



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/016
Judgment No.: UNDT/2021/052
Date: 10 May 2021
Original: English

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

KRIOUTCHKOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Dorota Banaszewska, OSLA

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

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant, a staff member of Economic and Social Commission for Asia and the Pacific (“ESCAP”) appeals the decision not to select him for a post of Russian Reviser, with the Department for General Assembly and Conference Management (“DGACM”) in New York (“the post”).

2. The Respondent replied that the application is without merit.

3. For the reasons set out below, the Tribunal finds that the decision not to select the Applicant, who refused to sit for the written test, was lawful and dismisses the application.

Facts

4. On 31 January 2019, the Applicant applied for the post.

5. On 28 February 2019, as a shortlisted candidate, the Applicant was invited to sit a written assessment as part of the selection process to be held on 7 March 2019 from 9.00 a.m. to 6.00 p.m., New York time. All the shortlisted candidates were directed to take the test at the same time, irrespective of their location.

6. The Applicant immediately requested that the time for the assessment be adjusted to regular office hours.

7. On 7 March 2019, DGACM informed the Applicant that the time for the assessment was synchronized with the other candidates and not negotiable. Shortly thereafter, at 9.00 a.m. New York time, the Applicant received an email with the written assessment.

8. The Applicant did not participate in the written assessment and on 24 April 2019, he was notified that his candidature for the post had not been successful.

Consideration

Preliminary matter

9. On 4 May 2021, the Applicant sought leave to introduce documentation and additional submissions in support of his allegation that he is the victim of a discriminatory practice in the selection of Russian translators at the P-4 level. The Applicant requested the Tribunal to order the production of “accurate statistics and information on how many internal candidates based outside of New York have been promoted in the last 10 years from P3 Russian translator to P4 Russian translator posts”.

10. The Tribunal finds that for an argument of long-term discrimination to be entertained, the Applicant would have to show that those or most of those selection exercises were unlawful. However, a review of the lawfulness of prior selection processes falls beyond the scope of this case and therefore, any such information is not receivable at this point.

Parties' submissions

11. The Applicant submits that while he requested a change in the schedule of the written assessment, which would run from 9.00 p.m. to 6.00 a.m. at the Applicant's location, he only received a negative response from DGACM on the same day on which the test was scheduled to take place.

12. He argues that as he was not available during the “unreasonable timeframe imposed by DGACM”, he did not sit the test.

13. The Applicant claims that the decision to deny his request to take the written test at a reasonable time deprived him of his right to a full and fair consideration. He further submits that due to the Administration's refusal to reschedule the test, he was “bound to fail” and therefore denied a fair chance of promotion.

14. The Applicant further avers that the decision is discriminatory because it allows candidates in New York to take the test at reasonable hours while he was denied the same opportunity merely on the basis of his location.

15. The Applicant submits that the contested decision is associated with a “long-term pattern of discrimination” against him. He states that DGACM has refused to consider recruiting staff members applying from outside DGACM.

16. The Applicant also notes that the reason given by the Administration for refusing to reschedule was the necessity to prevent any leak of test papers, which in the Applicant’s view still does not justify the imposition of unreasonable hours for candidates.

17. Finally, the Applicant submits that his case is distinguishable from *Charles* UNDT/2013/030 because as opposed to the case in *Charles*, the Applicant did not willingly make himself available for the test but was placed in circumstances which made it impossible for him to sit the test.

18. The Respondent, in essence, responds that, having refused to sit the written assessment, the Applicant estopped himself from challenging the selection decision. Furthermore, the Respondent submits that the applicable procedure was followed and the Applicant was afforded full and fair consideration.

Applicable law

19. The Appeals Tribunal has consistently held that the Administration has broad discretion in matters of staff selection. In reviewing such decisions, the Dispute Tribunal must assess whether the applicable law was applied in a fair, transparent, and non-discriminatory manner. The Dispute Tribunal’s role is not to substitute its decision for that of the Administration (see, for instance, *Kinyanjui* 2019-UNAT-932, para. 14).

20. The Appeals Tribunal further held in *Loeber* 2018-UNAT-836 (para. 30) that, by refusing to participate in an interview because of a belief that the panel was biased while offering no evidence of such bias, the applicant had estopped himself from challenging the outcome of the selection procedure.

21. In the present case, the Applicant was informed, along with all the other shortlisted candidates, of the time and modalities of the written test. In his response to DGACM, the Applicant stated: “Please, note the hours offered are between 2100 and 0100 and 0300 and 0600 [Bangkok] time. Considering this could you please adjust for regular office time? Thank you”.

22. Having received no reply from DGACM, the Applicant decided not to sit the test, which he received in due course.

23. The Applicant claims that his case is distinguishable from *Charles* UNDT/2013/030 because, unlike in *Charles*, he did not unilaterally choose not to participate in one of the stages of the selection process. This was rather rendered “impossible” by the Administration.

24. While the Tribunal understands that the schedule of the written assessment was probably inconvenient for the Applicant, it notes that he did not even attempt to provide a reason, neither when he was notified of the assessment’s schedule nor in his application, why it was not possible for him to take the test. He simply asked for the test to be rescheduled to coincide with the working hours at his location.

25. The Tribunal further finds that the reason provided by the Administration for not being able to accommodate different schedules, namely the avoidance of leaks, is fair and reasonable.

26. Therefore, the Applicant’s decision not to participate in the selection process was his own and, as per *Loeber*, he estopped himself from contesting the process’ outcome.

27. As stated above, the Applicant's request for information on prior selection processes is not receivable and he presents no other evidence of discrimination against candidates located outside of New York. To the contrary, the documentation provided by the Respondent shows that candidates located outside New York, including the Applicant, were considered in the selection process under review.

28. Given the Administration's ample discretion in establishing the modalities of a selection process and absent any evidence of unlawful motive, the Tribunal finds no reason not to uphold the contested decision.

Conclusion

29. In light of the foregoing, the application is rejected.

(Signed)

Judge Joelle Adda

Dated this 10th day of May 2021

Entered in the Register on this 10th day of May 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York