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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/007

Judgment No.: UNDT/2017/035

Date: 11 May 2017

Original: English

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**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

BATICHTCHEV

v.

SECRETARY





and Editorial error. There were no deductions for typing/formatting errors or anything relating to typing skills. The same methodology is used at the Language Competitive Examinations administered by the OHRM's Testing Section as well as during the bidding exercise for UN contractual translations procurement. Candidates with an overall score of 75% or of more at the technical evaluation test pass the test and are convoked for the second phase of evaluation, a competency-based interview.

The Applicant was labelled as candidate No.5. As noted in the Technical Evaluation Report, the TEC assigned the Applicant an overall score of 62.5%. This was a non-passing score.

As the Applicant did not demonstrate the required technical skills for the position, he was not invited for a competency based interview, and was not recommended for selection. The job applicants who successfully completed the technical assessment were invited to participate in competency based interviews. Following these interviews, these 3 candidates were found to demonstrate the required competencies, and were recommended for selection.

Since January 2012, the Applicant has been participating in the Long Term Telecommute Pilot Project. In order to participate in this pilot project he signed an Agreement on Work Away from the Office under the Flexible Working Arrangements. Paragraph IV of that agreement states: Work to be undertaken away from the office: Specific outputs: Translation in the file form. This means an electronic computer file format. The Applicant has extended the Long Term Telecommute agreement multiple times and over more than three years. In his performance appraisal for 2013-2014, the Applicant commented that his typing speed and skills are improved .

*Facts submitted by the Applicant and not accepted by the Respondent*

The Applicant cannot type and cannot learn to type due to a health condition.

[The Job Opening] did not contain a requirement that a candidate be able to type.

Within the RTS, there is no requirement to type translations. Everyone is free either to type or to dictate. With regard to telecommuting, the Applicant provided all his translations by dictating them, saving them as audio files, then placing them in a Dictations folder on the Russian Text Processing Unit's shared drive. A typist typed them. The Applicant then proof-read them before submission. The Applicant did not type his translations.



The Applicant could not meet the agreed requirements of the Long Term Telecommute Pilot Project unless he was able to submit translations in a computer file format. The Applicant could not create a computer file unless he knew how to type and use a computer. The Applicant has never stated that he could not submit his work in a computer file format, or that working from home on a computer resulted in additional stress.

The test required approximately 4 hours of translation and revision work. Thus if the Applicant elected to hand-write or transcribe his drafts, he had an additional 8 hours to convert handwritten and/or transcribed answers into a typed form. A professional text processor can type text of the TET in 35 minutes. The standard output of a professional in a DGACM Text Processing Units is 20 words per minute. To type the 558 words required in the translation text would therefore take approximately 28 minutes. Typing of the 744 words in the revision text would take less time, as the document is already in Russian and only required incorporation of revision changes. A non-professional text processor, such as the Applicant, should be able to type the test in no more than 1.5 to 2 hours. A non-professional text-processor would then have had an additional 6 hours of time to finalise and upload a response to the test website.

### **Procedural history**

5. On 22 February 2015, the Applicant filed the application and, on 23 March 2015, the Respondent duly filed his reply.
6. The matter was assigned to the undersigned Judge on 13 January 2016.
7. By Order No. 51 (NY/2016) dated 23 February 2016, the Tribunal ordered the parties to file, by 18 March 2016, a jointly signed statement setting forth: (a) a list of agreed facts in chronological order; (b) a list of agreed legal issues; (c) a list of any processor would

8. On 16 March 2016, the Applicant filed an eleven-page document consisting of: (a) one-page submission by the Applicant; (b) a seven-page *unsigned* document titled, \_\_\_\_\_-page message that appears to have been drafted by the Applicant as a communication to statement in response to Order No. 51 (NY/2016); and (d) a one-page signed statement by a third party, which appears to have been submitted by the Applicant as evidence.

9. On 18 March 2016, the parties submitted the jointly signed statement pursuant to Order No. 51 (NY/2016). The submission stated that neither party wished to adduce any additional documents and that both parties submit that the Tribunal could decide this case without an oral hearing. In addition, the Respondent moved for the \_\_\_\_\_ s not in fact a

10. By Order No. 87 (NY/2016) dated 8 April 2016, the Tribunal ordered the parties to appear in person at a Case \_\_\_\_\_ at the courtroom of the Dispute Tribunal in New York on 13 April 2016.

11. On 11 April 2016, the Tribunal received a submission from the Applicant stating that he was unavailable to attend the CMD in person. The CMD was rescheduled by the Tribunal and took place on 21 April 2016. The Applicant, who is self-represented, participated via telephone. The Respondent was represented by Mr. Gutman, who attended in person.

12. By Order No. 100 (NY/2016) dated 26 April 2016, the Tribunal ordered that a one-day hearing on the merits would be held in this case. The parties were ordered to file a jointly-signed statement providing a list of witnesses to be called and

a proposed mutually agreeable date range for the hearing. In addition, the Respondent was ordered to provide certain documentation by 6 May 2016.

13. On 5 May 2016, the Applicant filed his own separate statement consisting of a list of sixteen witnesses and a proposed date for the hearing. In his statement, the Applicant made additional submissions regarding this matter, also requesting protection for witnesses, and, since he had retired



18. By Order No. 138 (NY/2016) dated 9 June 2016, the Tribunal rescheduled the restoration of his official email account and stated that it would discuss the request to call sixteen witnesses for the one-day hearing on the merits at the rescheduled CMD. The Tribunal granted the s request to call the RTS Chief as a witness at the hearing on the merits.

19. On 29 June 2016, the CMD was held, at which the Applicant was self-represented (via telephone) and the Respondent was represented by Mr. Gutman, present in court.

the Dispute Tribunal in Geneva, which could be of relevance to the present case *Krioutchkov* UNDT/2016/041 and *Krioutchkov* UNDT/2016/042. Counsel for the Respondent also referred to a third judgment *Krioutchkov* UNDT/2016/066 which he submitted was also relevant to the present case. The Tribunal agreed to suspend the proceedings for two weeks to allow the Applicant time to consider how he wished



form (UNDT/F.12E, the template form can be found at <http://www.un.org/en/oaj/dispute/forms.shtml>).

b. The parties are to file a submission, if they so wish, on the impact of the pronouncements if any, of the appellate decision in *Krioutchkov* UNAT-2016-707, to the case in hand.

c. Without prejudice to the further conduct and outcome of this matter, the Applicant is also to advise whether he wishes to pursue his case on the merits and, if so, propose a date or date range during which he would be available to attend a hearing on the merits or on any submissions.

25. In accordance with Order No. 34 (NY/2017), the Respondent filed his submissions on 7 March 2017, contending that in light of the prevailing jurisprudence in a similar case disposed of by *Krioutchkov* UNAT-2016-707, the matter could be disposed of without any further oral or written submissions. The Applicant has not filed any response whatsoever, in particular he has failed to address the impact of the pronouncements if any, of the ruling in *Krioutchkov* UNAT-2016-707, a case concerning the exact same contested Job Opening, to the case at hand.

26. By Order No. 74 (NY/2017) dated 12 April 2017, considering the expiry of (NY/2017), and upon the documents before it, including those submitted by the Respondent pursuant to Order No. 100 (NY/2016), the Tribunal ordered that it would proceed to determine the present case on the papers before it.

### **Consideration**

27. At the outset, the Tribunal notes that, in the jointly signed submission dated 18

The Applicant has also orally confirmed that he was not pursuing any disability discrimination argument. The only remaining issue for the Tribunal to consider is therefore whether the written test for the Post was properly administered in that the candidates were required to type their responses on a computer.

28. In this regard, the Applicant essentially contends that the disputed decision ghts because the selection process did not provide [him] with full and fair consideration due to the fact that a related written test was based on a skill not provided for in the [the Job Opening] or P4 Reviser Generic Job Profile

29. In the case of *Singh* UNDT/2015/114 dated 20 November 2015, at paras. 52 and 53, the Tribunal said:

However, it is the contractual right of every staff member to receive full and fair consideration for job openings to which they apply. A staff member should be able to challenge criteria which are unlawful, where criteria may be directly or indirectly discriminatory, or would appear to be manifestly unreasonable or imposing unwarranted limitations on qualification or other requirements such as to constitute an unfair restriction on the eligibility of a group of staff members for appointment or promotion, especially if there is no proper basis in any promulgated issuance (see *Korotina* UNDT/2012/178). Where any exception is granted under the Staff Rules, the Respondent is to ensure that it is not prejudicial to the interests of any other staff member or group of staff members.

Section 4.5 of ST/AI/2010/3 (Staff selection system) states that he job opening shall reflect the functions and the location of the position and include the qualifications, skills and competencies required

30. However, the Dispute Tribunal has also observed in *Wang* UNDT/2012/080, para. 23, that ST/AI/2010/3:

does not impose any particular method to assess technical requirements and competencies, still less any specific conditions in which these evaluations should be performed. Moreover, the Applicant has not alleged that he had to perform the test under conditions which are different from those set for the other candidates.

31. The Applicant in the instant case maintains that the requirements listed as the evaluation criteria must be identical to those in the job opening as per para. 6.4.1 of the Manual for the Hiring Manager on the Staff Selection System, and an unlisted criterion may not be used to evaluate an applicant. Referring to the standard operating procedures for Russian translators and revisers, the Applicant further submits that translations are furthermore to be dictated on a \_\_\_\_\_, or if the text is short, they may be handwritten. The Applicant contends that, by failing to avail those candidates, who for many years dictated their translations, of appropriate technical means, and by requiring a criterion not mentioned in the job opening, the Respondent discriminated against them and effectively deprived them of the equal opportunity to compete.

32. Concerning \_\_\_\_\_ *Krioutchkov* UNDT/2016/041 (upheld by the United Nations Appeals Tribunal in *Krioutchkov* UNAT-2016-707), *Krioutchkov*





different from those envisaged in the Compendium, as the exam was administered online taking into account the time difference between New York and Bangkok, where the Appellant was based. There was thus no manner in which the Appellant could have participated in the examination other than by typing his answers to the exercise, uploading the text and submitting it by e-mail. There was, in the very specific circumstances, no possibility of sending handwritten answers or dictating the answers.

While handwriting was allowed in a subsequent examination for another job opening, JO 38908, the Appeals Tribunal notes that in that case, candidates had been advised accordingly and consented to such a procedure prior to the examination. Conversely, in the present case, handwriting had not been discussed or requested prior to the examination, although the Appellant had had the opportunity to request it, as he indeed did in the case of the subsequent examination. Therefore, handwriting was not prohibited, but simply not envisaged or even requested. Moreover, in the present case, candidates sitting the exam were advised that they would be required to work on a computer inherently implied that the examination would require typing.

should have provided ~~Z4LRQ~~



37. In the aforesaid case, the Appeals Tribunal rejected Mr. of discrimination. It also found that although keyboarding and typing were not explicitly mentioned in the Job Opening, it was a reasonable and normal conclusion to draw that the test would be so conducted from the emails he had received. While handwriting was allowed in a subsequent examination for another job opening, JO 38908 , handwriting had not been discussed or requested by Mr. Krioutchkov prior to the examination, although he had had the opportunity to request it.

38. The Job O experience in translation, précis-writing, self-revision and use of relevant computer contention that it would not be possible to meet those requirements without the basic ability to type and use a keyboard. Unlike Mr. Krioutchkov, the Applicant in this case actually took the examination; and it remains unclear when he first protested, although it appears he only did so following his non-selection. The Applicant in this instance received similar emails regarding the conduct of the examination, consented

