



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/102

Judgment No.: UNDT/2015/106

Date: 5 November 2015

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

KUCHEROV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Languages

Must have a perfect command of Russian, which must be his/her main language, and an excellent knowledge of English and another official United Nations Language.

6. the JO stated:

Evaluation of qualified candidates may include an assessment exercise which may be followed by competency-based interview.

7. Four candidates were released by the Office of Human Resources Management (OHRM) after passing the pre-screening process. After the closing of the posting for the JO, the Hiring Manager evaluated these four candidates, including their performance appraisals, and determined that two of them, the Applicant and the selected candidate, were suitable for further consideration.

8. During a preliminary evaluation, the two candidates were assessed against the education, work experience, and language requirements of the Post and allocated points for each requirement based on a four-point grading system: 1 unsatisfactory; 2 partially satisfactory; 3 satisfactory; and 4 outstanding. Both candidates received an overall score of 10 points out of 12. The Applicant was rated satisfactory for education and work experience and outstanding for languages. The selected candidate was rated satisfactory for work experience and languages and outstanding for education.

9. The Applicant was invited to an interview by email dated 28 November 2012. He was notified of the composition of the interview panel and advised that the interview would last approximately 90 minutes. Both the Applicant and the selected candidate were interviewed for the Post on 4 December 2012

11. The Applicant received an overall score of 15 points out of 20 for the interview. He received a rating of satisfactory for all five competencies. The selected candidate received an overall score of 18 points out of 20. She received a rating of satisfactory for two competencies Technological Awareness and Leadership, and a rating of outstanding for three competencies Professionalism, Managing Performance, and Planning and Organizing.

12. Both the Applicant and the selected candidate were found to meet the competencies of the Post and were recommended for consideration for selection.

13. In a two-page document addressed to the Acting Head of DGACM on 7 January 2013, the Hiring Manager presented the overall scores of the two recommended candidates from the preliminary evaluation and the competency-based interview. The Applicant received an overall score of 25 points out of 32 (10 points from the preliminary evaluation and 15 points from the interview); the selected candidate received an overall score of 28 out of 32 (10 points from the preliminary evaluation and 18 points from the interview). As follows from the first page of the document, b

subject to the successful review of

ending clearance by the

[Central Review] Secretariat, I recommend that [the selected candidate] be selected for the above-mentioned post (emphasis in original). The first page of the document is signed by the Acting Head of DGACM under an unmarked section titled and dated 14 January 2013.

14. al Transmittal Memorandum to the Central Review , and dated 17 January 2013, summarized the recruitment process for the Post and stated that the assessment panel had determined that both the Applicant and the selected candidate had met all of the evaluation criteria for the JO and been placed on the recommended list.

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30. On 10 December 2014,

3 December 2014 request for production of documents.

31. On 11 December 2014, the parties were informed that, for administrative reasons, the hearing had been rescheduled to take place between 26 and 28 January 2015.

32. On 21 January 2015, the Applicant filed a request to postpone the hearing until further notice and, on the same day, the Respondent confirmed that he had no postpo

a. The evidence on record shows that the selection process was conducted in accordance with ST/AI/2010/3 (Staff selection system) and that the Applicant was given full and fair consideration for promotion;

b. The interview panel was properly constituted, since there is no provision requiring the incumbents, whose positions are under recruitment, to participate in the interview panel in order to select his/her replacement and the interview was not a technical assessment of the Russian language but a competency-based interview to assess the competencies of the Post. The members of the interview panel had the experience and knowledge required for assessors and there was no need to include in the panel an expert on Russian language. All of the members of the panel had the required experience and knowledge. The Applicant did not question the composition of the panel before or after the interview;

c. Each candidate was asked the same set of pre-determined questions by the inter

g. In his response to Order No. 259 (NY/2013), filed on 24 October 2013, the Respondent confirmed that the successful candidate out-performed the Applicant in the competence based assessment and, even though the selected candidate was a women, she was not appointed because of the policy and principles in ST/AI/1999/9, but because she demonstrated that she was the more suitable candidate for the Post.

Applicable law

42. Article 101.3 of the United Nations Charter provides:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

43. Article 8.1(c) o

1. An application shall be receivable if:

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required;

44. f Procedure, provides:

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

45. ST/SGB/2012/1 (Staff Regulations) provides, in relevant parts:

Regulation 4.2

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

documents by the deadline indicated in the relevant announcement, which will be made available through the United Nations Careers Portal on iSeek.

Section 4

Specialized board of examiners

4.1 A specialized board of examiners will be set up for each examination. Specialized boards will normally be composed of staff members of the Secretariat; however, staff members of the specialized agencies or outside experts may also be employed. Each specialized board will have a non-voting *ex officio* member representing the Assistant Secretary-General for Human Resources Management and a chairperson elected by the members of the specialized board.

47. ST/AI/2010/3 (Staff selection system), issued on 21 April 2010, provides:

Section 1

Definitions

(c) *Assessment panel*: a panel normally comprised of at least three members, with two being subject matter experts at the same or higher level of the job opening, at least one being female and one being from outside the work unit where the job opening is located, who will undertake the assessment of applicants for a job opening.

(x) *Selection decision*: decision by a head of department/office to select a preferred candidate for a particular position up to and including the D-1 level from a list of qualified candidates who have been reviewed by a central review body taking into account the

the departmental human resources action plan, especially with regard to

Section 2

General provisions

2.1 The present instruction establishes the staff selection system promotion and mobility of staff within the Secretariat.

2.3 Selection decisions for positions up to and including the D-1 level are made by

specific job openings) and occupational group managers (for generic job openings) when the central review body finds that the candidates have been evaluated on the basis of approved evaluation criteria and the applicable procedures have been followed

9.3 When recommending the selection of candidates for posts up to and including at the D-1 level, the hiring manager shall support such recommendation by a documented record. The head of department/office shall select the candidate he or she considers to be best suited for the functions.

Section 13

Final provisions

13.1 The present administrative instruction shall enter into force on 22 April 2010.

13.2 Administrative instructions ST/AI/2006/3/Rev.1, entitled

by abolished.

13.3 The provisions of the present administrative instruction shall prevail over any inconsistent provisions contained in other administrative instructions and information circulars currently in force.

48. ST/AI/2010/3/Amend.1 (Staff selection system), issued on 29 June 2012, provides, in relevant parts:

9.4 Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position

57. According to sec. 6.3 of ST/AI/2010/3, adopted in April 2010, in order to be eligible to be considered for promotion to the P-5 level, the staff members from the Professional category must have at least two prior lateral moves. However, as results from sec. 6.3(d), this requirement for lateral moves is waived for staff serving against language positions that are subject to the provisions of the administrative instruction setting out special conditions for recruitment or placement of candidates successful in a competitive examination for positions requiring specific language skills *when applying for another such language position.*

58. Section 3 of ST/AI/1998/7/Amend.1 and sec. 6.3(d) together with sec. 13 of ST/AI/2010/3 confirms that the procedure established in ST/AI/1998/7 continues to be applicable to all competitive examinations for language posts at all Professional levels, including the P-5 level. ST/AIuding

32. Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only as long as they are consistent with the instruments of higher authority and other general

67. The Tribunal will analyze, in light of the grounds of appeal, whether the procedure as laid down in the Staff Regulations and Rules, and the staff selection system, including the manuals, has been applied, and whether it was applied in a fair, transparent and non-discriminatory manner.

and the selected candidate, who were considered the most promising applicants for the job.

72. As results from the records before the Tribunal, both the Applicant and the selected candidate received a score of 10 points out of 12 for the preliminary evaluation when assessing their eligibility for the Post in regards to education, work experience and languages. The Applicant contests the result of the preliminary evaluation, stating that:

- a. the selected candidate was wrongly short-listed because she did not meet the linguistic requirements for the Post; and
- b. she had less than ten years of work experience.

73. Regarding the first issue, the Tribunal notes that the linguistic requirement

must be his/her main language, and an excellent knowledge of English and another

In the application, the Applicant challenges a comment made by DGACM, submitted to the Management Evaluation Unit in response to his request for management evaluation, that the selected candidate, having passed the required exam for Russian verbatim r

DGACM, the selection procedure for appointing verbatim reporters has not changed since 1996. T
the Applicant.

75. As results from the notice issued for the 2005 competitive examinations for Russian language verbatim reporters, editors and translators/precis writers, the applicants were required to:

- (b) Have Russian as their main language;
- (c) Have a perfect command of Russian and an excellent knowledge of English and at least one of the other official languages of the United Nations (Arabic, Chinese, French or Spanish);
- (d) Hold a degree or an equivalent qualification from a university or institution of equivalent status at which Russian is the language of instruction or hold a university degree from a school of translation at which Russian is the language of instruction.

76. On 13 July 2006, the selected candidate was informed that, as a result of her performance in the 2005 examination, she had been placed on the rosters for Russian verbatim reporters and for Russian translators. This confirms that the selected candidate fulfilled all the mandatory requirements for a Russian verbatim reporter in 2005, inc

a requirement for a full and fair consideration of candidates given that they were being assessed for a linguistic position.

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soon as possible before the end of the assessment and if necessary to recuse any of the panelists if he s/he knows that there is a conflict of interest. The candidate(s) should not wait until the result of the selection process and invoke such reasons only if they are not selected for the Post.

88. The Tribunal concludes that in the absence of any evidence of bias of the member(s) of the panel, these allegations cannot constitute a ground of appeal and they are to be rejected.

89. The Tribunal will further analyse that since no member of the panel was an expert on Russian language, such an expert should have been appointed also as a member of the panel.

90. The Tribunal notes that the assessment panel was composed of five members as follows: the Chief of VRS/MPD/DGACM; the Chief of the English Verbatim Reporting Section, VRS/MPD/DGACM; the Chief of the French Verbatim Reporting Section, VRS/MPD/DGACM; the Chief of the Spanish Verbatim Reporting Section, VRS/MPD/DGACM and a Senior Reviser, Chinese Translation Service, Documentation Division, DGACM.

91. Section 7.5 of ST/AI/2010/3 states that short-

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interview. It is clear that only the short-listed candidates that passed the test were to be interviewed and that two different assessment methods were to be used.

93. The test requirement as stated in sec. 6.4.1.6 reflects the assessment method that will be used to evaluate a short-listed a *substantive knowledge* in line with the requirements of the position and where an assessment was indicated, the short-listed applicants must successfully pass the test

102. The interview, according to the panelist notes, was a typical competency-based interview, and the panel interviewed the candidates addressing only questions related to the job-related behaviors/competencies and did not cover any area of the substantive knowledge. No assessment exercise was conducted after the interview. As results from the interview questions, one of the questions included in the first competency, Professionalism, was: Please give us an evaluation of yourself in substantive knowledge or specialized area. Could you tell us an occasion where your better understanding of the subject matter had yielded better results? The substantive knowledge cannot be subject to a self-evaluation made by the candidate during the interview, but must be established through an assessment exercise by the panel, and the candidates scoring high in the assessment exercise are invited for an interview. Such a question included in the interview PleRfQAJaQAWpUAp/MYdQA

Methodologies

reiterated in the same manual republished in October 2012 (sec. 5.4.5, para. 6). The assessment panel cannot exercise any discretion to decide that only one of the two elements mentioned above (technical requirements and competencies) will be assessed and determined. On the contrary, the same panel must assess and determine both of them using the appropriate assessment methods.

105. The Professional language posts at P-5 level are not exempted from the above-mentioned rule regarding the assessment of the technical requirements (substantive knowledge) and competencies. The methods elected to be used for assessing the short-listed candidates are having a decisive role in the selection process because accuracy.

106. This interpretation is in line with the one adopted by the Respondent in *Wang* UNDT/2013/099 (upheld on appeal by the Appeals Tribunal in 2014-UNAT-454), a case involving a selection exercise for two Chinese Reviser posts at the P-4 level. As follows from the judgment issued in that case, the Respondent stated, *inter alia*:

38. the purpose of the written test was to short-list candidates to be invited for a competency-conceded at the hearing that at the time the written test for the advertised posts was administered, there were no written rules or guidelines governing written tests other than the provisions of the omitted].

39. Section 7.5 of ST/AI/2010/3 (Staff Selection System) provides that candidates shall be assessed to determine whether they meet the requirements for the job opening; it further provides that the assessment may include the competency-

substantial knowledge against the requirements of the vacant

41. The Manual further provided that the selected assessment
d among the elements

performance appraisal system (e-PAS), which is an electronic application that captures the main stages of the performance process (workplan, midpoint review and end-of-year performance appraisal). The interview panel has no competence to review the e-PAS reports and cannot substitute the mandatory assessment of the technical skills of the candidates for an advertised post with such a review of the e-PAS.

112. The Tribunal concludes that the mandatory procedural requirement to have a panelist expert in Russian to enable the panel to assess the candidates' substantive knowledge on Russian was not respected, which is directly linked with another major procedural irregularity: the lack of assessment through an assessment exercise/written test conducted before the interview of the short-listed candidates to test their substantive knowledge against the requirements of the vacant position on Russian, English and another official language of the United Nations.

113. As results from sec. 1 General from ST/AI/1998/7/Amend.1, in accordance with the needs of the Organization, language competitive examinations may be held for the purposes of recruitment or placement in posts requiring specific language skills in the Professional category. The relevant legal provisions for the present case are the ones from secs. 2.1 (Eligibility) and 4.1 (Specialized board of examiners).

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specialized board comp

121. Section 9.6.2 of t Hiring Manager
should inform the Applicant that the interview session will last between 30 and 60
minutes. However, in the email dated 28 November 2012, the Applicant was advised
that the According with para. 4 of
sec. 9.5.1 - from the Hiring
Manual:

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reason: each time when half of point is used to evaluate the candidates during a competitive examination, the average score remains accurate only if it is kept as a decimal number and therefore it must not be rounded. The same principle is applicable to the situation when only round points are awarded by a panel composed from an odd number of members (usually three or like in the present case five) because the total score is divided to three or to five and the accurate result the average score must include decimals in all cases where the total score is not a multiple of or divisible by the number of the panelists. The same method must be applied to the assessment exercise, to the interview, and to the average (final) scores

ones between 3.50 and 3.99 correspond to the grade outstanding , all the scores between 3.01 and 3.99, are to be rated as satisfactory.

136. Consequently, the unrounded average scores from the competency-based interview evaluation

140. The Tribunal notes that in the two-page document from 7 January 2013, on the first page, the Hiring Manager recommended both short-listed candidates for selection. However, the second page of the document included the following sentence:

[the selected candidate] be selected for _____ s that the second page is not signed by the Chief of VRS and/or by the Director of MPD. On 14 January 2013, the Acting Head, DGACM, decided to approve the recommendations and signed the first page f _____ Note to Mr. G (the Acting Head of DGACM).

141. The first page of the document is signed by the Acting Head of DGACM clear which recommendation this signature relates to the recommendation of both candidates for consideration, which appears on the first page, or the recommendation of the selected candidate for selection, which appears on the second page. In addition, the Acting Head of DGACM did not cross out or circle either option, so it is not clear from the document whether he is approving or not approving the recommendation.

142. On 17 January 2013, the transmittal memoranda concerning the selection exercise was submitted to the CRB.

143. Further, the Tribunal notes that final transmittal memorandum submitted to the Cent above-mentioned note was signed by the Acting Head of DGACM had a different content, stating *inter alia* that:

2 [candidates] were further evaluated for substantive assessment of their technical/professional knowledge, skills and abilities. The Assessment Panel additionally determined that the following two candidates have met all of the evaluation criteria for the subject job opening and are placed on the recommended list:

1. [The selected candidate]
2. [The Applicant]

approved/endorsed the recommendation of the selected candidate without exercising his mandatory role to decide himself the selected candidate.

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c.

was placed on a roster for pre-approved candidates for potential consideration for future United Nations Secretariat job openings with similar functions at the same level.

157. In case the contested decision would be rescinded and the entire selection process would restart, the Applicant would lose his rights as a roster applicant as mentioned in sec. 9.4 and 9.5 from ST/AI/2010/3/Amend.1 and reflected in secs. 15.6.3 and 15.7.3 from the Hiring Manual. Such a solution will breach the principle of *non reformatio in peius* (the principle of non-aggravating the situation of a party in its own appeal), an old principle of procedural law, according to which the use of an appeal cannot create, for the party that exercised it, a worse situation than the one from the decision under appeal. The decision under appeal can be reformed only in favor (*in melius*) and not at the expense (*in peius*) of that party. In *Skourikhine* 2014-UNAT-468, the Appeals Tribunal stated:

33. As we held in *Charles*, this is not a case where the written law is silent or has to be interpreted because it is not explicit. The plain wording of Sub-sections 9.4 and 9.5 makes it clear that the head of department/office has the discretion to make a selection decision from candidates included in the roster. The roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant position. There is no requirement in Section 9.4 for the head of department to first review all non-rostered

requirement, then it would be essential for the instruction to provide as much. On the contrary, as pointed out by the Secretary-General, Section 9.4 has been amended specifically to remove such a requirement.

158. Moreover, taking into consideration all the particular circumstances in the present case, together with the fact that the Applicant decided to move to the Translation Unit a couple of months after the selection decision was made, the relief requested by the Applicant is to be rejected.

159. The Tribunal is of the view that even if some of the irregularities in the selection process may have contributed to the Applicant's decision to accept the

invitation to work in another unit, ultimately a non-promotion decision has no such legal effect as forcing the non-selected candidate to work in a different unit.

160. Regarding the alternative relief, the Tribunal underlines that the Applicant has only the right to be fully and fairly considered for a post and not to be selected and therefore he is not entitled to receive compensation consisting of two years net base salary for violation of his right to be fully and fairly considered for the Post.

161. The Tribunal notes that that, after the selection decision was made, he was stressed and deprTJET2t264.53 5ETBT1 0 0 1 490.9 51m15 Tm

procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

163.

depressed as a result of the selection decision, which the Tribunal has found was together with this judgment, represents a reasonable and sufficient compensation for the moral damages resulting from substantial procedural errors.

Observation

164. The Tribunal is of the view that the most accurate scoring system in a competitive comparative review like the one used by the staff selection system is a scoring system based on decimal numbers and the current double system of converting scores into ratings or vice-versa for being recorded in Inspira should be modified in order to reflect real differences between the candidates. Such a system will simplify the procedure to reflect the results of the selection process ensuring full transparency and accuracy. The final scores of each candidate must reflect the results from all of the assessment methods used during the selection process (for example, the average between the scores from the written test and the scores from the interview).

Conclusion

165. In the light of the foregoing, the Tribunal DECIDES:

- a. The application is granted in part;

b. The Respondent is ordered to pay the amount of USD3,000 to the Applicant as moral damages for the breach of his right to be fully and fairly considered for the post.

(Signed)

Judge Alessandra Greceanu

Dated this 5th day of November 2015

Entered in the Register on this 5th day of November 2015

(Signed)

Hafida Lahiouel, Registrar, New York