview indicators "clearly shows that he provided the detailed answers that fully met all the positive indicators required for each competency";

b. Regarding the competency of accountability, "the example provided by [the Applicant] on the Murex project covered all the required indicators for this competency" as he described "how he had taken responsibility for the project and its shortcomings and how he honoured his organisational commitments by recognising that this complex project had not been meeting its goals and had risked not being in compliance with the Rules and Regulations of the Organisation". The Applicant "described in detail how he took personal responsibility for own shortcomings and those of his work unit as well as how he reacted to remedy those shortcomings in order to avoid unnecessary costs and meet the quality standards";

c. As to the second question of the interview panel regarding accountability, "it has to be mentioned that the question of whether a candidate had witnessed any ethical violations of his colleagues, from the very outset set up those candidates who had not witnessed any ethical violation on the part of their colleagues to fail". Yet, although the Applicant "had not witnessed such situation himself, he provided an example of a similar situation and described in detail how he dealt with this situation";

d. Regardless of the Applicant's "detailed answers", the interview panel "concluded that the Applicant only partially met the requirements set out for the competency of Accountability, *inter alia* since he did not 'explain an ethical violation which he witnessed and had to deal with'";

e. When answering the questions relating to the competency of empowering others, the Applicant "provided detailed examples of empowering the staff members supervised by him". He "explained how he had delegated responsibility and clarified expectations which had given the staff autonomy in important areas of their work while being provided with additional training and resources", and how "he had encouraged his supervisees and how he had demonstrated to them that he had genuinely valued all their input and expertise by showing appreciation and rewarding achievement and effort". In "another example", the Applicant "related to the mistakes he had made, and he explained how he had involved others when making decisions that had affected them". The interview panel, nevertheless, concluded that "the Applicant's answer was only partially satisfactory".

16. The Respondent, in essence, submits that the Applicant's "views as to his performance during the [competency-based interview] are irrelevant", because it is "not the function of the Dispute Tribunal to take on the substantive role of the Assessment Panel".

17. The Tribunal observes from the interviewing panel's report that the Applicant was "not recommended" for the Post. Whereas the Applicant's answers to the interview questions concerning "professionalism", "planning & organizing" and "leadership" were all deemed "satisfactory", his answers to the questions on "accountability" and "empowering others" were only rated as "partially satisfactory".

18. Concerning the "accountability" competency, the panel "agreed that the candidate did not fully answer the questions asked", because he "did not identify a complex project in which he was involved, which failed, for which he took accountability", "[n]or did he explain an ethical violation which he witnessed and had to deal with". This conclusion

was supported by a detailed summary of the answers that the Applicant gave, which appropriately reflected the conclusion.

19. As regards the competency of “empowering others”, the panel indicated that the Applicant “was not able to give a specific example of when a direct report made a mistake and how he handled the situation”. Also for this competency, the Applicant’s answers were summarized in detail and the conclusion properly reflected these.

20. The Tribunal finds that the interview questions were reasonable and that the panel’s report was comprehensive, well-structured and thorough. With reference to *Sanwidi*, the decision not to recommend the Applicant was therefore not “absurd or perverse”. In addition, under *Lemonnier*, by the interview report, the Respondent has demonstrated with “a minimal showing” that the Applicant’s candidature was given “a full and fair consideration”. While the Applicant evidently disagrees with the panel’s conclusions, he has not demonstrated with “clear and convincing evidence” that he was “denied a fair chance of promotion”.

21. Accordingly, the Tribunal concludes that the Applicant, as a matter of fact, did not pass the competency-based interview.

Was the entire selection process void *ab initio* due to the participation of external experts on the technical interview panel?

22. The Applicant’s submissions may be summarized as follows:

a. The Respondent has not contested that “outsourcing and subcontracting of the substantive part of the evaluation and decision-making process to external experts is unlawful”, but rather argues that since he passed the technical interview, he did not suffer any harm and that the Organization has a broad discretion in determining the best evaluation method to assess candidates;

b. While agreeing that “the Administration’s discretion in matters of recruitment is broad”, this discretion “is not unlimited, and it has its limits where—like in the present case—the Administration’s conduct is unlawful”;

c. Referring to *Fernandez* UNDT/2018/033, it is the well-established case law that “outsourcing and subcontracting of the substantive part of the evaluation and decision-making process to the external experts who do not fall under the auspices and direction of the Secretary-General and applicable Staff Regulations and Rules is unlawful”;

d. It “clearly follows” from *Fernandez* that “the outsourcing of the recruitment process or its parts to the external experts who are not [United Nations] staff members ‘makes the whole process procedurally flawed and must lead to the illegality of the contested decision’”. When the “external experts” constitute the majority of the panel, this is such a “significant” irregularity that it “affects the whole selection procedure and, thus, makes the selection decision void *ab initio*”, and [t]o draw a parallel: if an entity that does not have authority to issue an administrative decision issues a ‘decision’, such ‘decision’ will not have any attributes of a legally valid act”;

e. Since the Administration “did not have authority to outsource the technical interview, the contested non-selection decision was not only unlawful but void *ab initio* as being issued as a result of an *ultra vires* recruitment process”. It is therefore irrelevant whether the Applicant “suffered harm as a direct result of the technical interview or not” as the non-selection decision “was unlawful and needs to be rescinded”.

23. The Respondent, in essence, submits that the Applicant “was not prejudiced by the composition of the technical interview panel”, because he “passed the technical interview” and his claim is therefore only of “academic interest” as per *Israbhakdi* 2012-UNAT-277 and *Ho* 2017-UNAT-791.

24. The Tribunal notes that it is uncontested that the Applicant passed the written test, which was administered by the technical panel, whose composition he is now challenging. Accordingly, this composition evidently did not result in any concrete negative consequence(s) for the Applicant in the challenged selection process, but as a general

matter, the Tribunal cannot exclude that a situation could occur where an irregularity in a process is so fundamental that it would render it void from its beginning (*ab initio*).

25. In the present case, the Tribunal, however, notes that the fact that the technical panel was composed of one staff member of UNJSPF and two members, who were not employed by the United Nations, does not, by itself, render the panel incompetent, and therefore also unlawful, under the statutory definition of an assessment panel of ST/AI/2010/3, sec. 1(c). It follows from this definition that “at least” one member should be “from outside the work unit where the job opening is located”, which is evidently a minimum requirement (in the present case, there were two members), and no specification is made that the outsider(s) cannot be non-United Nations staff members. The Appeals Tribunal has also held that it falls within the discretion of the Administration to decide how to compose an appropriate technical panel with the required experts (see, for instance, *Faust* 2017-UNAT-778).

26. The Applicant refers to *Fernandez* in which the Dispute Tribunal held that the “design and administration” of a test cannot be outsourced to an “external contractor” (see para. 37). In the present case, UNJSPF, however, did not do so. This is evidenced by the fact that one out of three members of the technical panel that administered the test worked with UNJSPF. In any event, as the judgment in *Fernandez* was rendered by the Dispute Tribunal, it has only persuasive effect in the present case (see, for instance, the Appeals Tribunal in *Igbinedion* 2014-UNAT-410).

27. Consequently, the entire selection process was not void *ab initio* due to the participation of two external experts on the technical interview panel.

Was the contested selection decision tainted by bias against the Applicant?

28. The Applicant’s contentions may be summarized as follows:

- a. The Applicant, in fact, passed the competency-based interview even though this “was not reflected in his rating”, which was “inadequate and unfair”. This “irregularity inevitably led to him not having been given fair and full

consideration by the Administration”. The competency-based interview panel was also “presented with and had access to [the Applicant’s] performance evaluation documents proving that his competencies in the tested areas for around six years in total, i.e. when he had been temporarily placed against a post of the Senior Information Systems Officer and performed his duties at this P5-level post, constantly exceeded expectations”;

b. While the Applicant’s prior service on the Post did not provide him with a right to be selected, the Applicant “had constantly proven that he not only met but even exceeded the expectations with respect to the tested competencies”, but his competencies in two areas was rated as only “partially meeting the requirements” for the Post. This can “only be explained as being a result of lack of full and fair consideration” in evaluating the Applicant, which “shows clear bias towards him during the non-selection procedure”;

c. With reference to the Dispute Tribunal’s judgment in *Simmons* UNDT/2013/050, since allegations of bias are extremely difficult to prove, the Tribunal “must be prepared to draw inferences from the primary facts”. Where the established facts may tend to show that the possibility of bias or improper considerations may possibly have infected the process, the onus of proof shifts to the Respondent;

d. In the present case, “a strong indication of bias” is shown by the fact that the competency-based interview panel rated the Applicant’s answers relating to the competencies of “accountability” and “empowering others” with “partially meets requirements” instead of “fully meets requirements”, which did not correspond to the answers provided by him in light of the requirements listed in the competency-based matrix. As the Applicant’s “competencies in the tested areas had for around six years in total constantly exceeded expectations”, the panel’s “conduct cannot be explained in any other way than as bias”. Also, “the way in which his answers were evaluated by the CBI panel during his interview is a strong indication of bias towards him”;

e. It is therefore the Respondent who has the burden of proving that the panel's "bias did not affect the selection decision", which he has "failed to show even to a minimum extent that the bias did not in any sense whatsoever taint the decision";

f. "[O]nly one of the Hiring Managers was present" during the competency-based interview, and "the presence of the Hiring Manager during the [interview] is a well-established administrative practice". As the Tribunal held in *Elias* UNDT/2020/207, para. 31, if the Administration establishes a certain practice in the selection procedures, a job candidate can "legitimately expect that a selection exercise will be conducted in accordance therewith";

g. If "there are two Hiring Managers in a selection procedure, there are compelling reasons that the Administration shall make it possible for both of them to participate in the "competency-based interview", which "include especially the obligation of the Administration to act coherently, transparently, justly and fairly". Also, "[i]f it follows from a job opening that two Hiring Managers will be assessing the candidates throughout the recruitment process and two Hiring Managers will make the final recommendation, this requirement shall be met within the selection procedure as this is what the job candidates can legitimately expect";

h. The fact that "the presence of the second Hiring Manager during the CBI and his input would not have affected to any extent the final result of the selection procedure ... can only be interpreted either as purely hypothetical or as a clear admission that the [competency-based interview panel] conducting the interview] for the Post was biased against [the Applicant] and did not give him fair and full consideration from the outset".

29. The Respondent essentially contends that the Applicant's claim on "extraneous considerations is without merit" and "at its best [it is] a circular reasoning fallacy (*circulus in demonstrando*)".

30. The Tribunal notes from the consistent jurisprudence of the Appeals Tribunal that the Applicant bears the burden of proving any allegation on ulterior motives (see, for instance, *Parker* 2010-UNAT-012 and *Kisia* 2020-UNAT-1049). The Appeals Tribunal has further found that “[t]he mental state of the decision-maker usually will ... have to be proved on the basis of circumstantial evidence and inference drawn from that evidence” (see para. 39 in *He* 2016-UNAT-686).

31. The Tribunal notes that the assessments regarding the Applicant’s competencies in “accountability” and “empowering others” between his electronic performance assessment system (“ePAS”) reports for 2016-17 and 2017-18 and the competency-based interview panel’s findings, in fact, significantly differed—in the ePAS reports, it was found that his performance was either “fully competent” or “outstanding”, while the panel only rated his performance as “partially satisfactory”.

32. While the discrepancy evidently shows a difference in opinion, in the lack of any further substantiation of ill-motivation, it does, however, not indicate anything more. Also, the Appeals Tribunal has held that an assessment panel has no duty to consider the performance reports and reflect that consideration in its own assessment (see, *Riecan* 2017-UNAT-802, paras. 20-22). Similarly, the Applicant has failed to demonstrate how the circumstances surrounding the hiring managers could lead to a finding concerning them, or someone else on the assessment panels, holding an unlawful bias against the Applicant.

33. Accordingly, also referring to *Lemonnier* and *Sanwidi*, the Tribunal rejects the Applicant’s claim regarding bias.

Conclusion

34. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 19th day of March 2021

Entered in the Register on this 19th day of March 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York