



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2012/054

Judgment No.: UNDT/2013/101

Date: 6 August 2013

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

NGOKENG

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-Represented

**Counsel for Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant is a staff member of the International Criminal Tribunal for Rwanda (“ICTR”) based in Arusha, Tanzania, and serves as a Reviser on a P-4 post on a fixed-term appointment.

2. On 5 December 2012, he filed the present Application contesting two administrative decisions outlined as follows:

a) The decision to suspend the selection process for the position of Chief of the Language Services Section at the ICTR as advertised in job opening No. 12-ADM-ICTR-21952-R-ARUSHA (O) and to reject his application for the same so as to retain the incumbent beyond the retirement age.

b) The improper evaluation of his performance for the 2011/2012 performance cycle.

3. On 7 January 2013, the Respondent filed his substantive Reply which in addition refuted the receivability of this Application on primarily three grounds, namely:

a) The Application has been prematurely conceived as a final decision is still pending in respect of the contested selection process. Thus, there is no final administrative decision to be challenged under the Statute of the Dispute Tribunal.

b) The comments on the Applicant’s performance document do not constitute an administrative decision within the meaning of article 2.1(a) of the Statute of the Dispute Tribunal.

c) The rejection of the Applicant’s application for the post and the suspension of the selection process do not carry any direct legal effects on the Applicant’s contract of employment.

## **Factual Background**

4. On 16 February 2012, Job Opening No. 12-ADM-ICTR-21952-R-ARUSHA (O) (“Job Opening No. 21952”) was published for the post of Chief of the Language Services Section (“LSS”) at the ICTR. It is not in contention that at the material time of the publication of the job opening, the incumbent of the advertised position, Ms. Justine Ndong-Keller, was the Applicant’s direct supervisor.

5. Ms. Ndong-Keller was scheduled to retire and hence separate from the Organization on 30 April 2012. The recruitment for her post was initiated with the publication of Job Opening No. 21952 on 16 February 2012.

6. According to the Applicant, in addition to the stipulations on the eligibility criteria for candidates applying for the post, the said Job Opening limited eligibility to interpreters by including a heretofore unprecedented requirement that candidates for the job opening were required to ‘have a demonstrated ability to interpret’.

7. The Applicant applied for the vacancy on 16 March 2012 and in his cover letter to the application noted his disquiet over the incorporation of the requirement for interpretation skills in the job opening.

8. On 24 April 2012, the Administration notified the Applicant that recruitment in respect of the position of the Chief of LSS had been suspended and could ‘possibly reopen at a later date.’ No reasons were adduced in the notification for the suspension of the recruitment process.

9. According to the Respondent, the Applicant was among five applicants who were found eligible for the job opening but whose applications were eventually rejected for failing to manifest an ability to interpret pursuant to the vacancy announcement.

10. Following the suspension of the selection process for the position of Chief of LSS, Ms. Ndong-Keller, continued encumbering the post.

11. On 18 April 2012, Ms. Ndongo-Keller, acting in her capacity as the Applicant's First Reporting Officer ("FRO"), emailed him his statistics for the two performance cycles of 2010/2011 and 2011/2012 by way of attachments and requested him to call on her on 19 April 2012 for discussions on his 2011-2012 performance cycle.

12. On 27 April 2012, Ms. Ndongo-Keller finalized her evaluation of the Applicant for the 2011/2012 performance cycle and rated him as having successfully met performance expectations. However, in her overall comments on the Applicant's e-PAS, she indicated that the Applicant had a 'serious problem of output' and noted that the matter had been raised with him during the end of performance cycle discussions.

13. On 8 May 2012, Mr. Pascal Besnier, the Applicant's Second Reporting Officer (SRO) signed off on the Applicant's ePAS and made comments thereto thanking the Applicant for his contribution and commending him.

14. On 9 May 2012, the Applicant signed off on his ePAS and included therein observations disputing the First Reporting Officer's assessment of his performance in relation to output.

15. According to the Applicant, he further sent a memorandum to his FRO on 10 May 2012 in which he stated that her evaluation of his performance had been influenced by bad faith, discrimination and self-interest. This memorandum was copied both to the Applicant's SRO and to senior members of management at the ICTR.

16. The Applicant's FRO responded by an email dated 10 May 2012 in which she reiterated the Applicant's acknowledgment of her prerogative to evaluate her subordinates' performance and further stated that the other matters raised in the Applicant's memo were to be left to the appropriate quarters. She further invited the Applicant to see her for purposes of executing an improvement plan.

17. On 20 June 2012, the Applicant submitted a request for management evaluation of two decisions:

a) The first related to the decision by the Administration to suspend the recruitment process for the position of the Chief of LSS in respect of Job Opening No. 21952, to reject the Applicant's application for the same position and to extend the incumbent's contract beyond the stipulated retirement as well as the vacancy announcement used for the selections decision.

b) The second was the decision by the Applicant's FRO, Ms. Ndongo-Keller to improperly evaluate the Applicant's performance for the 2011-2012 performance cycle and to make dishonest comments in reprisal for the Applicant's application to her post.

18. On 24 August 2012, a job opening for the position of Chief, LSS was posted as No. 12-ADM-ICTR-23993-R-ARUSHA (R) (Job Opening No. 23993) In that Job Opening, the demonstrated ability to interpret was listed as a desirable asset.

19. On 6 September 2012, the Management Evaluation Unit ("MEU") responded to the request for evaluation and advised the Applicant that because the ICTR had informed them that the selection process for the position of Chief, LSS, was to be resumed and that the impugned vacancy announcement was to be revised to reflect the ability to interpret as merely a desirable trait as opposed to a requirement, the request for evaluation was not receivable and/or moot.

20. The MEU nevertheless noted that there appeared to be internal inconsistencies between the Applicant's overall ratings and the overall comments made by the Applicant's FRO regarding the existence of a work output problem.

21. On 11 October 2012, six months after the evaluation period, the Applicant's FRO requested a roll-back of the Applicant's 2011-2012 e-PAS report for purposes of ensuring consistency between the competency and core value ratings, comments and the overall performance rating following the letter by MEU dated 6 September 2012.

22. In her amended evaluation effected through a Note for the File dated 11 October 2012, the Applicant's FRO revised her earlier assessment of the Applicant's rating for the Teamwork and Communication competencies from a rating of 'fully meets performance expectations' to one of 'requiring development'. She further noted in her overall comments that the Applicant had serious output problems and further indicated that on several occasions, the Applicant had failed to exhibit the expected Teamwork and Communication spirit as well as failed to effect a timely delivery of his work assignments, the latter being a shortcoming that she brought to the attention of the Applicant.

23. The Applicant's FRO and SRO both signed off on the first amendment to the 2011-2012 e-PAS report on 11 October 2012. In the first amended performance evaluation, the Applicant's SRO noted in his comments that he concurred with the FRO's evaluation.

24. Ms. Ndongo-Keller further amended her assessment of the Applicant's performance a second time in a Note for the File dated 11 October 2012. In that instance, her overall comments were that the Applicant has 'serious output problems' and she indicated that the Applicant had failed to deliver work assignments within prescribed time frames and included the need for the Applicant to improve on the same. The Applicant's overall performance rating in the second amended evaluation remained that of 'successfully meets performance expectations.'

25. The Applicant's FRO and SRO both signed off on the second amendment to the Applicant's 2011-2012 e-PAS report on 8 November 2012.

26. On 8 November 2012, Ms. Charity Kagwi-Ndungu, a legal officer in the Office of the Chief of the Division of Administrative Support Services Section wrote to the HR Help desk through an email in which she stated as follows:

- a) The original Note for the File as drafted by the Applicant's FRO following the Roll back of the 2011-2012 e-PAS had no comments on core competencies.
- b) The comments on core competencies were included on account of good faith efforts by Ms. Kagwi-Ndungu after seeking

advice from the Chief of SDTU, Nairobi, who had recently concluded a training event at the ICTR on performance evaluation.

c) MEU had rendered advice on 12 October 2012 indicating that the purpose of redoing[sic] the e-PAS vide a Note for the File was limited in scope to ensuring internal inconsistencies by rectifying the discrepancy among overall comments, overall ratings and individual rating, which advice had been noted [presumably by the Applicant's FRO].

27. In her email dated 8 November 2012, Ms. Kagwi-Ndungu instructed HR to expunge the Note for the File as filed on 11 October 2012 and to instead submit the original Note for the file which did not contain any comments on core competencies that was drafted by the FRO [and which was attached in her email to HR dated 8 November 2012].

28. On the basis of the instructions in Ms. Kagwi-Ndungu's email dated 8 November 2012, the amended Note for the File dated and signed on 11 October 2012 that was previously submitted to the Human Resources Helpdesk was expunged from the record and the Note for the File signed by Ms. Ndongo-Keller and Mr. Besnier on 8 November 2012 was replaced in its stead.

### **Procedural Background**

29. The Applicant filed a Motion for Extension of Time to file an Application on 6 November 2012 requesting an extension of 30 days within which to complete his application on the merits. The Tribunal granted the Applicant's Motion on 7 November 2012 and he accordingly filed his substantive Application on 5 December 2012, to which the Respondent filed a substantive Reply on 7 January 2013 contesting the receivability of the Application.

30. On 9 January 2013, the Tribunal directed the Applicant to file any comments on the Respondent's challenge to receivability no later than 1 February 2013.

31. On 10 January 2013, the Applicant moved the Tribunal for leave to file a comprehensive response to the Respondent's Reply. The motion was granted by the Tribunal on the same date and the Applicant was directed to file submissions

specifically responding to matters of receivability as raised by the Respondent and a separate submission responding to the merits no later than 1 February 2013.

32. On 31 January 2013, the Applicant filed two separate comprehensive submissions on receivability and on the merits respectively.

33. On 1 February 2013, the Applicant filed a Motion for Production of Evidence for the Respondent to disclose evidence which he needs to establish his case.

34. The Tribunal rendered its Judgment on Receivability dated 28 March 2013 in which the Application was found to be receivable.

35. Vide Order No. 084(NBI/2013) dated 17 April 2013, the Tribunal directed the parties to attend a case management hearing, which was accordingly conducted on 24 April 2013.

36. Subsequent to the case management hearing, the Tribunal issued a Notice of Hearing and Scheduling Order No. 091(NBI/2013) dated 26 April 2013 setting the matter down for hearing on the merits on 10 - 12 June 2013.

37. On 3 May 2013, the Respondent filed a Motion for Extension of Time to file Amended Pleadings pursuant to Order No. 091(NBI/2013) on grounds that Counsel had not received sufficient instructions to enable compliance with the order. The Applicant filed his response to this Motion on 6 May 2013.

38. On 7 May 2013, the Tribunal extended the time limits stipulated in Order No. 091(NBI/2013) and on 10 May 2013, the Respondent filed his additional pleadings and annexures thereto.

39. The Applicant filed his response to the Respondent's submissions dated 10 May 2013 on 17 May 2013.

40. On 20 May 2013, the Applicant filed an urgent Motion for an Order directing the Respondent to comply with his disclosure obligations under Order No. 091(NBI/2013).



41. On 10 June 2013, hearing on the merits was conducted in this matter. The Applicant rested his case on his pleadings filed before the Tribunal. Ms. Justine Ndongo-Keller and Mr. Pascal Besnier were called to testify on behalf of the Respondent.

### **Applicant's Case**

42. The following contentions form the pillars of the Applicant's case:

a) The entire selection procedure revolving around Job Opening No. 21952 was a sham and not in actual fact aimed at identifying a competent successor to the incumbent of the post.

b) The Job Opening was part of a procedural sham that was published ostensibly to conform to the Organizational rules governing selection whereas the ultimate, improper and unlawful goal was to justify the extension of Ms. Ndongo-Keller's contract. This blocked the Applicant's considerable chances of promotion to the post of Chief, LSS.

c) The unprecedented eligibility criteria in the Job Opening limiting eligibility to interpreters by requiring eligible candidates to have a 'demonstrated ability to interpret' was improperly motivated by the incumbent's desire to secure the extension of her contract beyond her retirement age, contrary to the rules of the Organization on the retention in service of staff members beyond the mandatory age of separation.

d) Further, the eligibility criterion of a 'demonstrated ability to interpret' must be understood within the context of the ICTR draw down process where senior managers had projected the complete halt of ICTR trial activities in 2012 and which in fact did halt in July 2012. The Applicant contends in this regard that the functionality of interpreters was only to service court hearings and that after July 2012, the bulk of the work of the LSS would consist of translation and not interpretation. Under these circumstances, limiting the eligibility of the post to interpreters was highly suspect.

- e) The review and subsequent amendment of the eligibility criterion of a demonstrated ability to interpret in Job Opening No. 21952 to merely a desirable asset in Job Opening No. 23993 corroborates the Applicant's claim that his FRO was driven by improper motives in drafting the first job opening.
- f) The publication of the amended job opening on 24 August 2012 did not serve to rescind the impugned Job Opening No. 21952 since it related to a completely new job opening and did not cure the prejudice and injury caused to and suffered by the Applicant in respect of the first job opening.
- g) The decision of the Hiring Manager to reject the Applicant's application in respect of Job Opening No. 21952 and to suspend the selection process was improper and violated his right to a full and fair consideration of his application.
- h) It is also the Applicant's case that the decision to reject his application and that of other candidates' and to retain the incumbent, contrary to organizational rules on retention in service beyond the mandatory age of separation, was improper and unlawful.
- i) With respect to his performance evaluation by the FRO, the Applicant maintains that it was unfair and included false claims of a serious output problem and false allegations of teamwork and communication shortcomings.
- j) The Applicant submits that the dishonest, unfair and improper evaluation of his performance by the FRO was tantamount to abuse of authority which seriously damaged his professional reputation and violated his right to equal treatment and to a consistent and fair performance evaluation.
- k) The Applicant contends that in light of his previous performance ratings, the last of which was the 2011/2012 cycle for which his overall

rating was 'exceeds performance expectations', he could not in all likelihood have had an output problem as alleged by his supervisor.

l) The Applicant further maintains that his FRO's initial evaluation of the 2011/2012 cycle is invalidated by both its inconsistency with the opinions of the SRO and the discrepancy between his overall performance rating and overall comments.

m) The Applicant further claims that the use of statistics by his FRO to evaluate his performance was unreasonable on the following grounds:

i) His FRO had discontinued her predecessor's method of using statistics to measure output.

ii) In the course of the 2011/2012 performance cycle, Ms. Ndong-Keller failed to raise any output problem or other performance shortcoming for that matter during mid-point review or at any other point.

iii) Ms. Ndong-Keller's use of statistics was discriminatory with respect to the Applicant.

n) The Applicant submits that it was dishonest and unfair of his FRO to accuse him of teamwork and communication problems in light of his time spent in coaching and mentoring other staff in the section and his work undertaken to translate all Vacancy Announcements published by the ICTR in *Inspira*.

o) The belated referral to the Applicant's alleged output-related problems indicates that the FRO failed to discharge her obligation to continually review his performance during the cycle and to assist him to find a solution to any performance shortcoming.

p) With reference to the first amended evaluation, it was unlawful for officials who were neither familiar with his work nor designated as his additional supervisors under the provisions of ST/AI/2010/5 to assist his

FRO to evaluate his performance and to give her more ammunition in “good faith” and more so for his FRO to either seek or accept their assistance.

q) It was unlawful for the Applicant’s FRO to downgrade his performance rating in respect of the teamwork and communication competencies at a time when he had filed a request for management evaluation in respect of her actions in the matter.

r) The second amended evaluation is also flawed to the extent that the alleged output problem was retained even in light of the fact that a Retention Panel at the ICTR awarded him a perfect score on output for the period 1 April 2011 to 30 September 2012.

s) Ultimately, the successive evaluations of the Applicant’s performance by Ms. Ndongo-Keller for the 2011/2012 cycle were inherently vitiated by her improper intentions to ruin his career prospects to succeed her as the Chief, LSS at the ICTR.

### **The Respondent’s Case**

43. The Respondent’s case as gleaned from his pleadings and the oral testimony of his witnesses is outlined below as follows:

44. The initial Job Opening No. 21952 and the selection process commenced under it was not a sham and was initiated for the sole purpose of identifying a successor in anticipation of the retirement of the Chief of LSS. The Respondent accordingly rebuts the Applicant’s claim that the recruitment process for Job opening No. 21952 was a sham or that it was intended to justify the retention of the incumbent Chief of LSS beyond her retirement age.

45. The Respondent maintains that Job Opening No. 21952 was drafted in order to reflect operational needs of the ICTR and the Language Services Section within the context of ICTR’s completion strategy which justified a revision in the requirements for the work experience as was set out in previous job openings for the post of Chief, LSS.

46. It is the Respondent's case that interpretation Services are required until the closure of the ICTR and one of the functions of the Chief of the Language Services Section is to supervise and evaluate interpreters. It was reasonable therefore for the hiring manager to include the requirement that the incumbent should have a demonstrated ability to interpret.

47. The Respondent adopts the position that the Hiring Manager for Job Opening No. 21952 had the prerogative to establish the evaluation criteria to be used in the recruitment process and this was done with due regard to the relevant provisions of the administrative issuances on the selection process.

48. The Respondent argues that the decision by the Hiring Manager to require work experience in interpretation with respect to Job Opening No. 21952 did not target the Applicant, who in any event knew at the time of his application for the post that he did not meet one of the mandatory requirements of Job Opening.

49. Hiring Managers have a wide discretion in drafting job openings and while it is a matter of policy for job openings to be based on the greatest extent possible on a previously published job opening, deviation therefrom is permissible.

50. The Hiring Manager's decision to require work experience as an interpreter was justified and the Applicant bears the burden of proving ulterior motives in that regard, which he has failed to do.

51. The decision to suspend the recruitment in respect of Job Opening No. 21952 was based on an objective assessment of the five applicants to the position who failed to meet mandatory requirements for the post. Thus, the decision to suspend the recruitment process was justified and was not actuated by improper motives.

52. All candidates, including the Applicant, for the post of Chief, LSS, in respect of Job Opening No. 21952 were fully and fairly evaluated for the post but failed to satisfy the evaluation criteria and the job opening was cancelled.

53. On the matter of the Applicant's performance for the 2011/2012 cycle, the Respondent argues that Ms. Ndongo-Keller evaluated the output of all revisers in LSS for the 2011/2012 cycle on the basis of output statistics.

54. On the matter of Ms. Ndongo-Keller's retention in service beyond the mandatory age for her separation, the Respondent submits that the Registrar of the ICTR has the discretion and authority to extend her beyond retirement age.

55. The Respondent further contends that the Applicant's performance for the 2011/2012 performance cycle was fairly appraised and that the comments in his performance document on his output complained of in this Application are a fair and balanced evaluation of his performance because the Applicant deliberately refused to work and produced well below the normal output expected of him.

56. It is also the Respondent's case that the roll-backs of the Applicant's ePAS were neither irrational nor unfounded and were effected to address the inconsistencies between the overall performance rating of the Applicant and the comments by the Applicant's First Reporting Officer in accordance with the relevant administrative issuance on the performance evaluation of the staff members.

### **Issues**

57. Upon its review of the entire record of the case before it, the Tribunal has framed the issues arising for its consideration of this matter in the following questions:

- a) Was the inclusion of the requirement for a "demonstrated ability to interpret" in Job Opening No. 21952 motivated by improper purposes?
- b) Did the Hiring Manager have the discretion to reject all pre-screened candidates sent to him by OHRM in respect of Job opening No. 21952 and thereafter suspend the recruitment process for the post of Chief of LSS at the ICTR?

c) Was the Applicant's performance evaluation properly and lawfully carried out by his First Reporting Officer for the performance cycle of 2011/2012?

d) Was the extension of contract for Ms. Ndongo-Keller as Chief of the LSS beyond the mandatory age of retirement lawful?

e) Is there is a nexus between the suspension of Job Opening No. 21952 the Applicant's performance evaluation for the 2011/2012 performance period and the non-retirement of Ms. Ndongo-Keller as at 30 April 2012?

### **Considerations**

*Was the inclusion of the requirement for a "demonstrated ability to interpret" in Job Opening No. 21952 motivated by improper purposes?*

58. The applicable legal framework governing the recruitment, placement, promotion and mobility of staff is ST/AI/2010/3 (Staff Selection System). Section 4.5 thereof provides as follows:

*The job opening shall reflect the functions and the location of the position and include the qualifications, skills and competencies required. Job openings, to the greatest extent possible, shall be based on generic job profiles approved by OHRM, a previously published job opening or a previously classified individual job description reflecting the actual functions of the position (emphasis added). The evaluation criteria of job openings created on the basis of individually classified job descriptions require approval by a central review body.*

59. Evidence before the Tribunal clearly shows that Job Opening No. 21952 was drafted by the Applicant on the instructions and under the supervision of Ms. Ndongo-Keller.

60. In Job Opening No. 21952, the section on 'Work Experience' stipulated as follows:

A minimum of twelve years of progressively responsible experience in translation and revision in the language services of an international organization, a national administration or a large

scale private organization, with at least five years within the United Nations. Sound experience in the planning, coordination and supervision of translation services. Demonstrated ability to interpret. Training skills and experience would be an asset.

61. One of the issues raised by the Applicant is that the requirement of work experience as an interpreter in Job Opening No. 21952 was unprecedented in the history of the ICTR and was unlawful for having been actuated by Ms. Ndongo-Keller's improper motivation to scuttle the selection process. This, he contended, was done with a view to justifying the extension of her contract beyond the statutory age-limit for separation on the ground that no candidate could be found to qualify for her post.

62. On his part, the Respondent has pleaded that not only did the hiring manager comply with the relevant provisions of ST/AI/2010/3, but that it was within the said Hiring Manager's prerogative to establish the evaluation criteria to be used in the recruitment process. In that regard, the Respondent submitted that the inclusion of work experience as an interpreter in Job Opening No. 21952 was in consonance with the operational needs of the Language Services Section and the ICTR.

63. During the hearing on 10 June 2013, Ms. Ndongo-Keller testified that she instructed the Applicant to draft the said Job opening No. 21952 on account of her being pre-occupied with other engagements of her office at the material time and because the Applicant told her that he was not interested in the post. She also testified to having reviewed the drafts by the Applicant and making revisions thereto after receiving the last version of the draft job opening and sending it to the Hiring Manager.

64. It is important to note at this point that ST/AI/2010/3 contemplates that the Hiring Manager shall be responsible for establishing the evaluation criteria in a job opening by providing at Section 4.4 thereof that the 'Hiring Manager shall be responsible for creating the Job Opening.' In October 2012, a document titled 'Manual for the Hiring Manager on the Staff Selection System (Inspira)' was published by the Organization to amplify ST/AI/2010/3. Under the section titled 'Creating the Job Opening', it states that:



The Hiring Manager is responsible for the accuracy of the evaluation criteria. However, he/she *may request assistance from the Human Resources recruitment team* (emphasis added).

65. In the present instance, the Hiring Manager was the Applicant's SRO, Mr. Pascal Besnier, who was also Ms. Ndongo-Keller's FRO. Both in his oral testimony and in his witness statement, Mr. Besnier stated that Job Opening No. 21952 was drafted by the Applicant under the supervision of Ms. Ndongo-Keller and thereafter he [Mr. Besnier] 'approved' it as the Hiring Manager.

66. In the circumstances described by the witnesses, two questions arise as follows:

- a) Could Job Opening No. 21952 be amended in the manner asserted by the Respondent?
- b) Was it proper for the Hiring Manager to abdicate his responsibility for establishing the evaluation criteria for Job Opening No. 21952 to the incumbent of the post?

67. With regard to the first question, it must be noted that section 4.5 of ST/AI/2010/3 provides that a job opening should adhere to the greatest extent possible with either generic job profiles approved by the Office of Human Resource Management ("OHRM"), previously published job openings or previously classified individual job descriptions that reflect the actual functions of a position being advertised. Additionally, reference is made to the Hiring Manager's Manual which provides under section 5.5 that the job description 'must be aligned with the base document,' which is either a Generic job profile, a previously published job opening or a previously classified job opening.

68. Section 5.5.1.6 of the Hiring Managers' Manual under the title 'Work Experience' goes as far as to clearly state that 'the nature of the required work experience should not deviate from the generic job profile or the classified job description.' This simply means that the base document is the controlling document to be used in establishing the evaluation criteria for the determination of the eligibility of candidates for the advertised post.

69. The Respondent's Counsel has argued that while job openings shall be based to the greatest extent possible on a previously published job opening, deviation from previously published job openings is permissible. In that regard, the case of *Krioutchkov*, UNDT/2010/065 was cited in support of that proposition. It was held in that case that:

Accordingly, requirements differing from those expressed in a generic job profile which are seen as necessary or desirable for the particular post are permitted. Indeed, PCOs, when building vacancy announcements and evaluation criteria, are instructed that "elements of [the generic job profile] which are at a generic level should not be copied wholesale in [the vacancy announcement/evaluation criteria]."

70. However, in *Liarski*, UNDT/2010/134, it was held that:

Requirements differing from those expressed in a generic job profile which are seen as necessary or desirable for the particular post are permitted, *provided that the drafters of the vacancy announcement are not influenced by extraneous or ulterior motives when drafting the job requirement* [emphasis added].

71. In this instance, the Applicant's case rests to a large extent on allegations of bad faith and improper motive on the part of his supervisors in drafting the job opening in issue. The Tribunal must therefore be satisfied that the deviation from the generic job profile or previously published job openings was made in the interests of the Organization and in good faith. In the event that the absence of good faith is established in the deviation from previously published job openings or the generic job profile, then the authority of *Krioutchkov* relied upon by the Respondent is irrelevant.

72. The Applicant tendered before this Court two respective Job Openings formerly published for the position of Chief of the Language Services Section at the ICTR. In VA No. 06-CON-ICTR-410974-R-ARUSHA for the position of Chief of the Language Services Section, P-5, issued on 3 July 2006, the requirements for work experience was listed as follows:

**Work Experience**

At least 12 years' experience in translation and revision at responsible level, in the language services of an international

organization or national administration, or a large-scale private organization. Sound experience in the planning, coordination and supervision of translation services.

73. In VA 07-CON-ICTR-408807-R-ARUSHA issued on 10 January 2007 for the position of Chief, Language Services Section (“LSS”) at the ICTR, P-5, on which Ms. Ndong-Keller was selected, the requirements for work experience were detailed as follows:

**Work Experience**

At least 12 years’ experience in translation and revision at responsible level, in the language services of an international organization or national administration, or a large-scale private organization. Sound experience in the planning, coordination and supervision of translation services.

74. On 10 June 2013, Ms. Ndong-Keller testified that the ‘interpretation requirement has always been in the VA’ for the post of Chief, LSS. This piece of testimony on her part is not borne out by the facts or corroborated by the available documentary evidence. In the absence of any vacancy announcements or job profiles for that matter tendered before the Court in support of Ms. Ndong-Keller’s claims, the Tribunal finds that Ms. Ndong-Keller was being economical with the truth when she testified that the requirement for work experience in interpretation has always been included in the vacancy announcements for the post of Chief, LSS.

75. Do the reasons given by the Respondent to explain the deviation from the previous job openings accord with the evidence on record?

76. Neither Mr. Besnier nor Ms. Ndong-Keller testified as to the base document they used to establish the evaluation criteria for Job Opening No. 21952 and the requirement for work experience as an interpreter. Instead, in his witness statement, Mr. Besnier stated that three of four previous Chiefs of LSS have had a demonstrated ability to interpret and that the inclusion of the ability to interpret as a requirement in the Job Opening reflected the experience of the ICTR in recruiting for the position and identifying the experience required to oversee the provision of the language services to the Trials and Appeals Chambers. He also

stated that the incumbents of the equivalent position of Chief of Language at other international tribunals have experience in interpretation.

77. His oral testimony of 10 June 2013 however differed. He told the Tribunal that the requirement for work experience as an interpreter was included in Job Opening No. 21952 because it was an important part of the work of the Section and a 'good idea' in addition to it making 'sense' for the Chief of the Languages Section to be able to interpret because the interpreters at the ICTR are engaged in interpretation work both during court sessions and at other regular meetings at that Tribunal.

78. On her part, Ms. Ndong-Keller testified that when the Applicant raised the issue of the inclusion of the work experience as an interpreter in the said Job Opening, she told him that work experience in interpretation for the Chief of Language Services has always been a requirement in the preceding vacancy announcements. She further testified that the ICTR staff members were leaving *en masse* and that when the ICTR recruited more staff, some interpreters would have to be trained and oriented in their duties and the Chief of the Language Section consequently needed experience in interpretation. She said further exigencies could arise necessitating the Chief of LSS interpreting in Court.

79. During the said hearing on 10 June 2013, the Tribunal questioned Mr. Besnier on the number of new interpreters recruited at the ICTR since 2012, and he responded that he was not in a position to know. In response to the same question on the number of interpreters recruited at the ICTR since 2012, Ms. Ndong-Keller, who was still the incumbent of the post Chief of the Section during the hearing on 10 June 2013 told the Tribunal that none had been recruited as the ICTR does not have the necessary resources. It is therefore difficult to understand her explanation that the inclusion of work experience in Job Opening No. 21952 was necessary to ensure that the next incumbent of the post of Chief of the LSS needed work experience as an interpreter in order to train and orient new interpreters in the Section for a Tribunal that had started a draw-down process.

80. The Tribunal finds that none of the arguments and claims made by the Respondent's witnesses on the decision to include work experience as an

evaluation criterion in Job Opening No. 21952 withstands its careful and anxious scrutiny. Even if any predecessors to the post of the Chief of LSS had a demonstrated ability to interpret; the considered opinion of the Tribunal is that a job opening elicits information about the job and not the incumbent of the post. Although the incumbent can affect the post, the essence of the rules regulating establishment of the evaluation criteria is to ensure that the said criteria capture the characteristics of the job and not those of the incumbent. Indeed, this case serves to underscore the reason for promulgation of ST/AI/2010/3 and section 4.5 therein, which includes the curtailment of arbitrary and freewheeling amendments to the evaluation criteria for a post as happened here.

81. The entire thrust of Ms. Ndong-Keller's and Mr. Besnier's testimony was that the inclusion of work experience an interpreter in Job Opening No. 21952 was crafted within the context of changes to the functions of the post of Chief of the LSS and with respect to new developments at the ICTR at the material time. Even if the Tribunal was accordingly persuaded, ST/AI/1998/9 (System for the Classification of Posts) is categorical on the appropriate procedure to be followed if that were the case.

82. Section 1.1(c) thereof provides that requests shall be made for the classification or reclassification of a post, as the case may be,

*prior to the issuance of a vacancy announcement, when a substantive change in the functions of a post has occurred since the previous classification.*

83. In the particular circumstances of this case, the above section 1.1 of ST/AI/1998/9 must be understood in the context of the latter provisions of Section 4.5 of ST/AI/2010/3 which provides that:

The evaluation criteria of job openings created on the basis of individually classified job descriptions require approval by a central review body.

84. It is glaringly apparent however that in this instance, a central review body was never convened for that purpose.

85. The Tribunal has carefully reviewed Job Opening No. 21952 and concludes that nothing therein required the successful candidate to provide any interpretation services as Chief of LSS.

86. The Tribunal therefore finds as a fact that the inclusion of the requirement of work experience as an interpreter in Job Opening No. 21952 was unprecedented as it was never part of the previously published job openings under which Ms. Ndong-Keller or her predecessors were recruited under as Chief of the LSS at the ICTR.

87. With regard to the drafting of the competencies of the Job Opening in issue, the Tribunal is of the view that Mr. Besnier unprofessionally abdicated his responsibility as a Hiring Manager and allowed the incumbent of the post, Ms. Ndong-Keller, to unlawfully amend the competencies of the Job Opening for the self-same post she was to retire from effective 30 April 2012. It is indeed curious that these amendments and the resulting Job Opening were published only about two months to Ms. Ndong-Keller's due retirement date.

88. The Tribunal now turns to examine whether the inclusion of the "demonstrated ability to interpret" as a core requirement in Job Opening No. 21952 was actuated by improper and extraneous considerations on the part of Ms. Ndong-Keller and Mr. Besnier.

89. It is interesting to note that subsequently, Job Opening No. 23993 for the post of Chief, LSS, which was published on *Inspira* on 24 August 2012, differed critically from Job Opening No. 21952. Under work experience, it was stated as follows:

**Work experience**

A minimum of 12 years of progressively responsible experience in translation and revision in the language services of an international organization, a national administration or a large scale private organization, with at least five years within the United Nations. Sound experience in the planning, coordination and supervision of translation services. *Demonstrated ability to interpret desirable.* Training skills and experience would be an asset.

90. It is easy to see that in Job Opening No. 23993 which was published after the cancellation of Job Opening No. 21952, the requirement for a demonstrated ability to interpret was stated as merely desirable rather than a required competence.

91. Mr. Besnier testified that he gave the approval for the change in the evaluation criteria for Job Opening No. 23993 ‘a few days before August 2012’. Further, in his witness statement, he stated that the delay in posting the revised job opening was occasioned by the management evaluation process initiated by the Applicant.

92. The decision by the Hiring Manager to revise the evaluation criteria in respect of interpretation experience in Job Opening No. 23993 merely to ‘desirable’ completely unravels his claims with regard to the inclusion of the requirement in Job Opening No. 21952 in the first instance.

93. It can also be seen that contrary to Mr. Besnier’s testimony that the interpretation criteria was necessary in Job Opening No. 21952 to ensure that the incumbent of the post could train and orient new interpreters, Ms. Ndongo-Keller told the Tribunal that new interpreters have not been recruited by the ICTR since 2012. Does the removal of the interpretation criteria in Job Opening No. 23993 leave it open for the Tribunal to conclude that the supposed new developments at the ICTR were merely false claims?

94. Mr. Besnier also stated that the inclusion of the interpretation criteria in Job Opening No. 21952 was necessary to identify the skill-set and experience required to oversee provision of the language services to the Trials and Appeals Chambers. Did the subsequent removal of the interpretation criteria mean that the skill set required for the position of Chief, LSS had changed?

95. Moreover, Mr. Besnier stated with regard to Job Opening No. 23993 that he wanted to attract a larger number of applicants for the position, which is presumably why he approved the removal of the interpretation criteria as a requirement in Job Opening No.23993. The fact remains that after the aborted Job Opening No. 21952, the Hiring Manager published a new Job Opening on 24

August 2012 removing the requirement of interpretation which was evidently introduced by Ms. Ndongo-Keller. In doing so, Mr. Besnier finally paid heed to the proper functions of a Hiring Manager which was to be later expounded in the Organization's Hiring Manager's Manual published in October 2012. At paragraph 5.5, it is clearly stated:

The required work experience is defined in such a way as to attract a suitable pool of qualified applicants. Job openings that are too generally defined might attract a large pool of applicants who are generally qualified but do not necessarily meet the specific requirements of the position. Alternatively, *if the required experience is too specific, this may eliminate perfectly suitable applicants who lack a narrowly defined requirement. Too narrow a description could also lead to concerns that the job opening has been tailored to suit a particular applicant* (emphasis added).

96. In light of the foregoing, the Tribunal finds as a fact that the inclusion of the requirement for work experience in interpretation in Job Opening No. 21952 for the post of Chief, LSS was not effected in the best interests of the Organization or to secure the highest standards of efficiency, competence and integrity for that matter.

97. The Tribunal further finds and holds that the inclusion of the interpretation criteria as a requirement in Job Opening No. 21952 was informed by the desire of Ms. Ndongo-Keller with the apparent and active support of Mr. Besnier as the Hiring Manager to ensure that the recruitment process in respect of Job Opening No. 21952 was aborted.

98. It is clear that bad faith, improper and extraneous considerations and self-interest informed the inclusion of interpretation experience as a requirement in Job Opening No. 21952.

99. No doubt, the exercise of the authority of the Respondent's agents were tainted by abuse of power, bad faith, prejudice, arbitrariness and other extraneous factors, the presence of which contribute to a flawed and consequently unlawful administrative decision. This also served to violate the Applicant's right to a full and fair consideration of his application for the post in Job Opening No. 21952.



100. The Tribunal consequently holds that the inclusion of a “demonstrated ability to interpret” as a decisive requirement in Job Opening No. 21952 was unlawful.

*Did the Hiring Manager have the discretion to reject all prescreened candidates sent to him by OHRM in respect of Job Opening No. 21952 and thereafter suspend the recruitment process for the post of Chief of the Language Services Section at the ICTR?*

101. It is in evidence that 17 applicants applied for Job Opening No. 21952 for the post of Chief, LSS. Of the 17 applicants, 12 of them were screened out by *Inspira*, as they failed to meet the eligibility requirements. The remaining five applications for the post were then forwarded by Office of Human Resources Management (“OHRM”) to Mr. Besnier as the Hiring Manager for his review.

102. Mr. Besnier testified that after reviewing the said applications, he decided to reject all of them because he considered that they all individually fell short of the eligibility criteria stipulated in Job Opening No. 21952. He did not make a shortlist but rather terminated his evaluation of the candidates and on 24 April 2012, caused them to be notified by email that the recruitment for the position had been suspended.

103. Section 7.1 of ST/A/2010/3 provides that applications to job openings are prescreened by OHRM to determine whether they meet the minimum requirements of the job opening. It is on this basis that 12 applicants were screened out of the recruitment process for Job Opening No. 21952.

104. Section 7.2 of ST/AI/2010/3 provides that after the prescreening process conducted through OHRM, it electronically releases, for position-specific job openings as was the case in this instance, the applications of candidates who have “successfully passed the prescreening process together with the names of pre-approved eligible candidates, for consideration of selection.” In the present case, the names of the five eligible candidates for Job Opening No. 21952 were released to Mr. Besnier on the basis of the said provision.

105. The next step in the recruitment process is outlined in section 7.4 of ST/AI/2010/3 as follows:

The hiring manager *shall* further evaluate all applicants released to him or her and *shall prepare a shortlist of those who appear most qualified* for the job opening based on a review of their documentation.

106. In a memorandum to the Chief of the Human Resources and Planning Section (HRPS) dated 4 April 2012 and copied to the then Registrar of the ICTR and the Chief of the Division of Administrative Support Services, Mr. Besnier claimed that none of the candidates fully met the evaluation criteria. As is also evident from his handwritten analysis of the said candidates submitted to the Tribunal, he considered that three of the candidates, including the Applicant, did not have the ability to interpret whereas two of the candidates did not have any requisite experience as revisers.

107. It is the considered view of this Tribunal that no interpretation whatsoever of Section 7.4 of ST/AI/2010/3 allows the Hiring Manager any discretion to reject *all* the applications of eligible candidates forwarded to him or her by the Office of Human Resources Management.

108. ST/AI/2010/3 systematically outlines the manner in which the prescreening and assessment of candidates for job openings is to be conducted. Section 7.4 therein is not phrased in discretionary terms and requires that the Hiring Manager shall prepare a shortlist of eligible candidates of those who appear 'most qualified' for the job opening. This is however not to say that *all* eligible candidates must be included in the shortlist.

109. It was submitted by the Respondent that section 7.4 does not require a hiring manager to create a shortlist if none of the candidates meet the criteria for the job opening as to do so would violate article 101.3 of the Charter of the United Nations. It was further argued that the hiring manager can only short-list applicants who possess the required qualifications and that where qualifications are marked as required and these are not met by an applicant, such an applicant is screened out as he or she is considered not eligible. In support of this contention and as explanation for the decision to cancel Job Opening 21952, the Respondent relied on the guidance in paragraph 6.10.6 of the Hiring Manager's Manual which states that:

In the event the assessment panel concludes that none of the applicants were found suitable for the position, the assessment of the applicants will be properly recorded in Inspira by the Hiring Manager. The Hiring Manager will then submit to the Senior Recruiter a request to cancel the job opening, along with a detailed written justification explaining the reason why none of the applicants were found suitable.

110. The Respondent's reliance on paragraph 6.10.6 of the Hiring Manager's Manual above is as erroneous as it is premature. The reference to an assessment panel in that paragraph envisages that the recruitment process would have progressed beyond the shortlisting of eligible candidates and that an assessment panel of staff members has been convened to either conduct oral interviews or administer written tests to shortlisted candidates in line with the next step in the recruitment process. It is only after the Hiring Manager has sent the list of shortlisted candidates to the assessment panel that the said panel may make any decisions on the suitability of the candidates, or lack thereof. It is only at this point that the guidance of section 6.10.6 of the Hiring Manager's Manual stated above can take effect.

111. In the present instance, Mr. Besnier did not shortlist any candidates with respect to Job opening No. 21952. No assessment panel was convened. The Hiring Manager is not an assessment panel by himself. The only available evidence is that Mr. Besnier made the decision to truncate the recruitment process on his own and without reference to any assessment panel or Human Resources. If indeed Mr. Besnier rejected the applications to Job Opening No. 21952 on the strength of section 6.10.6 of the Hiring Manager's Manual, he did so in exercise of powers he did not have.

112. In any event, the Tribunal finds the Respondent's arguments on the suspension of the recruitment process for Job Opening No. 21952 both misguided and specious. Reference is made to section 9.2 of the Hiring Manager's Manual which is so pertinent to the present issue that it is here below fully reproduced:

During the preliminary evaluation of each applicant, the Hiring Manager will review and rate each applicant in the three areas (academic, language and experience). The Hiring Manager may place the applicant in one of the following lists:

a. Not Suitable - these applicants are rated unsatisfactory in *any one* of the three areas (academic, language or experience). No general comments are required; however, it must be self-evident as to why the applicant is not suitable.

b. Long List - *these applicants seemingly meet the basic evaluation criteria but may not meet the desired qualifications as outlined in the job opening. They are considered qualified for the job and should be placed on the long list for further consideration and possible movement to the short list.* A rating is required for each area (academic, language and experience) but a general comment is ONLY required for staff members of the United Nations Secretariat.

c. Short List - these applicants seemingly meet the basic evaluation criteria as well as all defined desirable qualifications as outlined in the job opening. They are considered the most promising applicants for the job and should be convoked to an assessment exercise and/or interview to be conducted by the assessment panel. A rating is required for each area (academic, language and experience) and a general comment is required for ALL applicants.

113. Nowhere, either in ST/AI/2010/3 or in the Hiring Manager's Manual, is it open for the Hiring Manager to completely reject the list of *eligible* candidates forwarded to him by OHRM. OHRM is the Organization's only entity charged with the provision of professional and proficient human resources management services. Its legal mandate means that the forwarding of the five applicants as eligible candidates to Mr. Besnier in the present case was done within the context of advice by a professional unit with the necessary expertise.

114. If Mr. Besnier was genuinely of the view that OHRM had made a monumental error in sending the names of the five prescreened candidates as to render the recruitment process an absurdity, nothing would have been easier than to contact OHRM and inform them of this monumental blunder on their part and seek their guidance accordingly. Instead, Mr. Besnier exceeded his mandate and initiated the cancellation of the job opening even where he had no authority to do so and certainly without any reference to the Registrar of the ICTR. ST/AI/2010/3

does not contemplate suspension of the recruitment process for the reasons given by Mr. Besnier.

115. In the case of *Contreras*, UNDT/2010/153, the Programme Manager cancelled an initial vacancy announcement. He informed the Executive Director that none of the candidates met the criteria for the vacancy announcement. Before the Tribunal, he sought to explain that he cancelled the vacancy because his assistant was not available and that he was swamped with work. The Dispute Tribunal held that the cancellation of the vacancy announcement was in contravention of the applicable legal issuance and held that the manager had no 'such prerogative, power or discretion' to do so. This decision was subsequently affirmed on appeal before the Appeals Tribunal in *Contreras*, 2011-UNAT-150.

116. In the instant case, the Tribunal finds that the Hiring Manager, Mr. Besnier, erred in rejecting all the applications of the five eligible candidates to Job Opening No. 21952. It further finds that Mr. Besnier's cancellation of the said Job Opening was done *ultra vires* the legal issuance vesting him with the powers and duties of a Hiring Manager.

117. With regard to the particular circumstances of this case, the Tribunal is not in any doubt that the cancellation of Job Opening No. 21952 was effected as part of a greater scheme aimed at ensuring that Ms. Ndongo-Keller was retained in service beyond the mandatory age limit of separation. This sophisticated manipulation of the recruitment process was nevertheless unlawful, and consequently vitiates the decision to suspend Job Opening No. 21952.

118. The Tribunal makes no hesitation in finding and concluding that the recruitment process for Chief, LSS through Job Opening No. 21952 was a complete procedural sham and was intended as a perfunctory means of satisfying the requirements of ST/AI/2010/3. This conclusion is further buttressed by the fact that after retaining Ms. Ndongo-Keller beyond retirement age on the claim that none of the five candidates satisfied the new criteria for the job, another Job Opening was later issued by Mr. Besnier in which he removed the new competency introduced by Ms. Ndongo-Keller in Job Opening No. 21952.

*Was the Applicant's performance evaluation for the performance cycle of 2011/2012 properly and lawfully carried out by his First Reporting Officer?*

119. It is in evidence that in the Applicant's ePAS for the 2011/2012 performance cycle, which was finalized on 27 April 2012, the Applicant received an overall performance rating of "successfully meets performance expectations." In the overall comments section, the Applicant's FRO, Ms. Ndongo-Keller stated as follows:

Staff member is one of the French Revisers at the LSS. There is a serious problem of output. We talked about it during the end of cycle discussion and I trust that he will endeavor to solve it.

120. The Applicant has raised allegations of bad faith and improper motives on the part of Ms. Ndongo-Keller in her evaluation of his performance for the said period. Specifically, he has challenged the entire evaluation process, the circumstances surrounding it as well as the comments made by Ms. Ndongo-Keller. He submitted that the said performance evaluation was improper and unlawful. He further alleged that any performance shortcomings in output on his part were never discussed with him during the midpoint performance review or at any time.

121. The Respondent's agents have raised several arguments to challenge the Applicant's submissions. It was argued in the Respondent's Reply that the comments made by Ms. Ndongo-Keller in the Applicant's 2011/2012 ePAS represent a balanced view of his performance and that his performance had dropped in terms of quantity during that performance cycle. In the Respondent's additional pleadings filed on 10 May 2013, it was submitted that the Applicant's actual output was well below what was expected of him as a reviser. The Respondent however conceded that the Applicant had a higher output in 2011/2012 than in the previous year in which his FRO had rated his performance as "Frequently exceeds performance expectations."

122. In her witness statement, Ms. Ndongo Keller stated that the Applicant's performance shortcomings began when his wife was not recruited for a position as a proof reader in LSS in 2009 and that the Applicant decided to 'underperform' in protest. She further stated that the Applicant's output shortcoming was discussed

during the midpoint review in ‘October 2012.’ Additionally, she stated that during the Applicant’s end of term discussion with her for the 2011/2012 cycle that was held in her office on 19 April 2012, the Applicant declared that he had decided not to fully perform his duties due to his ‘frustration resulting from his wife not being employed by the ICTR.’ As a result of the Applicant’s refusal to work, she had to await the arrival of a new staff member hired under a temporary appointment to assist in the revision of a judgment.

123. Ms. Ndong-Keller also testified that the Applicant’s output problems in 2009 were not quite obvious at the time but she was constrained to formally address them in 2011 at the point of the midpoint review because the LSS was inundated with work at the time. She said that she held an individual discussion with the Applicant on the matter of his output at the said mid-point review and that the Applicant promised that he would make improvements to his delivery of output. Further, she said that during the end-term discussion with the Applicant, he told her that he had decided not to work and that he was sitting in his office reading his books.

124. Three questions arise from her testimony as follows:

- a) Why did Ms. Ndong-Keller in evaluating the Applicant’s performance for the 2009/10 and 2010/11 performance cycles consistently rate him an asset to the LSS and as “exceeding performance expectations” when according to her testimony, she found him to be underperforming?
- b) Did Ms. Ndong-Keller raise her alleged shortcomings in the Applicant’s output at the midpoint review of the 2011/2012 performance cycle?
- c) Was her evaluation of the Applicant’s performance for 2011/2012 a fair and balanced appraisal?

125. With regard to the first question, it is in evidence that for the 2009/2010 performance cycle in which the Applicant allegedly developed output problems, he received a rating of “frequently exceed performance expectations.” In her overall comments for that performance cycle, Ms. Ndong-Keller stated:

The SM [staff member] is a top-notch material with tremendous talent, professional determination in his field of competence; he is one of the rare French Revisers at the LSS. A dependable colleague and an asset for the LSS. Congratulations for a job very well done.

126. It is difficult to understand why Ms. Ndong-Keller was lauding the Applicant to high heavens in the 2009/2010 ePAS when she now testifies that his output had begun to suffer. The same is the case for the 2010/2011 ePAS, in which the Applicant again received an overall rating of “exceeds performance expectations” and the laudatory comments below:

Staff member is one of the rare French Revisers at the LSS; he is a very dependable, available and reliable colleague. He is always ready to go beyond the call of his normal duties. He coaches all Translators and especially young Revisers in the Section. A real asset for the LSS. I congratulate him for a very successful cycle.

127. Section 9.5 of ST/AI/2010/5 (Performance Management and Development System) provides that a rating of “exceeds performance expectations” is applicable where the staff member significantly surpasses the success criteria and performance expectations in quantity and quality.

128. Ms. Ndong-Keller’s testimony about the alleged onset of the Applicant’s performance shortcomings in output in 2009 is not borne out by the evidence on the record. The Tribunal is not persuaded and is further not prepared to accept that a supervisor would so glowingly lionize a staff member in performance appraisal when that staff member’s performance was below expectations. To do so would be an unpardonable falsehood and an egregious breach of the provisions of ST/AI/2010/5.

129. The Tribunal finds that Ms. Ndong-Keller purported to address the Applicant’s shortcomings only after it had become obvious that she was able to avoid separation when her retirement was due, and that the Applicant had applied, contrary to her expectations, for a job that she was not willing to vacate. She was clearly being economical with the truth when she testified that the Applicant’s performance shortcoming in output began in 2009. If indeed her testimony was true, Ms. Ndong-Keller should have taken steps as the Applicant’s FRO to arrest the situation pursuant to the provisions of ST/AI/2010/5, but did not. Instead, she



lauded the Applicant's performance until the *volte face* in the 2011/2012 performance cycle.

130. As to the question whether Ms. Ndongo-Keller had raised any issues of under-performance with the Applicant during the mid-cycle review of 2011/2012, it should be noted that under section 5.1(b) of ST/AI/2010/5, the FRO is responsible for conducting the midpoint review and final evaluation. The same issuance at section 5.1(e) also provides that the FRO is charged with developing an improvement plan in consultation with a staff member in the event of any performance shortcomings or underperformance as the case may be.

131. Section 7.1 of ST/AI/2010/5 provides that the FRO and the staff member should hold either formal or informal discussions in the course of the year to address any shortcomings '*as they become apparent at any time during the cycle*'. The midpoint performance review is convened for this purpose and is held six months after commencement of the cycle's work plan.

132. Section 10.1 of ST/AI/2010/5 also requires an FRO to continually evaluate a staff member's performance. The section specifically requires that when a performance shortcoming is identified within the particular cycle [in which it occurs], the FRO is to "proactively" assist the staff member to remedy the shortcoming.

133. The remedial measures outlined in section 10.1 of ST/AI/2010/5 include counseling, transfer to more suitable functions, additional training or a *time-bound performance improvement plan* which includes clear targets for improvement or provisions for coaching by the FRO.

134. In the Applicant's ePAS for 2011/2012, Ms. Ndongo-Keller signed off on the mid-point review on 10 October 2011. No mention was made therein of a performance shortcoming in output or any discussion on the initiation of a performance improvement plan as part of a remedial plan of action. Instead, it was in her overall comments at the end-point discussion that she wrote that the "serious problem of output" was discussed with the Applicant during the '*end of cycle discussion*.'

135. Section 10.2 of ST/AI/2010/5 further provides for the preparation of a written performance improvement plan where the performance shortcoming is not rectified and the staff member receives a rating of “partially meets performance expectations.” Section 10.4 provides that a performance improvement plan should be initiated not less than three months before the end of the cycle.

136. In light of the foregoing review of the evidence and the law, the Tribunal finds that Ms. Ndongo-Keller did not address the Applicant’s output during the midpoint performance review in October 2011.

137. The Tribunal must now examine whether the Applicant was fairly appraised for the 2011/2012 performance cycle.

138. The Applicant received an overall rating of “successfully meets performance expectations.” However, in the same ePAS, Ms. Ndongo-Keller noted that the Applicant had a ‘serious problem of output.’

139. In section 9.6 of ST/AI/2010/6, a rating of “successfully meets performance expectations” is considered where the staff member has ‘fully achieved’ the defined success criteria and /or expectations for majority of the goals or key outputs during the cycle.

140. A perusal of the Respondent’s comparative table of output<sup>1</sup> shows that for the 2010/2011 performance cycle, the Applicant revised a total number of 855 pages. This was in addition to his performing other duties such as coaching and assisting other revisers in the section. In the 2011/2012 performance cycle, the Applicant revised a total number of 880 pages in addition to translating Vacancy Announcements in *Inspira*. It is somehow curious that when the Applicant revised a lower number of pages in the 2010/2011 cycle, he received a rating of “exceeds performance expectation” when it is clear that the highest number of pages revised in any of the performance cycles as disclosed to the Tribunal was the 2011/2012 period. This was the same period in respect of which Ms. Ndongo-Keller claimed the Applicant had a serious problem of output.

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<sup>1</sup> Respondent’s Annex 5

141. In her written testimony, she sought to explain this discrepancy on the basis that performance cycles are different and are rated differently and that notwithstanding that the Applicant revised a higher number of pages during the 2011/2012 cycle, the actual returns compared to the volume of work he was required to produce was lower.

142. She stated that the expected output for a reviser in the United Nations is 3960 words per day, or 12 pages per day.

143. The Tribunal has noted that the output of 12 pages per day she claims is expected of every reviser is based on A/57/289 (Report of the Secretary-General on Improving the Performance of the Department of General Assembly Affairs and Conference Management.)<sup>2</sup> There is no evidence that the standard of 12 revised pages per day for revisers applied to revisers in ICTR who had to revise legal texts and court documents that are expectedly different from those of the General Assembly and conference services.

144. In the absence of evidence showing that the Applicant had not met his goals as set out in his work plan, the Tribunal finds that Ms. Ndongo-Keller's claims that the Applicant's actual returns compared to the volume of work he was expected to accomplish was lower, is an afterthought and a spurious and hasty rationalization to justify her belated and incredible claims that the Applicant had under-performed.

145. The Management Evaluation Unit ("MEU"), following a request by the Applicant for management evaluation of his 2011/2012 performance rating, noted in its letter to Ms. Ndongo-Keller that her overall rating of the Applicant was glaringly inconsistent with her comments on his output. The MEU also noted that the comments about a serious problem of output were inconsistent with the Applicant's individual ratings for the core value of professionalism and the competencies of planning, organization and accountability.

146. Following the observations by the MEU, Ms. Ndongo-Keller requested a roll back of the Applicant's ePAS through a Note for the File on 11 October 2012. In an attempt to ensure consistency between her overall rating and her comments

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<sup>2</sup> A/57/289

and the competency and core value ratings, she downgraded the ‘fully competent rating’ that she had originally given the Applicant in the core competencies of team work and communication to ‘requiring development.’ She also commented that he had failed on several occasions to exhibit the expected team work and communication spirit essential to a harmonious work environment.

147. In the roll back to the ePAS, she maintained the same overall comment that the Applicant has serious output problems. In this instance, Mr. Besnier who was the Applicant’s SRO concurred with Ms. Ndongo-Keller’s evaluation, contrary to his congratulatory remarks to the Applicant in the ePAS finalized on 27 April 2012. It is the considered opinion of the Tribunal that the action by Ms. Ndongo-Keller to approbate and reprobate her evaluation of his performance for 2011/2012 was done in utmost bad faith to punish the Applicant for his audacity in applying for a post she did not intend to relinquish through Job Opening No. 21952 and in his request for management evaluation in respect of her actions against him. It speaks to a high degree of incompetency and a lack of leadership on the part of Mr. Besnier that he willingly followed wherever his supervisee, Ms. Ndongo-Keller, led.

148. The situation is further compounded by the request by Ms. Kagwi-Ndungu to the HR Helpdesk on 8 November 2012, presumably under the instructions of Ms. Ndongo-Keller, to request that the original Note for the File signed on 11 October 2012 be expunged from the official record and be replaced by a second Note for the File, signed both by Ms. Ndongo-Keller and Mr. Besnier on 8 November 2012. In that particular roll-back of the Applicant’s ePAS, Ms. Ndongo-Keller commented that ‘on several occasions,’ the Applicant ‘had failed to produce the required number of translation pages within the prescribed time frame’ and that there was need for the Applicant to improve his output and timely delivery of work. There was no reference to the Applicant’s core competencies in Teamwork and Communication.

149. The Tribunal finds that the evaluation by Ms. Ndongo-Keller of the Applicant’s performance for 2011/2012 was overcast by inconsistencies occasioned by bad faith and improper and extraneous motives amounting to gross abuse of her position and authority as the Applicant’s FRO.

150. The Tribunal holds that Ms. Ndongo-Keller's entire evaluation of the Applicant's 2011/2012 performance cycle was unlawful for having been motivated by bad faith, improper motive and abuse of power.

*Was the retention of Ms. Ndongo-Keller as Chief of the LSS beyond the mandatory age of retirement lawful?*

151. Retention of staff members beyond the mandatory age of retirement is governed by staff regulation 9.2 which provides that staff members shall not be retained in service beyond the age of 60 years, or the age of 62 years in cases where they are appointed on or beyond 1 January 1990. However, the same regulation provides that the Secretary-General may in the interests of the Organization extend the age limit in exceptional cases.

152. The Secretary-General's authority to retain staff members beyond the mandatory age of separation is to be exercised pursuant to the provisions of ST/AI/2003/8 (Retention in Service beyond the Mandatory Age of Separation and Employment of Retirees) The cumulative criteria for retention of staff beyond the age of retirement is outlined in its section 2.1 as follows:

- a) It has not been possible to identify a qualified candidate to discharge the functions of the post in a timely manner; *and*
- b) Retention of the staff member is in the interest of the Organization due to the exigencies of the service concerned;

*And* the conditions set out in section 3 below are satisfied.

153. Section 3 of ST/AI/2003/8 is reproduced in its entirety below and outlines the procedure for the retention of staff as follows:

3.1 For succession planning purposes, departments and offices are requested to regularly identify staff appointed under the 100 series of the Staff Rules who are due to retire within a period of twelve months.

3.2 Heads of departments or offices shall regularly monitor all vacancies that are foreseen to occur in their department or office, normally as a result of staff reaching the mandatory age of separation and shall take all necessary steps to ensure that such vacancies are advertised in accordance with the requirements of section 4 of administrative instruction ST/AI/2006/3 (currently

ST/AI/2010/3 at least 6 months before the anticipated vacancy occurs. *No extension shall be granted if that requirement is not met.*

3.3 *If, within a six-month period after the post has been advertised, circumstances beyond the control of the department or office concerned have made it impossible to replace a staff member due to retire, that department or office may request on an exceptional basis, that the staff member be retained beyond the mandatory age of separation, explaining why he or she could not be replaced in a timely manner, and providing information necessary to determine whether the conditions set out in sections 2.1, 3.2 and in the present section are met.*

154. It is in evidence that the initial Job Opening No. 21952 for the position of Chief, LSS, was published on *Inspira* on 16 February 2012, whereas Ms. Ndongo-Keller was due to retire on 30 April 2012. Mr. Besnier, the Hiring Manager for the said Job Opening first told the Tribunal that it was posted on that date because Human Resources notified him sometime between January and February 2012 that Ms. Ndongo-Keller was to retire on 30 April 2012. He then said that the issue came up probably at the end of 2011 and the beginning of 2012 and that he was informed about her retirement at the end of 2011.

155. From Mr. Besnier's testimony, it would seem that the date of Ms. Ndongo-Keller's retirement had conveniently escaped his notice and that of Human Resources (HR). In answer to a question by the Tribunal, Ms. Ndongo-Keller testified that it was not her business to notify HR of her impending retirement. She stated that it was the duty of HR to monitor and advertise the post since the said HR department keeps track of staff records and she could not be seen to direct HR officers on how to do their work.

156. Further, in Mr. Besnier's memorandum dated 4 April 2012 in which he relayed his assessment of the candidates for Job Opening No. 21952 and their failure to meet all evaluation criteria, he recommended that Ms. Ndongo-Keller's contract be extended for a period of one year beyond retirement age and that the Human Resources and Planning Section forward the file to the ICTR Panel on Extension Beyond Retirement Age.

157. Meanwhile, on 12 April 2012, Ms. Sarah Kilemi, the Chief of the Division of Administrative Services responded to Mr. Besnier's memorandum. She

referred him to the guidelines issued on the subject of retention in service beyond retirement age as well as a memorandum from the ASG/OHRM, Ms. Catherine Pollard, directing that ‘there are no more exceptions to extend anybody beyond retirement age.’ Ms. Kilemi also noted that a break of three months is required before being re-hired and it would have to be on temporary appointment. In her email, Ms. Kilemi asked Mr. Besnier to confirm why this option was not considered bearing in mind the ‘available capacity in LSS.’

158. In his response, Mr. Besnier wrote to Ms. Kilemi on 16 April 2012 stating that the memo from Ms. Pollard was a ‘caution’ to follow the administrative issuances and was not meant to prevent them from acting in the interests of the Organization. He also stated his reliance on Information Circular No. 48 of 16 July 2007 and Regulation 9.2. He further stated that:

We did not envisage hiring the Chief of LSS on temporary appointment after her retirement as I am of the view that we could request implementation of extension beyond retirement age to avoid any discontinuity in the management of the LSS, especially at this very critical juncture.

159. Section 2.2 of ST/AI/2003/8 provides that if a staff member is to be retained, it shall be for the minimum time required to replace the staff member concerned and *shall not normally exceed six months after the staff member has reached the mandatory age of separation.*

160. In his oral testimony, Mr. Besnier stated that the recommendation for extension of the incumbent’s contract for a period of one year was made on the basis of his observation that the recruitment process tends to be long and that it would take that much time to fill the post. In response to a question from the Tribunal on why he chose to flout the Rules, he stated that he wanted to avoid a situation where the LSS was without a supervisor and that he did not want a break of three months.

161. The Respondent’s Counsel submitted that the Secretary-General has discretion to extend the age limit in exceptional cases and that the situation in the ICTR at the material time fell within the ambit of exceptional cases calling for the exercise of this discretion in Ms. Ndongu-Keller’s favor. Indeed in his 4 April

2012 memorandum seeking her retention, Mr. Besnier had striven to give assurances of the high quality of Ms. Ndongo-Keller's services, her willingness to perform her tasks, her multitasked expertise and the significance of the French translations in the judicial work of the ICTR as exceptional factors which suggested that it would be in the interest of the ICTR to retain Ms. Ndongo-Keller. In other words, he was of the view that she was indispensable to the ICTR.

162. Section 3.2 of ST/AI/2003/8 expressly forbids the extension of an incumbent's contract beyond retirement age if the anticipated vacancy is not advertised in accordance with ST/AI/2010/3. Mr. Besnier's decision to recommend the retention of Ms. Ndongo-Keller beyond her age of retirement in flagrant violation of the applicable rules speak to his improper motives and bad faith when he approved an unnecessary new core competency inserted by Ms. Ndongo-Keller for the VA and aborted the entire selection process for Job Opening No. 21952.

163. The Tribunal finds and holds that Mr. Besnier deliberately and willfully violated and subverted all legal and mandatory procedures for the retention of a staff member in service beyond retirement age. He completely disregarded the mandatory criteria for such a retention set out in ST/AI/2003/8. In the process, he threw all caution to the winds and even rejected sound legal advice from the Chief of the Division of Administrative Support Services, Ms. Kilemi, in order to achieve his purpose of retaining Ms. Ndongo-Keller in service at all costs.

164. Mr Besnier's claim that he could not identify a qualified candidate to discharge the functions of the post of Chief, LSS through Job Opening No. 21952 was occasioned by the manipulation of the said job opening; firstly by ensuring, through re-writing the competencies for the post, that none of the applicants was an eligible candidate and secondly, by cancelling the said Job Opening on that excuse and aborting that recruitment process. This was meant to set the stage for a suitable justification for seeking the extension of Ms. Ndongo-Keller's contract beyond her due retirement date.

165. The Tribunal finds that on the facts of this case, there were no exceptional circumstances to warrant the retention of Ms. Ndongo-Keller. By her own admission, she decided not to notify management about her impending retirement.



This was in itself most irresponsible on her part as a senior manager in the Organization. Unfortunately, Mr. Besnier, her FRO, whose duty it was to find a replacement for her was evidently part of a plot to retain her beyond retirement age. In that regard, he even went so far as requesting one year's extension of her contract in brazen contravention of the Rules which require that a staff member retained beyond the mandatory age of retirement should only serve for the amount of time necessary to fill the post and that this period should not exceed six months.

166. The Tribunal concludes that the publication of Job Opening No. 21952 on 16 February 2012 was in violation of section 3.2 of ST/AI/2003/8 as the vacancy announcement was published only two months before the anticipated vacancy.

167. The Tribunal finds also that the retention of Ms. Ndongo-Keller in service, as it emerged during the proceedings, for a period of 15 months after reaching the mandatory age of separation is in flagrant and egregious violation of section 2.2 of ST/AI/2003/8.

*Was there a nexus between the suspension of Job Opening No. 21952, the Applicant's performance evaluation for the 2011/2012 performance period and the non-retirement of Ms. Ndongo-Keller on 30 April 2012?*

168. The foregoing examination of the issues and findings of the Tribunal easily demonstrate the unsavoury connection between the suspension of Job Opening No. 21952, the unfair performance appraisal of the Applicant carried out by Ms. Ndongo-Keller for the 2011/2012 performance cycle and the retention of Ms. Ndongo-Keller beyond her mandatory age of retirement.

***Accountability of United Nations Managers***

169. The Tribunal cannot fail to underscore the worrisome tendency of some senior managers in the Organization to treat the workplace as their personal property by manipulating the Administrative Instructions and other relevant issuances for personal gain. In deliberately failing to inform management about her impending retirement, secure in the knowledge that she had the support of Mr. Besnier to avoid her mandatory separation; Ms. Ndongo-Keller placed herself in a position of conflict of interest. Her actions and those of Mr. Besnier in the scheme

to retain her and block the career aspirations of others in her section clearly speak to a shameful and reprehensible lack of integrity which must be condemned.

170. These unfortunate manipulations on the part of the two senior managers not only besmirched the image of the Organization but further caused financial loss to it through the payment of compensation to the Applicant in the present case.

171. The Tribunal accordingly exercises its power under Article 10.8 of its Statute and refers both Ms. Ndongo-Keller and Mr. Pascal Besnier to the Secretary-General to account for their actions in subverting the rules of the Organization for personal gain as outlined in the text of this judgment.

### **Judgment**

172. The Application succeeds.

173. The Tribunal is on notice that since the institution of these proceedings, the position of Chief, Language Services Section at the International Criminal Tribunal for Rwanda has been filled.

174. The Applicant had faithfully applied to Job Opening No. 21952 which process turned out unfortunately to be a sham, lacking in integrity and fairness. It is hereby ordered that compensation be paid to the Applicant on this score in the sum of six months net base salary at the rate in effect at the date of this Judgment.

175. The Applicant is also entitled to compensation for the substantive and procedural irregularities occasioned by the failure of the agents of the Administration to follow the Organization's guidelines, Rules and procedures in wrongfully retaining Ms. Ndongo-Keller for fifteen months beyond her due date of retirement at the expense of the career progression of others. The Tribunal accordingly awards the Applicant six months net base salary.

176. For the bad faith exhibited in the flawed evaluation of his performance appraisal, the Applicant shall be paid compensation in the sum of four months net base salary.

176. The total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the

US Prime Rate applicable as at that date shall apply. If the total 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.

177. The Tribunal nullifies the entire evaluation of the Applicant's performance for the 2011/2012 performance cycle and all purported amendments thereto and orders the ICTR Administration to make suitable arrangements for a fresh evaluation of the Applicant's performance in the 2011/2012 cycle within two months of the date of this judgment and with due regard to the entirety of the provisions of the relevant legal issuance regulating performance management and evaluation.

178. The Tribunal directs that the ICTR Administration make suitable arrangements for the future performance evaluation of the Applicant that do not include any of the persons who took part in his performance evaluation for the 2011/2012 performance cycle.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 6<sup>th</sup> day of August 2013.

Entered in the Register on this 6<sup>th</sup> day of August 2013

*(Signed)*

Abena Kwakye-Berko, Acting Registrar, Nairobi.