



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/005

Judgment No.: UNDT/2013/040

Date: 28 February 2013

Original: English

**Before:** Judge Goolam Meeran

**Registry:** New York

**Registrar:** Hafida Lahiouel

CHARLES

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

Chenayi Mutuma, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a staff member in the Procurement Division of the Department of Management of the United Nations Secretariat in New York, contests the decision not to select him for the post of Procurement Officer (Team Leader), Field Supply Team, at the P-4 level (Job Opening No. 12-PRO-DMOCSS-24389-R-New York).

2. The key issue in this case is whether the Administration acted lawfully and in accordance with the principles and requirements of applicable issuances when they selected a roster candidate without considering the applications of non-roster candidates of whom the Applicant was one. Roster candidates are candidates previously reviewed and endorsed by a central review body as a result of a prior selection exercise for some position (although they were not selected for that position).

3. The Applicant submits that his candidature was not given proper consideration. He disputes the lawfulness of ST/AI/2010/3 (Staff selection system), as amended by ST/AI/2010/3/Amend.1. (Hereinafter the reference to ST/AI/2010/3 shall be read as a reference to its amended version, unless stated otherwise.) The Applicant asserts that the selection process was tainted with abuse of authority, bias and corruption. He also claims that the late response to his request for management evaluation caused him harm.

4. The Respondent denies the Applicant's claims. The Respondent submits that the application has no merit and that the decision to select a candidate for the job opening from the roster of pre-approved candidates was lawful and in accordance with ST/AI/2010/3, which allows the head of a department to select a roster candidate for a job opening without considering other applicants whose names are not on the roster.

## **Background**

5. The contested job opening was advertised from 10 July to 8 September 2012. In or about October 2012, OHRM released to the hiring manager in the Procurement Division a list of candidates for the job opening. The list contained 153 candidates, of whom five were on the roster of pre-approved candidates. The hiring manager did not review any non-roster candidates and instead recommended to the Director of the Procurement Division by memorandum of 25 October 2012 the selection of one of the candidates from the pre-approved roster. On 2 November 2012, the Director of the Procurement Division selected the recommended candidate. On 12 November 2012, the Office of Human Resources Management (“OHRM”) notified the Applicant of the decision to select a candidate from a roster of candidates pre-approved for similar functions at the level of the job opening.

6. By Order No. 50 (NY/2013), dated 22 February 2013, the Tribunal directed the Respondent to produce “[d]ocumentary evidence as to whether and how the non-rostered candidates who applied for the job opening were considered for it”. In response, the Respondent transmitted a confirmation from Mr. Philipp Mayrhofer-Grunbuhel, Team Leader, General Administration Team, Procurement Division, that the Procurement Division “did not review non-rostered candidates”.

## **The applicable instruments**

7. Article 101.3 of the Charter of the United Nations states:

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

8. Staff Regulations (ST/SGB/2012/1) state:

4.2 The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity....

4.3 In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.

4.4 Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations ... .

9. ST/AI/2010/3 states:

**Section 1**

**Definitions**

...

(i) *Generic job openings*: job openings which are based on generic job profiles, used for the purpose of creating and maintaining viable rosters of qualified and available candidates for immediate and anticipated job openings identified through workforce planning in entities with approval to use roster-based recruitment, peacekeeping operations, special political missions and other field operations;

...

(v) *Position-specific job opening*: a job opening used for the filling of an individual position at a specific duty station;

...

(x) *Selection decision*: decision by a head of department/office to select a preferred candidate for a particular position up to and including the D-1 level from a list of qualified candidates who have been reviewed by a central review body taking into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender, and giving the fullest regard to candidates already in the service of the Organization as well as those encumbering posts that are slated for abolition or are serving in secretariat entities undergoing downsizing and/or liquidation.

Selection decisions for positions at the D-2 level are made by the Secretary-General following review by the Senior Review Group;

...

## **Section 9**

### **Selection decision**

...

9.4 Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories and the Field Service category. Following the selection decision, roster candidates shall be retained in a roster indefinitely or until such time the present administrative instruction is amended. Candidates included in the roster may be selected by the head of department/office for a subsequent job opening without reference to a central review body.

9.5 Qualified candidates for generic job openings are placed on the relevant occupational roster after review by a central review body and may be selected for job openings in entities with approval for roster-based recruitment. The roster candidate shall be retained on an occupational roster indefinitely or until such time the present administrative instruction is amended. Should an eligible roster candidate be suitable for the job opening, the hiring manager may recommend his/her immediate selection to the head of department/office/mission without reference to the central review body.

## **Consideration**

10. The Respondent submits that the recommendation to select one of the candidates from the pre-approved roster was taken pursuant to its interpretation of ST/AI/2010/3 and pursuant to the Manual for the Hiring Manager on the Staff Selection System (Inspira) (“Inspira Manual”). In particular, the Respondent states that secs. 9.4 and 9.5 of ST/AI/2010/3 allow selection of roster candidates without consideration of those candidates who actually applied for the job opening.

11. The Respondent also refers to the Inspira Manual, which states that “the hiring manager may immediately recommend the selection of a qualified roster candidate among the released roster candidates”. Inspira is the Organization’s job web portal through which applicants and managers participate in the recruitment process.

*Paramountcy provisions of the Charter and staff regulations*

12. Article 101.3 of the United Nations Charter states that “the necessity of securing the highest standards of efficiency, competence, and integrity” is the “paramount consideration in the employment of the staff and in the determination of the conditions of service. Staff regulation 4.2 contains similar language.

13. In section II, para. 1 of resolution 61/244, the General Assembly reiterated that the Secretary-General has to ensure that the highest standards of efficiency, competence and integrity serve as the paramount consideration in the employment of staff. In section II, para. 10 of the same resolution, the General Assembly requested the Secretary-General to

promote the full utilization of existing rosters for recruitment and to further elaborate the use of pre-screened rosters, based on the organizational needs identified through strategic workforce planning, taking into account the need for transparency, support for the provisions of Article 101 of the Charter and administrative and resource implications, as well as geographical and gender mandates[.]

*Specific-position job openings and generic job openings*

14. Although the Respondent refers to both secs. 9.4 and 9.5 of ST/AI/2010/3, the Tribunal notes that sec. 9.5 applies to generic job openings. The Tribunal finds that the advertised position was not a generic job opening but a position-specific job opening as it was used “for the filling of an individual position at a specific duty station”. (For the difference between the two types of job openings, see secs. 1(i), 1(v), 4.2, and 4.3 of ST/AI/2010/3.) The advertised post was for a specific position of

the Team Leader of the Field Supply Team in the Procurement Division in New York. Accordingly, sec. 9.4 of ST/AI/2010/3 applied to this case.

15. There are certain benefits of being placed on the roster for position-specific job openings (sec. 9.4 of ST/AI/2010/3), such as being considered for a larger pool of job openings without having to apply for each of them and not having to go through the central review body process, if selected. (There are also additional benefits for qualified candidates for *generic* job openings (sec. 9.5) who are placed on the relevant *occupational* rosters.) However, an automatic appointment without a selection process that affords other candidates full and fair consideration and contrary to the paramountcy requirements of art. 101.3 of the United Nations Charter and staff regulation 4.2 is not one of such benefits, as explained below.

*Roster candidate considered for a position-specific job opening do not belong to a separate class of applicants*

16. In a number of cases before the Dispute Tribunal, including *Kasyanov* UNDT/2009/022, the Respondent placed significant reliance on the paramountcy requirements of the Charter and Staff Regulations. *Kasyanov* concerned the proper interpretation of ST/AI/2006/3, which contained the recruitment procedure prior to ST/AI/2010/3. ST/AI/2006/3 envisaged separate classes of candidates who would be given exclusive priority consideration by 15-day, 30-day, and 60-day marks. That former scheme defined these three separate classes of candidates (see secs. 5.4–5.6 of ST/AI/2006/3), provided reasons for their composition, and contained selection procedures that had to be followed with respect to each class.

17. In *Kasyanov*, the Respondent argued that although ST/AI/2006/3 required the Administration to first consider 15-day candidates and only then consider 30-day candidates, it was appropriate for the Administration to mix the two classes in order to ensure that the best available candidate was selected pursuant to art. 101.3 of the Charter. The Respondent asserted that provisions of ST/AI/2006/3 (i.e., Administration's own administrative issuance) were actually inconsistent with

the Charter and were therefore *ultra vires* (see paras. 39–49 of *Kasyanov*). Judge Adams found that the relevant provisions of ST/AI/2006/3 were not in conflict with the Charter, but that the Respondent’s interpretation of the administrative instruction was erroneous. His Honour found that ST/AI/2006/3 required eligible 15-day candidates to be considered on a priority basis, that there were justifiable and lawful reasons for it (see para. 40 of *Kasyanov*), and that this was consistent with the paramouncy provisions of the Charter and Staff Regulations.

18. Unlike the former scheme for 15-day, 30-day, and 60-day applicants, it is unclear why a roster candidate would get an advantage in a selection exercise at the expense of other candidates and contrary to the paramouncy requirements. Unlike the position with 15-day, 30-day, and 60-day candidates, the only distinguishing feature of roster candidates is that they have applied for some other position previously and were deemed eligible and available—but were not selected as there was a better candidate and were instead put on a roster. The Respondent’s interpretation of ST/AI/2010/3, in effect, allows rostered candidates to be treated as a privileged class above other candidates for position-specific job openings. No such priority consideration exists for roster candidates under ST/AI/2010/3. Simply put, they are not a separate privileged class of candidates for position-specific job openings and cannot be treated as such. This was not the purpose of the roster, which was mainly to speed up the recruitment process by avoiding the stage of a referral to the central review bodies if a roster candidate is considered the best candidate when compared to all other candidates.

#### *Selection of rostered candidates*

19. The selection decision is the decision made at the final stage of the selection process, after an objective comparison of eligible candidates. The Tribunal finds that an appointment to a position-specific job opening without giving proper consideration to all candidates would be contrary to the United Nations Charter and the elaborate selection procedures in ST/AI/2010/3.



20. If the selection scheme allowed the selection of rostered candidates for position-specific job openings without consideration of any other candidates, as suggested by the Respondent, the wording of ST/AI/2010/3 would be different. For example, sec. 7.2 of ST/AI/2010/3 requires OHRM to “release electronically to the hiring manager ... the applications of candidates who have successfully passed the pre-screening process, together with the names of pre-approved eligible candidates [i.e., roster candidates], for *consideration for selection*” (emphasis added). Section 1(x) makes it clear that the process of selection involves “giving the *fullest* regard to candidates *already in the service* of the Organization” (emphasis added). There cannot possibly be “fullest regard” given to candidates already in service of the Organization if the selection decision is made without proper consideration of non-rostered candidates and without due regard to the paramountcy requirements in the Charter and Staff Regulations.

21. ST/AI/2010/3 does not provide for the practice whereby non-roster candidates may be completely disregarded. Candidates from a pre-approved roster who are considered for position-specific job openings still have to be compared against other, non-rostered, candidates. However, if selected, they do not have to be referred to the central review bodies for approval pursuant to sec. 9.4 of ST/AI/2010/3. It should be noted that while requesting the Secretary-General to promote the full utilization of existing rosters, the General Assembly highlighted in resolution 61/244 the need to ensure the highest standards of efficiency, competence and integrity as the paramount consideration in the employment of staff.

22. The Tribunal finds that the provisions of ST/AI/2010/3 are consistent with the paramountcy requirements of art. 101.3 of the Charter and staff regulation 4.2. However, this case reveals a practice on the part of the Respondent that is inconsistent with a proper interpretation of ST/AI/2010/3 since it allows managers an unreasonably wide discretion to disregard non-roster candidates. It would appear that this practice has evolved from an incorrect understanding and application of ST/AI/2010/3.

23. As confirmed by the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, staff members applying for positions within the United Nations have the right to full and fair consideration (*Majbri* 2012-UNAT-200, *Charles* 2012-UNAT-242). The Tribunal finds that, by not considering the Applicant because he was not a previously rostered candidate, the Administration failed to give him such full and fair consideration.

#### *Inspira Manual*

24. The Respondent also appears to place undue reliance on the *Inspira Manual*. The Respondent's reliance on that document is misconceived. As the Tribunal stated in *Villamorán* UNDT/2011/126, at the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions. Information circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

25. While ST/AI/2010/3 had to go through a stringent process prior to its promulgation, the *Inspira Manual* did not. It does not have the same legal authority as a properly promulgated administrative issuance. Its only purpose is to attempt to explain in plain language what the relevant administrative issuances mean and how they should be implemented. It certainly cannot override the provisions of ST/AI/2010/3 or the United Nations Charter. Although circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, they may do so only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship (*Korotina* UNDT/2012/178). Just as a staff rule may not conflict with the staff regulation under which it is made, so a practice, or a statement of practice, must not conflict with the rule or other properly promulgated administrative issuance that it elaborates (*Korotina*).

*Breach of the Applicant's rights to full and fair consideration*

26. Accordingly, the Tribunal finds that by not giving proper consideration to the Applicant's candidacy for the job opening as a result of considering only rostered candidates, the Respondent breached the Applicant's rights.

*Other matters*

27. Although the Applicant alleged bias and discrimination, the Tribunal notes that the record before it does not support this allegation. Rather, it appears that the Procurement Division applied an incorrect procedure by disregarding entirely the applications of the non-rostered applicants for the position.

28. One of the ancillary claims of the Applicant concerns the delay in receiving a management evaluation response. The Tribunal notes that art. 8.1(d) of the Tribunal's Statute as well as staff rule 11.4(a) state that an applicant may file an appeal before the Dispute Tribunal if he or she has not received a response to his request for management evaluation within the response period. The Applicant's claim that the delayed management evaluation response caused him loss or damage is misconceived and is dismissed.

*Relief*

29. The Applicant was one of the 153 candidates whose names were released to the hiring manager. In the circumstances, it would be highly speculative for the Tribunal to even attempt to estimate the Applicant's chances of success. It is clear that he was deprived of his right to full and fair consideration, and suffered some harm as a result. The Tribunal finds that, in the circumstances, the sum of USD1,000 is sufficient to compensate him for loss of chance and consequential harm suffered.

**Conclusion**

30. The Tribunal awards the Applicant USD1,000 as compensation for the breach of his rights and resultant harm.

31. This amount is to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

*(Signed)*

Judge Goolam Meeran

Dated this 28<sup>th</sup> day of February 2013

Entered in the Register on this 28<sup>th</sup> day of February 2013

*(Signed)*

Hafida Lahiouel, Registrar, New York