Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

SEFRAOUI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Susan Maddox, ALU

Introduction

1. The applicant has appealed the decision of the respondent not to shortlist him for two P-4 positions as an Arabic reviser. Nine candidates were interviewed by the selection panel. It appears that the two successful candidates, as it happened, were interviewed in person whilst the applicant was interviewed by telephone. The records tendered do not show how the other unsuccessful candidates were interviewed. Broadly speaking, the applicant submits that he was not given full and fair consideration and has made a number of criticisms of the process undertaken by the selection panel. Neither party called any oral evidence and it was agreed that the issues were sufficiently informed by the documentary material tendered. These documents included the redacted minutes of the selection panel concerning the successful candidates and the applicant, documents attesting to the applicant's experience, and his electronic performance appraisal system (e-PAS) report for the two years prior to the application, together with statements from two members of the selection panel. The applicant was informed of his right to cross-examine the witnesses and test their evidence but he did not require them to be called.

2. The respondent raised the question of receivability at the outset of the proceedings. On 25 August 2009 Shaw J, for reasons not presently relevant, held that the applicant's appeal was within time.

Issues

3. The question in the case is whether the applicant's candidacy for the positions in question was properly and fairly considered. Also relevant is the nature of the burden of proof and its application to the evidence.

Facts

4. The applicant has many years of experience as a translator. In addition to his experience within the United Nations he was sworn in as a certified translator in

Morocco in 1992 and in Geneva in 1998, working also as a translator for a Swiss governmental body assisting refugees from 1990 to 1992. In April 1996 the applicant started working as a translator for the International Telecommuni

evaluations were tendered in evidence. The description of the applicant's experience is in point form rather than narrative and hence somewhat less informative than the descriptions of the experience of the other candidates. Otherwise there are no significant differences in styles. As to the applicant's professionalism, the selection panel noted that "[h]e has not yet reached a level of warranting assignment of self-revision/revision work at the UNHQ, even under monitoring as common practice". The panel also noted that the applicant "seems to maintain good relations with colleagues (we don't have direct experience on that as he is not working at UNOG)". So far as the other candidates are concerned the panel stated positively that they had "very good relations with colleagues" and it is reasonable to infer that this was personally known to one or more of the panel members. In respect of one of the other candidates the description of his command of language is in virtually identical terms to those used of the applicant's but the candidate is given 16 points to the applicant's 15 points. That candidate received a total score seven points greater than that of the applicant. One of the successful candidates was noted to have had "12 years of experience in translation, mostly in technical and military fields, including *some three years* [in fact, it seems, two years ten months] at the U.N.…preceded by two years relevant experience as journalist in the Arab press" (italics added).

7. In his statement tendered to the Tribunal one of the panel members stated that the process was based on an objective consideration of the qualifications of all candidates, their responses during the competency-based interviews and evaluation of all these elements by the selection panel. He said that "to ensure the maximum objectivity, the panel was composed of members of ATS as well as members from other UNOG translation sections". Interviewing candidates via telephone was undertaken for practical reasons and was a standard procedure with the individual interviews from other duty stations, but all interviews were in substance equal. A second panel member agreed with what had been said by the other member adding that the panel members unanimously agreed that the performance of the recommended candidates surpassed that of the applicant. He also confirmed that "the

over the telephone while the two selected candidates were interviewed in person and known to the panel members. So far as self-revision is concerned, he also contends that the panel's evaluation was wrong because it was inconsistent with the comments in his e-PAS that he produced high-quality translations and met the quantities standards. He also claimed that one of the successful candidates did not meet the posts' requirement of having "preferably" three years' work experience within the UN and, as a relatively new recruit, could not properly be regarded as better suited for the position.

11.

> [25] Before the hearing, the Tribunal requested the Respondent to produce the Secretary-General's decision, to no avail. During the hearing, the Respondent reiterated that the contested decision had been made by the Secretary-General. The Respondent refused, however, to comply with the Tribunal's orders to submit a signed confirmation from the Secretary-General that he made the decision to place the Applicant on administrative leave without pay.
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> [26] Faced with contradicting allegations from the Applicant and the Respondent, the Tribunal must strive to establish the truth. If a party refuses to comply with an order from the Tribunal to produce evidence, the Tribunal must draw consequences from such refusal. An administrative decision is unlawful if the author of the decision cannot be clearly identified. In the present case, it results from the Respondent's ill will that the proof of the identity of the author of the contested decision has not been adduced. Thus the decision to place the Applicant on administrative leave appears prima facie to be unlawful.

27. I cannot for myself see any good reason why the commencing assumption (the default position, as it were) in determining a dispute in the Tribunal should be that the impugned administrative decision is correct, that is to say, that it was made on the correct and adequate basis in compliance with the requirements of the relevant instruments. After all, the Administration is the moving party in the sense that it makes the decision, which in turn must be made by a person having the relevant authority who must both have and is obliged to give reasons for doing so (certainly when demanded). Those reasons are either right or wrong (or within the reasonable range of administrative discretion, which makes the decision right). This kind of litigation is thus very different from that conducted in the outside world, which is the context in which the rule placing the burden of proof on the moving or asserting party developed.

28. It seems to me that, as a matter of fundamental principle, *neither* the staff member nor the Secretary-General should be in a favoured position. As a practical result of the rule of equality before the law, the appropriate starting position is that there are no assumptions either way. (It is implicit that I do not accept the existence of any presumption of regularity, which applies in some jurisdictions to governmental

or official acts.) Accordingly, the general rule should be that the case is determined by the preponderance of evidence. In the rare event that there is no preponderance of evidence one way or another, in my view the more appropriate rule is that the impugned administrative decision should be regarded as unjustified since the Administration has the contractual obligation of making decisions for reasons that are accurate, sufficient and proper. Although the outcome is consistent with that which results from imposing a burden of proof, this characterization depends explicitly on the contractual rights and obligations of the parties rather than on an *a priori* legal rule resting on inappropriate presumptions.

29. That there should be no rule that the administrative decision is correct by default does not mean that the decision is assumed to be wrong. As the International Labour Organization Administrative Tribunal has said, "While there is no doubt whatsoever that the Organisation owes a duty of good faith to its staff … bad faith must be proved and is never presumed": (2004) Judgment 2293 at [11], (2007) Judgment 2647 at [4]. In this context, "bad faith" does not mean mere disobedience of a rule, making a mistake of significant fact, taking into account irrelevant or omitting to consider relevant matters, or denying procedural fairness where that is a contractual requirement, but the presence of an immoral or improper motive of some kind. The requirement that alleged bad faith must be proved is entirely satisfied by the preponderance of evidence test: if the preponderance of evidence demonstrates the probability of bad faith, the staff member will have succeeded and if it demonstrates no bad faith, then he or she will not.

30. Whilst the ILOAT has also consistently stated that the staff member alleging harassment must prove specific facts supporting such an allegation, it candidly acknowledged (in (2004) Judgment 2370, at [9]) that this is often difficult to prove and warned that it was necessary to "be particularly careful to take into account all the elements arising from an adversarial examination of the alleged facts…" Although the practical effect of this warning has not been elaborated or explained, it

seems to me to be a reference to the widely accepted approach that, where evidence capable of refuting an available inference is

Analysis of the facts

33. That the applicant was interviewed by telephone and the successful candidates in person, does not give the latter had an unfair advantage. Of itself, the mode of interview is neutral. The personal interview might be either advantageous or disadvantageous for the particular candidate and there is nothing in this circumstance itself which could justify a conclusion one way or the other. It can readily be accepted that, in an ideal world, candidates would all be interviewed in the same

course, reasonable to infer that they knew more about those candidates than merely appeared on the documents but I think that is knowledge which the panel was entitled to take into account in evaluating the competing claims.

36. A selection panel is not a judicial or quasi-judicial tribunal having the duty of impartially determining a case between litigating parties, each of whom must be made aware of and have the opportunity to respond to the evidence upon which the case is to be decided. Candidates are not in any sense like witnesses whose evidence must be assessed in its own terms by a judicial tribunal which cannot bring into account any personal knowledge of a witness or, indeed, any special knowledge relevant to the case but which has not been adduced by the parties. The function of the selection panel is fundamentally different, for all that it must act objectively and fairly. It is its duty to bring to bear its combined knowledge of the requirements of the position, the particular competencies necessary, the environment in which the work is to take place, and any other relevant factor that might assist them in their task of selecting the best candidate. In my view this includes any personal knowledge that they might have about a particular candidate, whether in favour of or adverse to him or her. If adverse, of course, it would be necessary in the interests of fairness to bring that matter to the attention of the candidate during the interview in order to provide an opportunity for response. However, I do not see why, in principle, the Organization should not be able to take advantage of the knowledge of members of a particular selection panel of the attributes of the candidates which it is interviewing. To do this is not, to my mind, to be in any way unfair to a candidate who is not personally known. Of course, if there were any real suggestion of favouritism or conflict of interest of any kind then it would be quite wrong for the panel member whose relationship with a candidate could give rise to such a suspicion to sit on the panel. Mere personal knowledge of a candidate does not in my opinion give rise of itself to a serious question of favouritism or conflict of interest, as distinct from a speculative possibility. At all events the statements of the panel members, in effect, refuted this allegation. Furthermore, it was not disputed that the panel, as is

conventional, proceeded by way of asking the same set of agreed questions. I conclude that, so far as the evidence goes in this case, in acting, in part, on the knowledge of a candidate, the panel acted fairly.

37. The applicant contends that the comment of the panel that "[h]e has not yet reached a level warranting assignment of self-revision/revision work at UNHQ, even under monitoring as common practice" was inaccurate since, according to him, "no one, at that time, was doing self-revision in the Arabic Translation Service (ATS) at UNHQ". It does not seem to me that this is a contradiction. Since self-revision was a function of the post, I would infer that the applicant had dealt with this question in his application and possibly also in the interview. The applicant also relies on his favourable e-PAS evaluations but these, though no doubt advantageous for him as a general matter, do not deal with the question of self-revision. As was in effect

Conclusion

42. The preponderance of evidence demonstrates that the applicant's candidature was given full and fair consideration and, accordingly, the application is dismissed.

(*Signed*)

Judge Adams

Dated this 24th day of December 2009

Entered in the Register on this 24th day of December 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York