

Case No.: UNDT/GVA/2016/022
Judgment No.: UNDT/2018/033
Date: 6 March 2018

Introduction

1. By application filed on 23 February 2015 with the Nairobi Registry, the Applicant contests the result of an online test (2014 Field Service (“FS”) Campaign), arranged by the Department of Field Support/Field Personnel Division

7. The Applicant applied to it and, on 17 March 2014, he participated in an online written test. The test consisted of two parts: a general and a technical assessment. The general assessment consisted of 30 multiple-choice questions on UN competencies and key values. The technical assessment consisted of 21 multiple-choice questions to assess the candidates' technical knowledge. The test was taken by 480 staff members in various duty stations.

8. By email of 24 November 2014, the Applicant was informed that his application for the above-referenced position was not successful, in the following terms:

Title: GJO-426110, FS-5, Telecommunication Assistant

Dear Applicant, Please refer to your application to vacancy announcement GJO-426110 for the position of Telecommunications Assistant, FS-5, with Field Missions Administered by DPKO. We

Procedure before the Tribunal

12. After the case was transferred to the Geneva Registry of the Tribunal, the latter requested the Respondent, by Order No. 207 (GVA/2017) of 9 November 2017, to file a copy of the general assessment and the technical assessment part of the online written test administered for the GJO, as well as the Applicant's responses provided to both parts of the test, and the evaluation of the same.

13. The Respondent informed the Tribunal on 17 November 2017 that he did not have copies of the we c. T022

15. By Order No. 219 (GVA/2017) of 23 November 2017, the parties were convoked to a case management discussion (“CMD”), which took place on 30 November 2017. At that time, the Applicant was still self-represented. However,

19. On 19 December 2017, the Respondent filed a copy of the technical part of the written assessment for the vacancy. According to orders made at the CMD, the Applicant filed an amended application on 12 January 2018. The Respondent filed a response to the Applicant's amended application on 5 February 2018. The Tribunal subsequently informed the parties that in light of their latest submissions, it would decide upon the matter on the basis of the written submissions.

Parties' submissions

20. The Applicant's principal contentions are:

- a. In his request for management evaluation, he identified the specific recruitment process and the fact that he had been found unsuccessful as the contested decision; he also identified the date of the email informing him that he had not been successful as the date he was informed of the contested decision;
- b. In his application to the Tribunal, he again identified the contested decision as being the outcome of the generic recruitment exercise for FS-5, Telecommunications Assistants, and provided a copy of the contested decision, namely an email advising of his non-selection in relation to a specific recruitment exercise;
- c. If any doubt subsisted, and consistent with *Planas* UNDT/2009/086 and *Applicant* UNDT/2012/149, the Applicant may be and was offered the opportunity to provide clarification of the contested decision, which is the decision to exclude him from recruitment against Generic Job Opening No. 426110; the application is therefore receivable;
- d. The outsourcing of the evaluation was procedurally irregular, since it did not comply with the applicable rules under ST/AI/2010/3, which provide for an assessment by an assessment or expert panel;

- e. The Administration failed to comply with general disclosure and

multiple-choice question, questions 8, 13 and 16 are irrelevant, because none of the roles for Telecommunications Assistants include project management functions; the impact of these defective questions was magnified by the fact that a passing mark of 90% was required, meaning that staff could only get two questions wrong; it follows that even a finding that only one of 21 questions was defective would be sufficient to conclude that the recruitment process was vitiated; and

j. The Applicant seeks rescission of the decision and the opportunity to be fairly considered for rostering; alternatively, he seeks compensation for the loss of opportunity to be given full and fair consideration; DPKO currently recruits almost exclusively from the roster, placement on which did thus represent the only opportunity for available career progression for the Applicant; he thus claims compensation for the material damage for the lost opportunity to be put on the roster.

21. The Respondent's principal contentions are:

a. There is no provision in the Tribunal's Statute or Rules of Procedure that allows amendments to an application; the directions made by the Judge at the CMD were made in accordance with art. 19 of the Tribunal's Rules of Procedure; however, the amended application filed by the Applicant's Counsel falls outside the scope for which the Tribunal allowed the original application to be amended during the CMD; it is a new application filed many years after the expiry of the filing deadline; the Judge did not give permission to the Applicant to file a new application challenging a different decision, which would be in direct contravention of statutory time limits;

b. The application is not receivable, since the Applicant has not identified any individual administrative decision having direct legal consequences to his terms of appointment; his assessment that the design of the technical part of the

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c. He failed to show that the distribution of the questions in the written assessment was an administrative decision directed toward him individually or that the Administration was required to tailor the test to his strengths and skills set (cf. *Charles* UNDT/2013/142; 2014-UNAT-477);

23. In that respect, the Tribunal recalls that the Appeals Tribunal ruled the following in *Massabni*, 2012-UNAT-238:

25. The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.

26. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

24. The Tribunal notes that in his request for management evaluation, the Applicant identified the specific recruitment exercise for which he was informed he had been unsuccessful, and the date of the email notifying him thereof. The Management Evaluation Unit characterized the request for management evaluation as concerning "the results of [the Applicant's] application for the generic job opening for Telecommunications Assistant, FS-5".

27. It is noted that art. 19 of the Tribunal's Rules of Procedure provides that:

The Dispute Tribunal may at any time, either on an application of a party a

31. To do justice between the parties, amendments must be permitted as an applicant cannot know matters that are in the exclusive domain and knowledge of the Respondent at the time of the filing of an application. On many occasions, the real, but not disclosed, reasons for decisions or serious procedural errors, are disclosed after the application has been issued. Not to allow amendment in such circumstances would be a denial of justice.

32. Further, and with the foregoing in mind, the Tribunal is satisfied that the Applicant's Counsel, in accordance with the directions given during the second CMD, merely clarified the decision as contested, which had, however, already been sufficiently identified by the Applicant in his request for management evaluation and his application.

33. Therefore, the Tribunal is of the view that in the amended application, the

24. The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

36. It further notes that the Appeals Tribunal held in *Rolland* 2011-UNAT-122 that:

26. There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

37. The Tribunal notes that the ST/AI/2010/3 (Staff Selection System) does not provide for the possibility for the Organization to outsource the design and administration of a test for the purpose of a recruitment or roster exercise to an external contractor. Rather, the definitions provided by the administrative instruction with respect to "assessment" (sec. 1 (b)) and of an "expert panel" (sec. 1(g)) leave no doubt that under the current legal regime within the United Nations, recruitment tests have to be conducted by an assessment panel, or,

the final version, as approved by OHRM and then entered by “The test factory” in the online test. The Respondent also said that, unfortunately, he was not in a position to provide the Tribunal with the Applicant’s answers to these questions and their assessment.

39. Despite the Tribunal calling on the Respondent’s Counsel to provide it with further details about the expertise of “The test factory” and guidelines on the assessment of the test results, it was not possible for the Respondent to provide them. Also, the Respondent did not provide any communication or document showing that OHRM had indeed reviewed and approved the test questions.

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46. Also, under sec. 8.1 of ST/AI/2010/3, it is the role of the CRB to “review proposals for ... placing candidates on the roster following a generic job opening ... to ensure that applicants were evaluated on the basis of the corresponding evaluation criteria and that the applicable procedures were followed in accordance with sections 5.2 and 5.6 of ST/SGB/2002/6 [(currently ST/SGB/2011/7)]”. Section 4.5 of ST/SGB/2011/7 provides as follows:

4.5 The central review bodies shall review the recommendation for ... placing candidates on the roster following a generic job opening, made by the department/office concerned, to ensure that the integrity of the process was upheld, that the applications and profiles of applicants were reviewed on the basis of the pre-approved evaluation criteria and that the applicable procedures were followed.

47. Additionally, according to sec. 4.6(c) of the above-mentioned bulletin, that review includes the consideration by the CRB of whether “[t]he record contains a fully justified analysis of each of the competencies listed in the job opening, which must be evaluated during the competency-based interview and/or other assessment methodologies for all short-listed candidates”. It goes without saying that the CRB cannot exercise that control when it is not provided with the relevant record, as in the present case. Thus, the first safeguard in the procedure to ensure its regularity could not be exercised in any meaningful manner, or at all.

48. It is not possible for the Tribunal to exercise its judicial control or review if the Respondent is not in a position to provide it with the relevant documentation as a result of an inappropriate outsourcing exercise. The Tribunal thus draws negative inferences as to the procedural regularity of the selection exercise.

Remedies

49. Art. 10.5 of the Tribunal’s Statute, as amended by General Assembly resolution 69/203 adopted on 18 December 2014, delineates the Tribunal’s powers regarding the award of remedies, providing that:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision.

50. The decision to exclude the Applicant from recruitment against GJO No. 426110 was found to be illegal and has to be rescinded. As a consequence, the Applicant has to be placed in the same position he would have been in if the illegality had not occurred, that is, he has to be granted an opportunity to be fairly considered for rostering.

51. The Tribunal recalls what the Appeals Tribunal held in *Nwuke* 2010-UNAT-099, namely that:

37. The judicial review of the administrative decision may result in the affirmation of the contested decision or its rescission, and in the latter case, Article 10 of the UNDT Statute allows to order both the rescission and the performance needed to bring the administrative situation in compliance with the law.

52. While the Tribunal cannot order the Respondent to place the Applicant on the roster, and it would not be appropriate to do so, it falls within its competence to order the Administration to allow the Applicant to sit on a new test, without delay, and thus to give him the opportunity to be fairly considered for rostering (cf. *Farr* 2013-UNAT-350, para. 28).

Conclusion

53. In view of the foregoing, the Tribunal DECIDES:

- a. The contested decision is rescinded;
- b. The Administration has to set a new written assessment to be taken by the Applicant, without undue delay.

(Signed)

Judge Rowan Downing

Dated this 6th day of March 2018

Entered in the Register on this 6th day of March 2018

(Signed)

René M. Vargas M., Registrar, Geneva