



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/020
&
UNDT/NBI/2011/057
Judgment No.: UNDT/2013/035
Date: 28 February 2013
Original: English

Before: Judge Nkemdilim Izuako
Registry: Nairobi
Registrar: Jean-Pelé Fomété

LUVAI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Miouly Pongnon, UNON
Katya Melliush, UNON

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

Introduction

1. The Applicant is a Senior Security Officer at the rank of a Sergeant, GS-5, with the United Nations Office at Nairobi's Department of Safety and Security ("UNON/DSS").

2. In case No. UNDT/NBI/2011/020, the Applicant contested the administrative decisions not to select him for the following posts: Security Lieutenant under Vacancy Announcement Number 10-SEC-UNON-424103-R-NAIROBI dated 23 March 2010 and Security Lieutenant under Vacancy Announcement Number 10-SEC-UNON- 424422-R-NAIROBI dated 19 April 2010.

3. In case No. UNDT/NBI/2011/057, he challenged a decision by UNON's Chief, Safety and Security Section to suspend his use of the Organization's Lotus Notes e-mail account.

4. The matter was heard on 10 October 2011 and from 12-13 March 2012. On 12 March 2012, the Tribunal ordered that the two cases be consolidated.

Facts

5. The Applicant's official fire arm was revoked by the Chief, UNON/DSS in October 2006 on grounds of his performance. Since the revocation of his official firearm the Applicant had been attending weapons qualification training without a firearm.

6. On 23 March 2010, a vacancy announcement ("VA 1") was advertised for six G-6 posts for Security Lieutenant within UNON/DSS. On 19 April 2010, two vacant posts were advertised for the same post for Security Lieutenant G-6 UNON/DSS ("VA 2")

7. The Applicant applied for the posts in both VA 1 and VA 2. UNON/DSS decided that, given the identical requirements for the two vacancy announcements and in the interest of saving time and resources, the recruitment process of the two posts should be merged.

8. A total of 11 candidates including the Applicant were shortlisted, all the shortlisted candidates were internal applicants at the G-5 level serving as Security Sergeants within UNON/DSS and seeking promotion to the G-6 level.

9. The 11 shortlisted candidates were interviewed on 27 May 2010. The interview panel comprised of the Deputy Chief of UNON/DSS, Mr. Roger Lewis, Mr. Donald Zimmer, Safety and Security Officer at the United Nations Human Settlement Programme and Mr. Elsaid Karara, Security Coordinator UNON/DSS.

10. Following the interview, the panel recommended all the 11 shortlisted candidates including the Applicant as demonstrating the requisite qualifications, experience, and competencies for the G-6 Security Lieutenant posts. The interview panel considered the ability to carry a fire arm as a desirable skill for the post of Security Lieutenant.

11. On 25 June 2010, the Programme Case Officer (“PCO”) submitted the list of the 11 candidates to the Secretary of the Central Review Panel (“CRP”), Mr. Sousa Jossai for endorsement.

12. By a memorandum dated 13 September 2010 the CRP endorsed the list of recommended candidates and indicated that it was satisfied that UNON/DSS had properly applied the relevant evaluation criteria and the prescribed procedures under Administrative Instruction ST/AI/2002/6. The names of eight candidate selected from the list of 11 endorsed by the CRB was sent to UNON’s Director, Division of Administrative Services.

13. On 16 September 2010, the eight candidates selected to fill in the eight vacant posts were notified of their selection. The Applicant was not one of the eight selected candidates.

14. The Applicant sought management evaluation of the decision not to select him for the post of Security Lieutenant on 21 November 2010. By letter dated 13 January 2011, the MEU informed the Applicant of its decision to uphold the decision of the Secretary-General not to select him for the Security Lieutenant post.

15. On 8 March 2011 while the Applicant was on leave, the Information Communication Technology Service (“ICTS”) informed the Chief, UNON/DSS that obscene and pornographic materials had been discovered in the Applicant’s private folder on the network shared hard drive.

16. The Chief UNON/DSS, on 9 March 2011, instructed the ICTS to suspend the Applicant’s access to his Lotus Notes e-mail account until a preliminary investigation was initiated to verify the allegation that the Applicant had misused the United Nations information technology assets.

17. Upon his return from leave on 28 March 2011, the Applicant raised a query with the ICTS help desk concerning his inability to access his Lotus Notes e-mail account. By email dated 29 March 2011 the ICTS service desk informed him that on the instructions of the Chief, UNON/DSS, his Lotus Notes had been disabled because it was discovered that he had used his email account to exchange pornographic material.

18. On 15 April 2011, UNON/DSS referred the matter of the Applicant’s alleged misuse of the ICTS resources to the Special Investigation Unit of the Security and Safety Section at the United Nations International Criminal Tribunal for Rwanda (“SIU/ICTR”) for investigation.

19. The Applicant filed his Application in case UNDT/2011/020 on 28 April 2011. The Respondent filed a reply to this Application on 19 July 2011.

20. On 2 May 2011, the Applicant wrote to the Chief, Africa Section, Investigation Division, Office of Internal Oversight Services (“ID/OIOS”) inquiring whether ID/OIOS had carried out any investigations before the suspension of his Lotus Notes account. The ID/OIOS responded the same day and informed him that it had not carried out any investigation in respect to him and that the OIOS intake committee had referred the matter back to UNON/DSS for appropriate action.

21. The Applicant sought management evaluation of the decision to suspend his access to his Lotus Notes account on 29 March 2011. On 14 July 2011 the management evaluation unit communicated its decision upholding the decision to suspend his access to Lotus Notes.

22. SIU/ICTR issued its fact-finding report on the Appellant’s alleged misuse of the UN ICTS resources on 12 August 2011. The SIU/ICTR issued an addendum to the same fact-finding investigation report on 28 September 2011.

23. The SIU/UNICTR investigation reports concluded that the statements and type of the photographic and video materials gathered in the course of investigations were found within the Applicant’s private folder. The materials found were obscene and pornographic and a clear violation of section 4.1 of ST/SGB/2004/15, (Use of information and communication technology resources and data).

24. The Applicant filed the second Application contesting the closure of his Lotus Notes account, case UNDT/NBI/2011/057 on 9 September 2011.

25. A motion for production of documents was filed by the Applicant on 12 September 2011. The Applicant prayed that the Tribunal order the Respondent to produce the following documents: the report of the investigation that was conducted SIU/ICTR with regards to the closure of his Lotus Notes account; an investigation

report on a 7.2 mm bullet allegedly found in the office of Mr. Jorum Mkunde and; an investigation report on matters addressed by Mr. Jones Atogo in a 26 May 2006 memorandum to Mr. David Venness relating to certain concerns within the ranks of the Security and Safety Services of UNON.

26. On 10 October 2011 the Tribunal issued a ruling on the motion for production of documents. The Tribunal ordered the Respondent to produce all the documents prayed for by the Applicant

27. The Respondent made an ex-parte production of documents and an application to maintain confidentiality of the same on 18 October 2011. The Applicant asked the Tribunal to make the said documents available to him in the interest of justice. The Tribunal allowed the production of documents to be done in an ex-parte basis as per the Respondent's request.

28. The Respondent produced two documents, that is, the Report of the SIU/UNICTR and the report of the investigation by DSS Compliance, Evaluation and Monitoring Mission to UNON. The Respondent submitted that he was unable to find any report on the 7.2 mm bullet that was allegedly found in Mr. Mkunde's office.

29. The Respondent filed a reply to the Application in case UNDT/NBI/2011/057 on 24 October 2011.

30. The Tribunal held hearings on 11 October 2011, from 12-13 March 2012, 27 August 2011 and from 17-18 September 2012. At the hearing of 12 March 2012, the Tribunal ordered the consolidation of the two Applications under article 10 of the Tribunal's Statute.

31. During the hearings the Tribunal received oral evidence from the following witnesses:

- a. The Applicant.

- b. Mr. Peter Marshall (Chief, DSS/UNON).
- c. Mr. Roger Lewis (Deputy Chief, DSS/UNON).

32. Mr. Marshall's testimony is summarized below:

- a. He has worked for the United Nations in different capacities for over 24 years. At the time of the Applicant's recruitment to join UNON/DSS, he was the Deputy Chief of Security in UNON. He was on the panel that recruited the Applicant and he made a favourable recommendation for the Applicant's recruitment.
- b. He had on various occasions reprimanded the Applicant. Part of his official duties deal with weapons certification. He is the Chief Licensing Officer for weapons in the United Nations. Once a Security Officer has passed the theoretical and practical training they are licensed to carry firearms. As the Chief Licensing Officer, he has the discretion to withdraw fire arms from an Officer.
- c. The withdrawal of the Applicant's firearm was based on performance issues. He could not recall the specific details of what led to his withdrawal of the Applicant's firearm as this happened six years ago. There were many happenings at the time including, his performance, poor judgment attitudes and the safety of staff members. He decided to withdraw the Applicant's firearm to reduce the chances of an accident within the UNON complex.
- d. The Applicant was sent to counselling before the withdrawal of his firearm. The efforts at counselling were not successful and he was informed by the Human Resources Officer, Ms. Jamie Kearney-Sassi and the Assistant Chief of Security UNON that the Applicant demonstrated instability. The Applicant may regain his weapon but he

needs to show mental stability and an understanding of the UN policy on the use of force.

- e. He was not involved in the recruitment process of the G6 Security posts advertised on 23 March 2010. He appointed the Deputy Chief of UNON/DSS as the Case Officer for the said recruitment process. He did not select the members of the interview panel neither was he involved in the deliberation process.
- f. The Applicant was on the list of recommended candidates. He could not recall if he made the selection of the candidates but the ultimate decision maker was the Director-General of UNON. He did not in any way influence the selection of the candidates.
- g. The considerations in the final selection included, *inter alia*, past performance, attitude and leadership skills. Most of the candidates were qualified. The Applicant was the weakest candidate when considering these competencies.
- h. He does not have personal animus towards the Applicant. The Applicant had not demonstrated any qualities to merit his promotion. Promotion is not based on seniority or length of service. He can only recommend the Applicant if he shows improvement in his performance and that he can do the right thing and gain respect from his subordinates.
- i. The Applicant's performance has always been problematic. He is never at the right place at the right time, he is sometimes absent from his duty post, he is involved in various acts of misconduct, his productivity is low and he is inefficient in most of his duties.

- j. He did not suspend the Applicant's access to Lotus Notes as he is not capable of doing so. He received an email from Mr. Suresh Khattry of the ICTS that pornographic materials had been found in the Applicant's shared hard drive. He instructed Mr. Suresh to do whatever the rules dictated in such matters.
- k. He instructed the Deputy Chief, DSS/UNON to ensure that all official correspondence is given to the Applicant in hard copy so as to enable him to discharge his duties. To the best of his knowledge this has been complied with.
- l. It is within his discretion to ask the ICTS to restore the Applicant's access to Lotus Notes. He has not done so because it is not essential to the Applicant in carrying out his duties.
- m. This is not the first time that the Applicant had been found storing obscene materials and without an undertaking from the Applicant that he will not repeat such behaviour, he cannot ask the ICTS to restore the Applicant's Lotus Notes privileges.
- n. A lack of fire arm certification had nothing to do with the selection process, the Applicant was one of the weakest candidates and so it is not true that his lack of fire arm had worked against his selection.

33. Mr. Lewis' evidence is summarized below:

- a. He is the Deputy Chief of UNON/DSS. He interacts with the Applicant as his senior level supervisor.
- b. He was appointed the Case Officer or hiring manager during the recruitment process for the post of Security Lieutenant. His duties in that capacity were to oversee the posting of the vacancy

announcement, administering of tests, interviewing and sending the report to the CRB.

- c. He was the one responsible for setting up the interview panel. He has no personal animus toward the Applicant and to the best of his knowledge none of the other members of the interview panel had personal enmity with the Applicant.
- d. The Applicant was found to be suitable for the post but was not selected to fill the eight vacant posts because those selected were better candidates than him.
- e. It is not true that the Applicant was not selected because he did not possess a fire arm. Carrying of a fire arm was a desired skill but the Applicant was considered by the interview panel technically capable of handling a fire arm as he was once a fire arm instructor. He does not know why this fact was not reflected in the interview notes but it was something that the panel deliberated upon to determine the Applicant's competency in handling of a fire arm.
- f. He is aware that the Applicant's Lotus Notes privileges were suspended. He received an email from Mr. Suresh Khattry of UNON/ICTS informing him that the Applicant had misused his Lotus Notes privileges by storing pornographic materials.
- g. He communicated to the Applicant the withdrawal of his Lotus Notes privileges and informed him that all communications will be sent to him in hard copy. He instructed the administration officers that all official email correspondence should be printed out for the Applicant and to the best of his knowledge this order was complied with.

- h. He is not aware of the fact that the computer that the Applicant was using is used by more than 15 Security Officers. He does not know if any one accessed Applicant's Lotus Notes while he was on leave because the he did not report on this matter.

34. On 12 March 2012 the Respondent filed with the Tribunal a Motion to amend his reply and to introduce some new documents. The Tribunal issued order 163 (NBI/2012) granting the Respondent's Motion. The Respondent filed his amended reply on 19 December 2012.

35. The Applicant filed a Motion to tender additional documents on 21 August 2012. On 11 December 2012 the Tribunal issued an order granting the Applicant's Motion. On 13 September 2012 the Applicant filled another Motion requesting production of additional documents. The Motion was denied by the Tribunal under Order 162(NBI/2012), on the grounds that the documents were irrelevant to the instant suit.

Applicant's case

36. The Applicant's consolidated case is summarized as follows:

37. The Respondent did not give him full and fair consideration during the promotion exercise.

38. The Respondent's withdrawal of his firearm was meant to frustrate his promotion and career advancement in the United Nations as it made it impossible for him to attend the annual weapons training.

39. The decision not to promote him was discriminatory.

40. The Chief, UNON/DSS, obstructed justice by ordering the closure of his Lotus Notes. Due to the closure of his lotus notes, the Applicant is not able to obtain

evidence to submit in support of his claims on non-selection of the Security Lieutenant post.

41. The Applicant has suffered immeasurable damages as a result of the disabling of his Lotus Notes; including the fact that he was not given the opportunity to be heard before its closure and also the delays in finalizing the investigation pertaining to this issue.

42. The MEU report on the closure of his Lotus Notes was reached based on an inconclusive investigation report therefore its validity is questionable.

43. The closure of his Lotus Notes is one among the many ways in which the Respondent has been harassing and intimidating him.

44. In view of the foregoing the Applicant prayed that the Tribunal:

- a. Compel the Respondent to return the firearm so as to enable him to fairly sit for interviews in the future.
- b. Order the Respondent to stop subjecting him to unfair treatment and harassment.
- c. Order for a review of the decision not to appoint him to one of the Security Lieutenant posts.
- d. Expunge the management evaluation decision as it did not take into account his skills.
- e. Compel the Respondent to unconditionally restore access to his Lotus Notes and all the documents that may have been tempered with.
- f. Order the Respondent to pay damages incurred as a result of the suspension of privileges on the use of ICT resources.

Respondent's case

45. The Respondent's case in response to both applications is summarized as follows:

46. The Applicant's claim that his fire arm was unjustifiably, maliciously and unfairly revoked is not receivable as this claim was not submitted for management evaluation.

47. The Applicant's requests for management evaluation on both Applications was filed beyond the 60 day limit as required by staff rule 11.2 and are therefore not receivable.

48. The Tribunal has no competence to extend the deadlines for filing a request for management evaluation.

49. The Applicant has not provided evidence to support his allegation of irregularity or bias in the selection process. On the contrary, factual and documentary evidence show that Respondent accorded the Applicant full and fair consideration for the posts.

50. The Applicant's speculation that Mr. Marshall and the Human Resources Services conspired to prevent his promotion is without any basis.

51. The Applicant was owed no preferential consideration on account of his seniority.

52. The selection of candidates other than the Applicant was a valid exercise of discretion as the Applicant's past work performance compared to the other candidates was wanting in areas that were desirable for the discharge of the functions for the post of Security Lieutenant.

53. The Respondent's withdrawal of the Applicant's fire arm was done after a proper procedure. The Applicant received counselling from Human Resources

Officers and was offered professional psychiatric counselling to resolve certain aspects of his behaviour that led the Human Resources and Mr. Marshall to believe that the Applicant was unstable and therefore not fit to carry a fire arm.

54. The Applicant's contention on the suspension of his Lotus Notes privileges pending investigation is without merit. The decision to suspend the Applicant's access to Lotus Notes was a proper, non-arbitrary exercise of the Respondent's discretion pursuant to staff rule 10.1.

55. The use of organizational resources including the right to use Lotus Notes and other ICTS services is a privilege conferred on staff for the benefit of the organization rather than a right devolving to a staff member for his or her own benefit.

56. The facts and the legal principles demonstrate that the decision to suspend Applicant's Lotus Notes privileges was predicated upon credible information received from the ICTS that the Applicant used his Lotus Notes and the disk on his UN- assigned computer to receive and thereafter store pornographic materials.

57. The Applicant's non-selection for the subject post was not based on lack of fire arms qualification. The Applicant had a record of dereliction of duty, dishonesty and a poor work attitude which also informed the final selection decision. The Applicant had poor records when compared with other candidates which made him a less attractive candidate.

58. In view of the above, the Respondent prays that the Applications be dismissed in their entirety.

Issues

59. Having reviewed the entire case records, the Tribunal finds that the following are the legal and other issues that arise for consideration.

- a. Whether the Applicant's claims are receivable.

- b. Whether the non-selection of the Applicant for the post of Security Lieutenant was unfair and motivated by discrimination.
- c. Whether the continued withdrawal of the Applicant's access to Lotus Notes was a proper exercise of authority?
- d. Whether the Chief, DSS/UNON abused his authority with regard to the revocation of the Applicant's licence to bear a firearm. Did the said revocation affect the Applicant's chances of promotion?
- e. Whether the Applicant was a victim of harassment in the work place?
- f. Matters of concern for DSS/Headquarters (DSS/HQ).

Considerations

Are the Applicant's claims receivable?

60. The Respondent submitted that all claims for which management evaluation were not previously requested are not receivable as per art.8 of the Tribunal's Statute. The Respondent submitted that the Applicant's claim with regard to the revocation of his licence to bear a firearm was not submitted for management evaluation and hence is not receivable.

61. The Respondent argued that the applications are not receivable *ratione temporis*. The Respondent submitted that the Applicant requested management evaluation of the decision not to select him for the posts of security lieutenant and for the decision to suspend his access to Lotus Notes beyond the applicable time limit as provided under staff rule 11.2.

62. On his part, the Applicant submitted that he had not introduced any new claims that had not previously been submitted for management evaluation. The withdrawal

of his official firearm is interlinked with his non-selection case and is not an independent claim thereof.

63. The Applicant also submitted that all his claims were sent for management evaluation within the 60-day time limit contrary to the Respondent's assertions.

64. Pursuant to art. 8.1(c) of the Dispute Tribunal's Statute, an application shall be receivable if the contested administrative decision had been previously submitted for management evaluation. Thus, where an administrative decision is being contested, the first step in the process is for the Applicant to request a management evaluation, except where a decision was taken following a disciplinary process.

65. In the present case, the Applicant requested management evaluation of the decision not to select him for the Security Lieutenant posts on 17 December 2010. In his written request to the MEU, the Applicant clearly stated that he was not selected for the said posts because he did not possess a licence to bear firearm and therefore was considered as not capable of handling a fire arm.

66. MEU in its reply addressed the Applicant's claims on firearm qualification when it ruled:

the distinguishing factor came down to the desirable skills ...and specifically, certified knowledge or sound experience in handling of fire arms. The eight selected candidates had passed their United Nations firearm qualification course which you had not. Recalling that this skill was only considered desirable rather than required, the MEU nevertheless considered this was a reasonable basis on which to choose from the eleven candidates to fill in the eight vacant posts.

67. The Tribunal finds and holds that the revocation of the Applicant's licence to bear an official firearm is not an independent claim but rather that it is a claim that is interlinked with the selection process and does not stand alone. It is obvious that the MEU dealt with the firearm qualification issue as part of the Applicant's submissions on his non-selection decision.

68. The Respondent submitted that the Applications were not receivable *ratione temporis*. Pursuant to staff rule 11.2(c), a request for management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

69. On the matter of receivability due to the exhaustion of time, the Tribunal observes that it was never raised before the MEU whether the Applicant's requests were receivable, but rather the MEU had proceeded to review the Applicant's requests on the basis of the facts before it resulting in the contested decisions being upheld.

70. Just as the Tribunal has no power to extend time limits for management evaluation under art 8.3 of the Tribunal's Statute, it has no business examining, in a case like this, whether a management evaluation request was entertained out of time. It is up to the MEU to decide whether to deal with requests brought to it outside its own time limits. The MEU having affirmed the impugned administrative decisions, it is indeed strange that the same Respondent should seek at this stage to attack the process simply in order to convince this Tribunal to reject the Application.

71. The Tribunal adopts a presumption of regularity in respect of the MEU proceedings. The Respondent fully cooperated with the MEU and at no point during the proceedings did he challenge the receivability of the Applicant's requests.

72. The Tribunal finds on this score that the applications were filed within the applicable time limit and that all the Applicant's claims were properly submitted for management evaluation and are therefore receivable.

Was the non-selection of the Applicant for the posts of Security Lieutenant unfair and motivated by discrimination?

73. The Applicant submitted that the failure to select him for the post of Security Lieutenant was due to the fact that he had previously challenged irregular vacancy announcements. He testified that no explanation was given as to his unsuitability for the posts and that the candidates selected were either recently recruited, junior in rank and/or had been recently promoted/selected during the irregular selection process. He also argued that UNON/DSS had failed to disclose any superior qualifications possessed by the selected candidates in comparison to his.

74. The Applicant contended that the interview panel did not consider that despite the fact that his licence to bear a firearm had been revoked, he was capable of handling a firearm as he had once been a firearms instructor.

75. The Respondent submitted that he meticulously followed the requirements of the staff selection process and accorded the Applicant a full measure of his right to receive full and fair consideration for the posts and that the Applicant's seniority did not in any way entitle him to preferential treatment in the selection process. The Respondent submitted that the Applicant did not adduce any evidence to prove that there was a conspiracy to prevent his promotion.

76. The Respondent also submitted that the Applicant was assessed and found to possess the required qualifications and competencies for the posts. On the basis of that assessment, the interview panel placed the Applicant on the list of recommended candidates. The CRP subsequently endorsed him as one of the candidates possessing the competencies and other requirements for the posts and he was rostered for similar posts accordingly.

77. The Chief/DSS testified that the Applicant had not demonstrated any qualities to merit a promotion and that he could only select the Applicant if he showed improvement in his performance. The Tribunal is curious as to why the Applicant

would be placed on the roster in the first place if his promotion is entirely dependent on the whims of the Chief/DSS.

78. The Respondent submitted that the reason for the Applicant's non selection was that he was the weakest candidate and not because of his lack of firearms qualification as this was a desirable but not a required skill.

79. The MEU took into cognizance the fact that the Applicant had not completed the UN firearms qualification training while the other candidates had completed the said training as a justification for the Applicant's non-selection for the Security Lieutenant posts.

80. Mr. Lewis had testified that firearms qualification was considered by the interview panel as a desirable skill and although the Applicant's firearm licence had been revoked by the Chief UNON/DSS, the panel considered him as technically capable of handling a firearm because he was once a firearms instructor.

81. In a memorandum to the MEU dated 4 January 2011, Mr. Marshall wrote:

Mr. Luvai was found to be lacking in one of the other desirable skills noted in the two relevant vacancy announcements. Namely, he lacked 'certified knowledge or sound experience in handling of firearms' because he had not passed the UN firearm qualification course.

82. Clearly what Mr. Marshall explained to the MEU was that although the interview panel was satisfied that the Applicant had met all other requirements, it took the view that he had not met the "other" skills requirement because he did not pass the firearm qualification course and that this placed him behind other candidates.

83. The Tribunal cannot dictate what competencies the interview panel should consider in the selection process. Where, however, the said panel claims that it considered the Applicant as technically capable of handling firearms, it is easy to see from the interview records that this was not reflected in the Applicant's evaluation notes. Apart from the testimony of Mr. Lewis that the interview panel considered the

Applicant as technically capable of handling a firearm, the Respondent has not produced any documentary evidence to support the same. On the contrary all evidence points to the fact that the Applicant was not selected because he was considered as lacking firearms qualification.

84. Mr. Marshall's testimony conflicts with both what he himself wrote to the MEU and the testimony given by his deputy, Mr. Lewis. Mr. Marshall had told the Tribunal that the Applicant was not selected for the Security Lieutenant posts because he was the weakest candidate and not because of his firearm qualifications, while he had earlier written to the MEU clearly stating that the Applicant's non selection was due to his non completion of the UN firearms course. Mr. Marshall had also told the Tribunal that the interview panel considered the Applicant capable of handling a fire arm.

85. This unfortunate resort to blowing hot and cold over the issue on the part of the Respondent's agents raises serious doubts as to the integrity of the entire promotion exercise. Mr Marshall's memorandum to the MEU clearly shows that the MEU's decision was based on the misleading statements of the Chief of UNON/DSS.

86. The Dispute and Appeals Tribunals in their jurisprudence have consistently held that the Administration bears the burden of proving that a candidate was given full and fair consideration for appointment/promotion. Where an applicant alleges discrimination or unfairness in the appointment/promotion process, he/she bears the evidentiary burden.¹ In *Majbri* 2012-UNAT-200, the Appeals Tribunal stated that,

All the candidates that appear before an interview panel have the right to full and fair consideration. A candidate challenging the denial of a promotion must prove through a preponderance of the evidence any of these grounds: that the interview and selection procedures were violated; that the members of the panel were biased; that the panel discriminated against an interviewee; that relevant material was

¹ See for example in *Andrysek* 2010-UNAT-070 and *Rolland* 2011-UNAT-122.

ignored or that irrelevant material was considered; and potentially other grounds depending on the facts of each case.

87. Due to the lack of access to an official firearm as a result of the revocation of his licence since October 2006 by Mr. Marshall, the Applicant was not able to complete the UN firearms qualification course. The Applicant had successfully completed the “firearms instructor course” and the “Glock armourer’s course” in April 2005. He had also been a firearms instructor before the revocation. The Applicant no doubt had certified knowledge and sound experience in handling of firearms.

88. Having analysed the evidence before it, the Tribunal finds and holds that the interview panel, in spite of Mr. Lewis’ claims, failed to fairly consider the material issues on the Applicant’s firearm qualification and that this failure impacted unfavourably on the selection of the Applicant for the Security Lieutenant posts. It is also the Tribunal’s findings that because of the inclinations of the Chief, UNON/DSS who was hell-bent on truncating the Applicant’s chances of promotion, his candidacy was not fairly considered at the selection stage.

Was the withdrawal of the Applicant’s access to Lotus Notes a proper exercise of authority?

89. The Applicant submitted that the decision to suspend access to his Lotus Notes account violated his right to freely use ICT services without being “gagged” by the Chief, UNON/DSS and the Acting Chief of ICTS. The Applicant also submitted that the said decision constitutes a form of harassment, intimidation and discrimination against him.

90. The Respondent submitted that the decision to suspend the Applicant’s Lotus Notes account was a valid exercise of authority under staff rule 10.1(c) and ST/SGB/2004/15. The rules permit the Administration to suspend a staff member’s privilege to use the information technology resources if it has a basis to believe that

the organisation's assets are being misused for impermissible purpose such as the storage and dissemination of pornographic materials.

91. Paragraph 4.1 of ST/SGB/2004/15 provides that:

Authorized users shall be permitted limited personal use of ICT resources, provided such use: (a) Is consistent with the highest standard of conduct for international civil servants (among the uses which would clearly not meet this standard are use of ICT resources for purposes of obtaining or distributing pornography, engaging in gambling, or downloading audio or video files to which a staff member is not legally entitled to have access);

92. Paragraphs 6.1(a) and (b) of ST/SGB/2004/15 provide for the organisation's right to block or restrict access to any ICT resource or ICT data at any time and without notice when necessary for maintaining or restoring the technical integrity or performance or for any other appropriate purposes including prevention of prohibited activities, which include *inter alia*, storing and distribution of pornography.

93. The rules do confer authority on the Respondent's agents to restrict or block access without prior notice pending investigation of allegations of alleged misuse of ICT resources. However, such powers are to be used judiciously and not according to the whims of the authorizing officer.

94. In his testimony Mr. Marshall stated that:

- a. He had no powers to restrict the Applicant's access to Lotus Notes but had asked the ICT Chief to do whatever the Rules dictate in such matters.
- b. He has the discretion to ask the ICTS to restore the Applicant's access to Lotus Notes;
- c. He had not done so because it is not essential for the Applicant in carrying out his official duties;

- d. It was the Applicant's second offence and that he would only restore the Applicant's access to Lotus Notes if he gets an undertaking from the Applicant that such behaviour will not happen in the future.

95. Mr. Marshall's testimony is contradictory.

- a. While he said he had no powers to restrict the Applicant's access to Lotus Notes, he also told the Tribunal that he has the discretion to restore the access.
- b. Also while stating that access to Lotus Notes was not essential for the Applicant's performance of his official duties, he claimed to have instructed the Deputy Chief UNON/DSS to print out hard copies of all official correspondence and avail them to the Applicant.
- c. Although he testified that he would not restore the Applicant's access to Lotus Notes unless he received an undertaking and promise from him that he will not misuse the same in the future, he never told the Applicant as much.

96. If indeed the Chief UNON/ DSS needed an undertaking from the Applicant in order to restore the access to him, nowhere in the records is it shown that he demanded such an undertaking from him. Instead it is on the record that the Applicant on various occasions wrote to the Chief, UNON/DSS, Deputy Chief UNON/DSS and the Acting Chief UNON/ICTS complaining of the withdrawal of his access to Lotus Notes. Most of these were not replied to.

97. Paragraph 8.5(b) (ii) of ST/SGB/2004/15 provides that if necessary to ensure the integrity of the investigation, the staff member may be denied access to the ICT resources and the ICT data under investigation, including computers, electronic files and e-mail accounts. Section 8.5(f) also stipulates that, investigations shall continue

only for such time as is reasonably necessary to ascertain whether the suspected misconduct had occurred.

98. In the investigation report from the SIU/UNICTR, dated 12 August 2011 it was stated that: “following consultation between the OIC, ICTS and the Chief, UNON/DSS it was decided to deny the officers access to their accounts while an investigation was conducted.” This shows that Mr. Marshall was in fact involved in suspending the Applicant’s access to Lotus Notes and that the suspension of the Applicant’s access to Lotus Notes was intended only for the purposes of ensuring the integrity of the investigation.

99. In the present case, the investigation on the Applicant’s alleged misuse of ICTS resources was concluded on 12 August 2011. Para 3 of ST/AI/371 (Revised Disciplinary measures and procedures) directs that where the investigation report indicates that the allegation of misconduct is well founded, the head of the office or the responsible officer should immediately report the matter to the ASG/OHRM.

100. The investigation report was never sent to the ASG/OHRM for appropriate action. The Respondent has not shown that any measures were taken as a result of the investigations.

101. The Tribunal is of the view that if the withdrawal of the Applicant’s access to Lotus Notes was imposed only to secure the integrity of the investigation, the proper procedure would have been to restore access upon the completion of the investigation. Surprisingly, this is not the case and so from August 2011 when the investigations were concluded to date the Applicant’s access to Lotus Notes has not been restored while no disciplinary action was commenced against him.

102. The Tribunal finds that Mr. Marshall abused his position and authority by not restoring Applicant’s access to Lotus Notes even after the completion of the investigation.

Did the Chief, DSS/UNON abuse his authority with regard to the revocation of the Applicant's official licence to bear firearms?

103. The Applicant submitted that he had been intimidated and harassed in many ways by the Chief UNON/DSS. He submitted that the Chief UNON/DSS revoked his firearm licence without providing any reason and that the only real reason was to impede his career advancement in the United Nations.

104. The Respondent submitted that the withdrawal of the Applicant's firearm licence was subsequent to a procedure whereby the Applicant received counselling from the Human Resources Officers and was offered professional psychiatric counselling to resolve certain aspects of his behaviour that led the Human Resources Officer and Mr. Marshall to believe that the Applicant was unstable and therefore not fit to carry a firearm.

105. The Respondent further submitted that the withdrawal of the firearm licence was informed by the relevant UN firearm policy.

106. Pursuant to para. 1.4 of ST/SGB/2008/5(Prohibition of Discrimination, Harassment including Sexual Harassment and Abuse of Authority), "abuse of authority" is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion.

107. By a memorandum dated 10 October 2006, Mr. Marshall had revoked the Applicant's official firearm licence. The memorandum did not state any reasons but referred to the Policy Governing the Use of Physical Force and the Use of Firearms

by the United Nations Security Officers (hereinafter referred to as “UN firearms policy”) paras. D (7) and (8). Paragraphs D (7) and (8) state as follows:

(7) An officer shall not carry a firearm unless the officer has received training for that firearm in accordance with the applicable policies of the United Nations, and the Officer is authorized to carry the firearm ...by the Chief, United Nations Security and Safety Service.

(8) An officer shall only carry a firearm as and where authorized by the Chief of the Security and Safety Service.

108. It not in contention that the Applicant had successfully completed his “firearms instructor course” and the “Glock armourer’s course” in 2005 which explains why the Applicant was given a firearm. Paragraph D (7) poses a restriction to persons who have not received firearm training. The Applicant having completed firearm training and being authorised to carry a firearm, the question arises as to whether there were other reasons for revoking the Applicant’s official firearm licence.

109. While giving oral evidence before the Tribunal Mr. Marshall stated that:

- a. The withdrawal of the Applicant’s fire arm was due to performance issues. He could not recall the specific details of what led to his withdrawal of the Applicant’s firearm as this happened six years ago. There were many happenings at the time including, his performance, poor judgment attitudes and the safety of staff members. He decided to withdraw the Applicant’s fire arm to reduce the chances of an accident within the UNON complex.
- b. The Applicant was sent to counselling before the withdrawal of his firearm. The efforts at counselling were not successful and he was informed by the Human Resources Officer, Ms. Jamie

Kearney-Sassi and the Assistant Chief of Security UNON that the Applicant demonstrated instability. The Applicant may regain his weapon but he needs to show mental stability and an understanding of the UN policy on the use of force.

110. This testimony raises two major issues, first, the credibility of his testimony and second, the role of the Assistant Chief of Security UNON and the Human Resources Officer in counselling in this regard.

Mr. Marshall's testimony

111. Whereas Mr. Marshall's testimony was that he couldn't remember the actual events that informed his decision on the firearms issue regarding the Applicant as the revocation was done six years ago, he also said it was based on performance issues and the safety of UNON staff members. Details of these performance issues were never disclosed.

112. Mr. Marshall had obtained various adjournments from the Tribunal. It was expected that he would come prepared more so since he knew that he was coming to testify and he knew the contents of the case and Applicant's allegations against him. It is disappointing that the Chief of UNON/DSS could not explain or give details of the poor judgment, poor performance and the endangering of the lives of UNON staff members all of which he claimed the Applicant was guilty of.

113. Remarkably, the revocation letter did not reflect any of Mr. Marshall's testimony. If indeed Mr. Marshall's testimony on this score was truthful, it would at least have been reflected in the revocation letter or attested to by some documentary evidence. This was not the case.

114. The Tribunal is not in any doubt that a licence to bear firearms is important for the work of a Security Officer in the United Nations. The revocation of the

Applicant's licence to bear firearms has indeed impacted on his career advancement in the United Nations as the said revocation has been used to deny him promotion.

115. Mr. Marshall is a senior official within the UN/DSS, and was responsible for revoking the Applicant's licence to bear firearms. His contradictory and unreliable testimony attests to an unfortunate lack of credibility on his part.

Is there any role for the Chief, UNON/DSS, Assistant Chief of Security UNON and a Human Resources Officer in medical evaluation of staff members?

116. It was submitted for the Respondent that the Applicant had obtained counseling from a Human Resources Officer and the Assistant Chief of Security, UNON. Further, Mr. Marshall testified that his decision to revoke the Applicant's licence to bear firearms was reached after the Human Resources Officer and the Assistant Chief of Security UNON informed him that the applicant demonstrated mental instability.

117. In a note to file signed by one Mr. Alphonso Jasper and tendered as part of the Respondent's case, Mr. Marshall was said to have requested the Assistant Chief, Mr. Jasper, to counsel the Applicant and that on 15 September 2005 he scheduled a meeting with the Applicant and Ms. Kearney-Sassi, a HR officer at UNON. The Applicant was informed that the purpose of the meeting was to counsel him on his performance.

118. Another note to file also tendered by the Respondent and signed by the then Acting Deputy Chief of UNON/DSS stated that the Applicant was invited by telephone on another occasion to meet with one Ms. Ba, a stress counselor from New York. The Applicant refused and asked that the request to see a stress counselor be made to him in writing.

119. Three questions arise from this account of events; the first is whether a manager can unilaterally refer a staff member to counseling; the second is whether the Assistant Chief and the Human resources officer have any authority to provide

unsolicited counselling to a staff member while the third question is whether Mr. Marshall and the Human resources officer can declare a staff member mentally unstable. To the first two questions, the answers are no.

120. The provisions of the applicable ST/AI/2005/12 (Medical clearances) are clear that only the UN Medical Director or a medical officer duly authorized by him can, under permitted circumstances, make determinations as to a staff member's medical or mental state with a view to providing medical clearance where necessary. Certainly, it is not within the competence of the Chief, UNON/DSS, his deputy or a Human Resources Officer to usurp the powers of the Medical Director in this regard.

121. It is curious that these two senior officials who are not medical professionals and have no authority in medical matters came to a conclusion that the Applicant was mentally unstable following one meeting and one phone conversation with him.

122. Mr. Marshall had testified that he would not restore the Applicant's licence to bear firearms until he showed mental stability. The fact that Mr. Marshall has not even tried to make a case for a proper psychiatric evaluation of the Applicant more than six years after revoking his licence to bear firearms simply means that he is determined to continue to abuse his authority with regards to the Applicant and to frustrate the said Applicant's career prospects.

123. In *Kasmani* UNDT/2009/017, the Tribunal held that:

When an applicant seeks to impugn a decision of an administrative authority by challenging the legality or rationality of the decision, a failure by that authority to offer an answer to the allegations may justify an inference that its reasons were bad in law or that it had exercised its powers unlawfully.

124. The Tribunal finds and holds that by deciding through his own personal methods, and employing the assistance of an overreaching Human Resources Officer, to conclude that the Applicant is mentally unstable; Mr. Marshall's abuse of authority and position on this score is manifestly egregious.

Was the Applicant a victim of harassment in the work place?

125. The Applicant had alleged that the Chief, UNON/DSS had on various occasions harassed and intimidated him. He cited the revocation of his licence to bear firearm, the withdrawal of his access to Lotus Notes and his non-selection for the Security Lieutenant post as just a few examples of the ways that he had been harassed and intimidated by the Chief, DSS/UNON.

126. The Respondent argued that the revocation of the firearm licence was done after a proper procedure was conducted. The withdrawal of his access to Lotus Notes was done after receiving reliable information from the ICTS that the Applicant was storing pornographic materials in his office computer. There was no purported harassment as alleged by the Applicant and furthermore, he has not provided any evidence to show that he was harassed.

127. Harassment is defined in ST/SGB/2008/5 as any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents.

128. What is the proper procedure that was conducted before the withdrawal of the Applicant's firearm licence? Mr. Marshall even testified that he could not recall the circumstances that led to the said withdrawal of firearms. There is more than a preponderance of evidence to show that the Applicant had over several years been humiliated, abused, belittled and demeaned in a way that must not be tolerated in a standard-setting organization such as the United Nations. The Tribunal finds that the Applicant's workplace has been rendered most hostile for him for many years now. It is precisely situations like what we find happening in the UNON/DSS office in this case that the Secretary-General had promulgated ST/SGB/2008/5 to address.

Matters of concern for DSS/Headquarters

129. The Applicant has filed a total of five applications with the Tribunal. All of the Applicant's claims are based on the actions of the Chief, UNON/DSS against him.

130. This Tribunal is of the view that the situation of the Applicant in the UNON/DSS workplace does not bear out the noble intentions of the Secretary-General who has promulgated a special bulletin for the protection and respect of every staff member. The reaffirmation of faith in the dignity and worth of the human person boldly made in the preamble of the Charter of the United Nations must constantly remain a beacon for managers in this organization.

131. During the course of the proceedings in this case, this Tribunal had the opportunity to observe the demeanour of the witnesses and to fully study their pleadings and submissions. The unnecessary hostility and lack of respect between the Applicant and the Chief, UNON/DSS which have been on-going for several years were writ large throughout.

132. It is tragic that the Chief, UNON/DSS has felt free for so long to mistreat an officer working under him and has never been called to account. It is equally unfortunate that the affected staff member has been made to resign himself to the glaring fact that his eligibility for promotion will always be truncated.

133. The Tribunal is concerned that DSS/HQ appears to have failed so far to resolve this hostile working relationship which can only serve to compromise the safety and security of the staff members working within the UNON compound. At a time like this when the world in general and the United Nations in particular, is battling with serious and sophisticated security issues, UNON/DSS needs every resource at its disposal to remain vigilant. Its officers must be empowered to give of their best and such empowerment includes good faith in the giving of promotions where they are earned.

134. The Tribunal recommends that DSS/HQ should take more concrete actions in resolving this situation.

Findings

135. The following are the Tribunal's findings:

- a. The Applications were filed within the applicable time limit, all the Applicant's claims were properly submitted for management evaluation and are therefore receivable.
- b. The Applicant was not given full and fair consideration in the selection process. The Chief, UNON/DSS, has consistently employed personal methods to frustrate the Applicant's career prospects.
- c. The Applicant was a victim of harassment in the workplace. The Chief, UNON/DSS' actions constituted harassment as defined under para. 1.2 of ST/SGB/2008/5.
- d. The Chief, UNON/DSS abused and exceeded his authority by not restoring the Applicant's access to Lotus Notes after the investigations were completed and no further action was taken on the matter.
- e. The Chief, UNON/DSS abused his authority by revoking the Applicant's firearm licence without providing reasons for his decision.
- f. The Chief, UNON/DSS, the Assistant Chief of Security UNON and the Human Resources Officer, UNON abused their authority by usurping the powers of the Medical Director and declaring the Applicant mentally unstable.

Judgment/Remedies

136. In the light of its findings the Tribunal:

- a. Orders the Respondent to reinstate the Applicant's licence to bear a firearm;
- b. Orders the Respondent to restore the Applicant's access to Lotus Notes; and
- c. In view of the fact that the Applicant was not given a full and fair consideration in the selection process and that he was a victim of harassment and abuse of authority, the Tribunal awards compensation in the amount of six months' net base salary.

137. The Applicant is entitled to the payment of interest on the awards from the date this Judgment is executable at the US Prime Rate until payment is made. If payment is not made within 60 days of the date that this Judgment becomes executable, an additional five per cent shall be added to the applicable US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of February 2013

Entered in the Register on this 28th day of February 2013

(Signed)

Jean-Pelé Fomété, Registrar, Nairobi