



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is currently a Senior Legal Officer at the United Nations Environment Programme (UNEP), in Nairobi, Kenya, at the P-5 level. On 5 June 2011, she filed this Application in which she contests “a series of non-transparent, organizational acts that have resulted in the failure, in two years, of her Field Central Review Body (FCRB) clearance for a job that she performed for 19 months at a level appraised as “frequently exceeding performance expectations”.

2. The Respondent filed a Reply on 5 July 2011 in which it was argued that the Application was not receivable on three grounds, namely:

- a. the Application does not identify a specific administrative decision;
- b. the Application is time-barred; and
- c. the Application is moot.

3. On the merits, the Respondent submitted that the Applicant was given full and fair consideration for the FCRB roster during the selection exercise at the United Nations Mission in the Central African Republic and Chad (“MINURCAT”). The Respondent submitted that following her request for management evaluation, the Applicant had been reconsidered for the FCRB roster and that as she has recently been appointed as a Senior Legal Officer at the P-5 level, her claims that she has been denied career advancement are without foundation.

Facts

4. On 13 May 2009, the Applicant applied on the *Galaxy* tool against a vacancy announcement for the post of “Senior Legal Officer (P-5), multiple duty stations”.

5. On 18 May 2010, the Applicant was informed that she had been short-listed for the position of Legal Officer at the P-5 level in MINURCAT. She was interviewed for the position on 7 June 2010. She was not successful.

6. On or about 20 June 2010, the Field Personnel Division, Department of Field Support (FPD/DFS) conducted Expert Panel interviews for the post of “Senior Legal Officer (P-5), multiple duty stations”. The Applicant was not interviewed.

7. On 3 September 2010, the Special Representative of the Secretary-General for the United Nations Integrated Mission in Timor-Leste (“SRSG/UNMIT”) sent an email to the Applicant in which she stated that she had received an updated list of rostered candidates and that the Applicant’s name was not on it. The Applicant responded to the email on 7 September 2010 and informed the SRSG/UNMIT that she had contacted FPD to inquire about her status.

8. On 8 September 2010, the SRSG/UNMIT informed the Applicant that she had already selected someone else for the post of Legal Adviser in UNMIT.

9. On 27 September 2010, the Applicant filed a request for management evaluation against “a series of organizational acts” that had resulted in her failure to obtain FCRB clearance at the P-4 or P-5 level and that these actions had resulted in the violation of her right to full and fair consideration for lateral movement and/or promotion as a legal officer in peacekeeping.

10. On 11 November 2010, Mr. Brian Wallace, Legal Officer in the Management Evaluation Unit (MEU) informed the Applicant that he wished to discuss her request for management evaluation. On various other dates in November 2010, the Applicant exchanged a series of emails with Mr. Wallace and Ms. Singh of MEU regarding the possibility of being interviewed for the purposes of FCRB rostering.

11. On 2 December 2010, Mr. Wallace wrote an email to the Applicant in which he informed her that DFS wished to set up an *ad hoc* panel for the purposes of determining whether she should be rostered as a P-5 candidate. He also informed her that MEU would hold “her case in abeyance pending the conduct of the interview”.

12. On 27 January 2011, the Applicant requested MEU to proceed with her management evaluation request.

13. On 30 March 2011, the Applicant was interviewed by the Expert Panel for the FCRB roster.

14. The Applicant filed the present Application on 6 June 2011. The Application was served on the Respondent on 7 June 2011 and the Respondent filed a Reply on 5 July 2011.

15. On 17 August 2011, the Tribunal issued Order No. 106 (NBI/2011) scheduling the merit hearing of this case for 1 and 2 November 2011. On 26 September 2011, the Applicant filed a Motion seeking a change of the hearing dates. The Respondent had no objection to the rescheduling of the hearing dates.

16. During the hearing of the case on 1 December 2011, the Applicant was directed to streamline her pleadings. The Applicant filed her streamlined pleadings on 15 December 2011.

17. The Respondent filed a response to the Applicant's streamlined pleadings on 29 December 2011.

18. The Tribunal heard the case on 30-31 July 2012 and on 1 and 16 August 2012 during which evidence was received from the following:

- a. The Applicant.
- b. Ms. Wanda Carter, Conduct and Discipline Officer, United Nations Assistance Mission in Darfur (UNAMID) for the Applicant.
- c. Mr. Paulin Djomo, Chief Africa II Missions, FPD/DFS for the Respondent.
- d. Mr. Guy Siri, Director of Mission Support, MINURCAT for the Respondent.

19. Ms. Carter's testimony is summarized below:

- a. She is currently a Conduct and Discipline Officer in UNAMID and has also been a member of the FCRB since 2009.
- b. The role of the FCRB is to review the selection process and to make sure that it conforms to the Staff Rules and Regulations.
- c. She has come across situations where an Expert Panel does not interview all eligible candidates or where mistakes are made by Expert Panels in considering candidates. The role of the FCRB in such situations is to correct the errors.
- d. The FCRB may on some occasions fail to catch all the errors and could clear recommended candidates without seeing the errors. In some instances a flawed exercise by an Expert Panel may pass unnoticed by the FCRB as they have to juggle several duties as well as their regular jobs.
- e. The MINURCAT process was mission-specific and is not the same as the Expert Panel process. In the MINURCAT process, there were few members and they employed very mission-specific criteria.
- f. Before a candidate's interview, two steps were required to be passed, that is, initial clearance by the Occupational Group Manager based on the baseline qualifications set out in the vacancy announcement and clearance by the Programme Manager to ensure that the candidate meets the mission-specific criteria. Prior to 22 April 2010, technical clearance was required.
- g. There are some general problems recognizable in the MINURCAT evaluation. There is no evidence that the mission-specific criteria were actually tested for and the candidates recommended were not shown to have actually met those criteria which were very narrow. It was also not shown why a large number of candidates were eliminated.
- h. The MINURCAT evaluation is problematic because the conclusions are inconsistent referring to "him" and "her" at the same time.

They state that some responses were marginal without stating why the responses were considered marginal.

i. When there are mission-specific criteria, it is presumed that the objective of the Programme Manager is to fill a post, not to populate the roster.

20. Mr. Djomo's testimony is summarized below:

a. He is in charge of 10 missions and offices in Africa from a Human Resources perspective.

b. In 2009, the recruitment system changed. FCRB was introduced for recruitment in field missions. The missions had authority to initiate the process and submit their result to FCRB for validation.

c. His office realized that the mission recruitment process had slowed down and decided to help them by populating rosters for recruitment.

d. An Expert Panel was constituted by staff members, the missions and Headquarters.

e. The reason for having different panels in May 2010 was to target the functional areas where candidates were needed. There were three different panels to take care of the different locations. MINURCAT had vacancies for mission-specific posts.

f. The panels were composed of similarly placed staff members at the same level or at levels above. The panel members had to have the relevant professional background.

g. All the panels assessed candidates against the standard United Nations competencies using a competency-based system. The results of the interview process were forwarded to the FCRB which is an independent body. The FCRB secretariat then reviewed the case and if endorsed, communicated this to the office sending it. They also sent back the result if it was not endorsed.

- h. If the candidates were not recommended, they could not be placed on the FCRB roster.
- i. The MINURCAT mission was in the process of conducting a recruitment exercise. Usually his office would ask the mission if they wanted to continue the process or to have his office do it for them. If the mission had advanced along the recruitment exercise, they would let them complete it to avoid duplicating efforts as the recommendations would go to the same FCRB for review.
- j. Whether it was MINURCAT or the Expert Panels, they all went to the one source for recruitment, that is, Galaxy. The initial clearances and technical clearances were done by Human Resources. Hundreds of candidates are technically cleared and it is from this pool that candidates are selected to compete.
- k. The Expert Panel was an assistance provided to the missions to ease recruitment and to avoid the duplication of efforts.
- l. When a recruiting manager goes into the roster, there are hundreds of potential candidates and the Programme Manager may be looking for only one person. The Programme Manager will have to whittle down to a reasonable number. This is with a view to identifying the person best suited for the position and therefore different criteria are used to narrow down the list.
- m. Actions to be taken by the Expert Panel for a full and fair consideration of a candidate include:
 - i. The submission of the list of candidates to the FCRB.
 - ii. The Expert Panel reviews the application and applies the guidance to be used for screening the candidates.

n. If the Expert Panel had to interview all the candidates who have been technically cleared, they would have to interview hundreds of candidates.

o. An expert panel may be generic or targeted to find candidates in a specific mission. An Expert Panel targeted for a specific mission, as is the MINURCAT case, is different for a generic population of the rosters.

21. Mr. Siri's evidence is summarized below:

a. Currently as the Director of Mission Support in MINUSTAH, he is involved in the selection of senior staff at the P-5 and D-1 levels. At MINURCAT, he was also the Director of Mission Support and participated in the selection of candidates.

b. He is familiar with the selection exercise for the Senior Legal Officer position in MINURCAT.

c. Because of the specifics of the position, a Legal Officer was a member of the interview panel. The Chief Judicial Affairs Officer was present as well as a Human Resources official and himself.

d. The interviews were recorded by a Human Resources Officer who took notes.

e. The Applicant did not meet the minimum competencies in two areas of "planning and judgment" and "decision-making". As she was regarded as "marginal", she was not recommended to the FCRB. The two recommended candidates were to be placed on the roster.

f. He approved and signed the evaluation report relating to the Applicant. The report was transparent and fair. All the panel members agreed that the candidate would be rated as "marginal".

g. The selection process for the post was not completed because, in July 2010, MINURCAT was scheduled to close down by the end of April 2011. As a result, none of the recommended candidates was selected and

instead a Senior Legal Officer from Headquarters was recruited for a six-month period on a temporary appointment from November 2010 until the close of the mission on 30 April 2011.

22. On 15 May 2013, the Office of Legal Affairs (OLA) informed the Applicant that she had been placed on the P-5 Senior Legal Officer roster as a result of a successful competitive selection process following which she was appointed as a Senior Legal Officer in UNEP.

Applicant's submissions

23. The Applicant's case, as distilled from her oral and written submissions is summarized below.

Receivability

24. In response to the challenge to the receivability of her Application by the Respondent, the Applicant submits that the MEU contacted her in November 2010 seeking an informal resolution to this case. She was asked to put her case in abeyance until an interview could be scheduled as soon as was possible.

25. In another email dated 2 December 2010, the MEU informed her that they would continue to hold her case in abeyance pending the conduct of the interview. The Applicant submits that to any reasonable person, this means that the timeline was put on hold until the interview was conducted.

26. The interview of 30 March 2011 constituted the Applicant's receipt of the response by management. Under art. 8.1 of the Statute of the Dispute Tribunal, her Application was filed within 90 calendar days of that response and it is therefore disingenuous for the Respondent to claim that she did not file it in a timely manner.

Merits

27. She was entitled to an interview by the Expert Panel when it conducted its exercise for the P-5 Senior Legal Officer position in June 2010. The Expert Panel interviews serve to populate the roster in their respective occupational groups; it is from this roster that hiring managers in the peacekeeping operations are to select their candidates. An Expert Panel must consider all candidates.

28. Having been technically cleared (and being one of the few female candidates), she was entitled to a full and fair consideration for the roster for Senior Legal Officer, particularly given that she had performed the functions for 19 months at the United Nations Mission in Sudan (UNMIS).

29. The Expert Panel made an arbitrary decision not to interview a number of candidates including the Applicant in the interest of expediency.

30. Contrary to the Respondent's argument that the decision of the Expert Panel not to consider her for the FCRB roster in light of MINURCAT's consideration was a valid exercise of discretion, taking into account the need to preserve resources, the Applicant submits that it was precisely to remedy the inconsistent quality of interviews at the mission level that the selection process was centralized in FPD and the interview of candidates was to be conducted by "Expert Panels". This inconsistent quality is evidenced by the evaluation report in the MINURCAT process.

31. The decision to preserve resources cannot be made at the expense of fairness to qualified candidates. This constitutes a procedural error in the selection process.

32. Many mission selection processes have mission-specific criteria. Candidates can be disqualified at the interviews based on those criteria. Mission-specific criteria should not prevent candidates from being rostered against a generic vacancy. For this reason as well, the Expert Panel should have interviewed the candidates also considered by MINURCAT.

33. She has not been advised of the outcome of her interview of 30 March 2011, contrary to section 10.1 of ST/AI/2010/3 (Staff selection system). She is still not on the field roster for Senior Legal Officer, despite having performed the work in the field for 19 months with two successive performance evaluations of “frequently exceeds performance expectations”.

34. As a result of the Expert Panel’s arbitrary decision not to interview her in the interest of expediency in June 2010, she missed an opportunity for promotion in September 2010.

35. The absence of full and fair consideration for the field roster deprived her of the possibility of mobility, advancement, and continued exercise of her profession where she was cleared for an interview and the hiring manager was interested in her application.

36. The hampering of mobility, advancement and continued exercise of her profession continued to August 2012 when the Respondent filed a response to the Tribunal’s Order to provide the results of the Expert Panel interview. Given that she had neither been informed of the outcome of her March 2011 interview, nor had she otherwise been rostered, she could not be considered for Senior Legal Officer posts open to candidates on the field roster.

37. Contrary to Mr. Siri’s witness statement, the MINURCAT panel that interviewed her consisted of three or four members and an ex-officio member. Ms. Dara Lysaght, Senior Legal Officer, was not on the interview panel.

38. The evaluation report attributed to her does not accurately reflect her candidature for the following reasons:

- a. The evaluation report states that she attended the University of Assas, a school which she has never attended.
- b. The evaluation report states that she worked with USA Property, an organization where she has never been employed and which she did not mention during the interview.

c. The report's summaries of her responses on "planning and organizing" and "judgment and decision-making" do not reflect her answers at all and appear to be those of another candidate.

d. The summary of her responses to the "teamwork" and "communication" interview question is erroneous.

e. The overall evaluation refers to a male candidate.

39. The Applicant submits that the evaluation report supports her argument that the MINURCAT selection exercise suffered from serious procedural errors.

40. With respect to the Expert Panel's evaluation report of her 30 March 2011 interview, the Applicant observes as follows:

a. Her interview took place on 30 March 2011, despite the report stating that it took place in April 2011.

b. The evaluation report was finalized on 2 August 2011, over four months after the interview process took place. It was submitted to the FCRB on 11 August 2011, over two months after the latest time it was supposed to have been submitted according to the interview panel chair.

c. Fair process requires that an evaluation report be done contemporaneous to the interview, or immediately thereafter – not four months after the interview took place.

d. The timeline indicates that FPD waited to see whether she would file an appeal before finalizing its report and submitting it to the FCRB.

e. The delays in FPD's actions are *prima facie* evidence of retaliation for her having filed an appeal. FPD's decision to not recommend her is an attempt to support the recommendations of the flawed MINURCAT process in light of upcoming litigation.

f. The Expert Panel members did not sign off their agreement to the evaluation report.

g. An examination of the evaluation of the specific competencies upholds her argument of bias and the absence of a fair and accurate record. The conclusions are not supported by the evidence provided.

h. FPD's evaluation of her candidacy for the roster does not appear to be based on a fair and accurate record of the interview: the fact that the evaluation report is unsigned by the Expert Panel members and was completed months after the interview buttresses this assertion.

i. The evaluation report and cover memorandum were submitted to the FCRB on 11 August 2011. However, it was only one year later that the FCRB allegedly "reviewed and approved the process," with its report "expected to be finalized within the next few days." The timing of these results suggests an endeavour to justify FPD's actions and cover up its errors. These results are now being arranged to support the Administration's case in an effort to win the litigation: it begs the question as to the grounds for which the FCRB refused to clear the case over the past year.

41. The Applicant submits that it is interesting to note that, as soon as she had been interviewed and evaluated by a panel which included two lawyers and that was not organized by FPD, she was recommended for the position of Senior Legal Officer, UNEP. The evaluation process and recommendation of her candidacy were submitted shortly after the interview to the Nairobi Central Review Body, which promptly cleared the process and its recommendations, the whole timeline from the interview date to her selection by UNEP being a little over two months. On the other hand, the interviews managed by FPD, either via the MINURCAT Panel or the Expert Panel it finally established to interview candidates omitted in its 2010 exercise had only one lawyer on each of the Panels.

42. In view of the preceding, the Applicant requests the Tribunal to order:

a. Her immediate placement on the field or FCRB roster so that she can be considered by hiring managers for future P-5 Senior Legal Officer job openings in peacekeeping operations.

b. Given that in memoranda dated 4 and 7 February 2013, the Assistant Secretary-General, Office of Human Resources Management, approved the extension of the validity of roster candidates retroactively to 1 July 2009 and given that she was selected as a Senior Legal Officer in May 2011 through a process endorsed by the Nairobi Central Review Body, to order her immediate placement on the FCRB roster for P-5 Senior Legal Officers so that she can be visible to hiring managers in the United Nations Secretariat including peacekeeping.

c. Noting that FPD has not been able to provide her with full and fair consideration in its rostering process and has provided evidence, from its actions, of retaliation and bias, the Tribunal should order additional damages; and

d. Compensation in Special Post Allowance at the P-5 level from the time she could have begun working as Senior Legal Officer at UNMIT - in or around November 2010 - and other entitlements which she would have received, until the effective date of her entry on duty on the P-5 post at UNEP.

Respondent's submissions

Receivability

43. The Respondent's case is summarized below.

44. The Applicant filed a request for management evaluation on 27 September 2010. The Applicant should have filed her Application by 19 February 2011 in accordance with staff rule 11.4 and art. 8 of the Statute of the Tribunal. She did not do so and consequently her appeal is not receivable.

45. The Applicant maintains that she was in discussions with the MEU to informally resolve the matter. Such informal discussions do not suspend the time period for filing an application with the Tribunal. Only a formal referral of the matter to the Ombudsman/Mediation Division will suspend the time limit. The informal discussions engaged in by the Applicant did not suspend the deadline for filing her Application and her claim is thus not receivable.

46. The Applicant's claim that the interview of 30 March 2011 constituted the Applicant's receipt of the response by management is misconceived. Staff rule 11.4 states that a response from the MEU must be in writing. It cannot be by way of performance. The Applicant's claim that the granting of a second interview process was a response is incorrect and not supported by the record of her correspondence with the MEU.

47. The Applicant cannot validly claim that the deadlines for filing with the Tribunal were suspended pending informal resolution through the MEU while at the same time maintain that the MEU did respond to her and that the deadline should be counted from the date of the response. The Applicant missed the deadline for filing an application with the Tribunal and her claim should be dismissed.

Merits

48. The decision not to interview the Applicant under the FPD selection exercise was revised by the MEU. The Applicant was subsequently invited for an interview on 18 March 2011. The interview took place on 30 March 2011. The Applicant has been interviewed for inclusion on the roster on two occasions, once by MINURCAT and, following revision by the MEU, once by FPD. In light of the above, her claim must be considered moot and should be dismissed.

49. The decision not to consider the Applicant for the FCRB roster by an Expert Panel in light of her consideration by MINURCAT was a valid exercise of discretion. FPD decided not to interview the Applicant for the FCRB roster on the basis that she was already being interviewed by MINURCAT for a P-5 post. This included considering her for the FCRB roster. Rather than consider the Applicant for the same roster twice, FPD correctly decided that she should only be considered once, during the MINURCAT selection exercise. This was a lawful exercise of discretion and it took into account a very relevant consideration, namely, the need to preserve resources.

50. The Applicant received full and fair consideration during the MINURCAT process. The typographical errors highlighted by the Applicant are immaterial to

the outcome of her evaluation as they did not impact on her full and fair consideration for the roster.

51. On 30 March 2011, the Applicant was interviewed for the FCRB roster pursuant to a new Expert Panel process. The decision to reconsider the Applicant was taken following her request for management evaluation. The decision was without prejudice to the merits of the original decision to consider the Applicant during the MINURCAT selection process.

52. If the Applicant had been successful in the interview process, she would only have been recommended for placement on the roster. She was not successful and was, therefore, not placed on the roster.

53. There is nothing in the email from the SRSG/UNMIT that amounts to an assurance that the Applicant would have been selected for the post had she been on the roster.

54. The Applicant's claim that her career prospects have suffered is without foundation. Since being reconsidered by the Expert Panel, she was promoted to the position of Senior Legal Officer at the P-5 level on 20 May 2011.

55. The Applicant's request that she be placed on the FCRB roster should be dismissed. She has not demonstrated that her right to full and fair consideration was breached in the MINURCAT process and she took part in a second interview process where the Expert Panel gave her further opportunity for inclusion on the roster.

56. The basis for the Applicant's compensation claim is too remote from the alleged breach. Her assertion that she would have been appointed as Senior Legal Officer at UNMIT is unfounded. The evidence provided in support of this claim merely shows that she was in discussions with the SRSG/UNMIT regarding her placement on the FCRB roster. There is no evidence of a promise to select her from that roster. In addition, the Applicant cannot demonstrate that if she had been considered during the Expert Panel process, that she would have been placed on the roster in time to be available for selection by the SRSG/UNMIT.

57. For all the foregoing reasons, the Respondent requests the Tribunal to dismiss the Application.

Consideration

58. Having reviewed the entire case record, the Tribunal finds that the following legal issues arise for consideration in this case:

- a. Is this Application receivable?
- b. Was the Expert Panel legally required to interview candidates also being considered by MINURCAT in June 2010? Was the Applicant given full and fair consideration for the FCRB roster during the 7 June 2010 MINURCAT interview?
- c. Did the Applicant suffer any harm as a result of the failure by the Expert Panel to interview her in June 2010?
- d. Was the Applicant given full and fair consideration for the FCRB roster during the 30 March 2011 Expert Panel interview?
- e. Is the Applicant entitled to the reliefs she claims?

Is this Application receivable?

59. Counsel for the Respondent submitted that the Applicant should have filed her Application by 19 February 2011 in accordance with staff rule 11.4 and art. 8 of the Statute of the Tribunal and that since she did not do so, her appeal is not receivable. Counsel for the Respondent further submitted that the Applicant's informal discussions with the MEU about her case in attempts to informally resolve the matter did not suspend the time period for filing an application with the Tribunal.

60. Part of the documentary record in this case is a series of emails exchanged between the Applicant and Mr. Wallace, a Legal Officer in the MEU in which he advised that MEU would hold her case in abeyance pending the conduct of the interview which took place on 30 March 2011.

61. Staff rule 11.2(c) provides as follows:

A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

62. Section 10.2(d) of ST/SGB/2010/9 (Organization of the Department of Management) provides as follows:

The core functions of the [Management Evaluation] Unit are as follows:

(d) Proposing means of informally resolving disputes between staff members and the Administration; making recommendations to the Under-Secretary-General for Management on extending the deadlines for filing requests for management evaluation by staff members or for extending the deadlines for completing a management evaluation pending efforts for informal resolution by the Office of the Ombudsman;

63. Staff rule 12.3(b) provides as follows:

Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members. (Emphasis added).

64. Applying the foregoing rules to the facts of this case, the Tribunal concludes that Mr. Wallace as a Legal Officer in MEU had the requisite delegated authority to make an exception to the Staff Rules in suspending the time limits for the Applicant to request for management evaluation as he did in the present case.

The Applicant's case was therefore held in abeyance until 30 March 2011. The Applicant, as a result, had until 30 June 2011 to file her Application which she did on 6 June 2011. Having suspended the time limit for the Applicant's management evaluation request, the Respondent is estopped from arguing that the claim is now not receivable.

65. The Tribunal finds and holds that this Application is receivable.

Was the Expert Panel legally required to interview candidates also being considered by MINURCAT in June 2010? Was the Applicant given full and fair consideration for the FCRB roster during the 7 June 2010 MINURCAT interview?

66. The Respondent submitted that the decision not to consider the Applicant for the FCRB roster by an Expert Panel (in June 2010) in light of her consideration by MINURCAT was a valid exercise of discretion and that FPD decided not to interview the Applicant for the FCRB roster on the basis that the Applicant was already being interviewed by MINURCAT for a P-5 post. Further, this included considering her for the FCRB roster, therefore, rather than consider the Applicant for the same roster twice; FPD decided that she should only be considered once, during the MINURCAT selection exercise. The Respondent submits that this was a lawful exercise of discretion and it took into account a very relevant consideration, namely, the need to preserve resources.

67. The Respondent further submits that the decision not to interview the Applicant under the FPD selection exercise was revised by the MEU thus her claim under this head must be considered moot and should be dismissed.

68. In reviewing administrative decisions regarding appointments and promotions, the Dispute Tribunal has to examine the following: whether the

procedure as laid down in the Staff regulations and Rules was followed; and whether the staff member was given fair and adequate consideration¹.

69. Further, all the candidates that appear before an interview panel have the right to full and fair consideration. A candidate challenging the denial of a promotion must prove through a preponderance of the evidence any of these grounds: that the interview and selection procedures were violated; that the members of the panel were biased; that the panel discriminated against an interviewee; that relevant material was ignored or that irrelevant material was considered; and potentially other grounds depending on the unique facts of each case².

70. The evidence before the Tribunal is that the MINURCAT process was mission-specific and was not the same as the expert panel process. In the MINURCAT process, there were few members and they employed very narrow, mission-specific criteria. Further, when there are mission-specific criteria, it is presumed that the objective of the Programme Manager is to fill a post, not to populate the roster.

71. The Applicant applied for the generic job opening for the post of “Senior Legal Officer (P-5), multiple duty stations”. ST/AI/2010/3 defines “generic job openings” as,

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.

72. It is the Tribunal’s view that the MINURCAT process was for an immediate job opening with mission specific criteria. Much as it was argued that the MINURCAT interviews in June 2010 were also to be used for populating the roster, the Respondent did not provide any evidence to show if any candidate was rostered as a result of that exercise. The Expert Panel should have interviewed all

¹ *Majbri* 2012-UNAT-200 at p.98.

² *Ibid*, at p. 8.

the candidates for the generic job opening for the post of Senior Legal Officer for the purpose of giving them an opportunity to be placed on the roster for similar job openings in the future.

73. In conclusion, the Expert Panel was legally required to interview candidates also being considered by MINURCAT in June 2010 but failed to do so. The Applicant, subsequently, was not given full and fair consideration for the FCRB roster prior to June 2010.

74. Further, the uncontested evidence before the Tribunal is that the MINURCAT interview of 7 June 2010 was marred by several fatal deficiencies as enumerated by the Applicant, namely:

- a. The evaluation report states that she attended the University of Assas, a school which she has never attended.
- b. The evaluation report states that she worked with USA Property an organization where she has never been employed and which she did not mention during the interview.
- c. The report's summaries of her responses on "planning and organizing" and "judgment and decision-making" do not reflect her answers at all and appear to be those of another candidate.
- d. The summary of her responses to the "teamwork" and "communication" interview question is erroneous.
- e. The overall evaluation refers to a male candidate.

75. In Rolland³, it was held that there is always a presumption that official acts have been regularly performed, but this presumption is rebuttable. The Applicant in this case has discharged her evidentiary burden of proving that she was not given full and fair consideration for placement on the FCRB roster during the 7

³ 2011-UNAT-122, p. 6.

June 2010 MINURCAT interview. She has also established that the Expert Panel was legally required to interview candidates also being considered by MINURCAT in June 2010 but failed to do so.

Did the Applicant suffer any harm as a result of the failure by the Expert Panel to interview her in June 2010?

76. The Applicant submitted that as a result of the Expert Panel's arbitrary decision not to interview her in June 2010, she missed an opportunity for promotion in September 2010. On 3 September 2010, the SRSG/UNMIT sent an email to the Applicant in which she stated that she had received an updated list of rostered candidates and that the Applicant's name was not on it. On 8 September 2010, the SRSG/UNMIT informed the Applicant that she had already selected someone else for the post of Legal Adviser in UNMIT.

77. The placement of the Applicant on the roster was dependent on how she would have performed in the interview. The Tribunal cannot speculate, notwithstanding the Applicant's appraisal of "frequently exceeding performance expectations," that had she been placed on the roster, she would subsequently have been selected from the roster by the SRSG/UNMIT in accordance with the relevant provisions of section 9 of ST/AI/2010/3. Further, the Tribunal cannot conclude that the Applicant suffered harm as a result of the failure by the Expert Panel to interview her in June 2010.

Was the Applicant given full and fair consideration for the FCRB roster during the 30 March 2011 Expert Panel interview?

78. The uncontested evidence before the Tribunal is that the Expert Panel interview of 30 March 2011 was also characterized by several shortcomings the most serious of which are summarized below:

- a. The interview evaluation report was finalized on 2 August 2011, over four months after the interview process took place. It was submitted to the FCRB on 11 August 2011, over two months after the latest time it

was supposed to have been submitted according to the interview panel chair.

c. The Expert Panel members did not sign off their agreement to the evaluation report.

g. The evaluation report and cover memorandum were submitted to the FCRB on 11 August 2011. However, it was only one year later that the FCRB “reviewed and approved the process.

79. The Tribunal is convinced that the errors highlighted by the Applicant coupled by the excessive delay in compiling the interview report vitiated the entire process. The interview report was only produced pursuant to an order of the Tribunal after the excessive delay. The Tribunal agrees with the Applicant that the interview results were arranged to support the Administration’s position in this case.

80. The Applicant was not given full and fair consideration during the 30 March 2011 Expert Panel interview. For these procedural errors, the Applicant is entitled to compensation.

Conclusion

81. The Tribunal orders the Respondent to pay the Applicant compensation of two months’ net base salary at the level she encumbered in UNMIS for the procedural errors.

82. The Applicant is also entitled to moral damages. The Tribunal recognizes the stress caused to the Applicant by the circumstances of this case and awards USD1000 as moral damages.

83. All other claims are dismissed.

(Signed)

Judge Nkemdilim Izuako

Dated this 31st day of January 2014

Entered in the Register on this 31st day of January 2014

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi