



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2013/070
UNDT/GVA/2013/071
UNDT/GVA/2013/073
Judgment No.: UNDT/2014/036
Date: 28 March 2014
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

ZHAO
ZHUANG
XIE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Víctor Rodríguez

Counsel for Respondent:
Jérôme Blanchard, UNOG

Introduction

1. By application filed on 13 December 2013 and registered as No. UNDT/GVA/2013/070, the Applicant, Mr. Zhao, contests the decision not to select him for the position of Senior Interpreter (Chinese) at the P-5 level, advertised as job opening No. 13-LAN-UNOG-27762-R-Geneva (L).
2. By application filed on 13 December 2013 and registered as No. UNDT/GVA/2013/071, the Applicant, Mr. Zhuang, contests the decision not to select him for the position of Senior Interpreter (Chinese) at the P-5 level, advertised as job opening No. 13-LAN-UNOG-27762-R-Geneva (L).
3. By application filed on 20 December 2013 and registered as No. UNDT/GVA/2013/073, the Applicant, Ms. Xie, contests the decision not to select her for the position of Senior Interpreter (Chinese) at the P-5 level, advertised as job opening No. 13-LAN-UNOG-27762-R-Geneva (L).
4. The three Applicants request the rescission of the contested decision, the restart of the selection process and compensation for loss of career opportunity, harm to their professional reputation and moral damage.

Facts

5. The three Applicants work as interpreters in the Interpretation Service, Division of Conference Management (“DCM”), United Nations Office at Geneva (“UNOG”), at the P-4 level.
6. On 16 April 2013, the post of Senior Interpreter (Chinese) was advertised as job opening No. 13-LAN-UNOG-27762-R-Geneva (L) in Inspira. The deadline to apply for the position was 15 June 2013. The Applicants applied for the post on 9 May and 14 June 2013, respectively.
7. Five candidates, including the Applicants, were deemed eligible and invited for a competency-based interview, which took place on 3 July 2013.

8. The assessment panel was composed of the Chair and four other members. The Chair was the Chief of the Interpretation Service, DCM, UNOG, who was also the hiring manager. By information circular ST/IC/Geneva/2013/13 of 19 June 2013, he was transferred to the position of Chief of the Central Planning and Coordination Service, DCM, UNOG, as from 1 August 2013, while retaining the functions of Officer-in-Charge of the Interpretation Service between 1 and 25 August 2013. The other members of the panel were the Chief of the Chinese Interpretation Section, the Chief of the Arabic Interpretation Section, a Senior Interpreter from the Chinese Interpretation Section and the Chief of the French Translation Section.

9. The Chief of the Arabic Interpretation Section was responsible for taking notes during the interviews. Later, on the basis of a draft she prepared, the Chief of the Chinese Interpretation Section drafted the initial candidate evaluation reports, which he sent to all panel members for their comments. These reports were approved by all members of the panel without changes or comments, at which point the Chief of the Chinese Interpretation Section submitted them by email dated 11 July 2013 to the Administrative Assistant of the Chair of the panel, specifying that the reports were the final versions that had been approved by the other members.

10. On instructions from the hiring manager, his Administrative Assistant entered the evaluations into Inspira. As a result, the ratings used by the panel, which were entered in the evaluation reports approved by its members, namely “Minimally/basically meets”, “Meets” and “Fully meets”, were converted to the Inspira rating scale of “Unsatisfactory”, “Partially Satisfactory”, “Satisfactory” and “Outstanding”. The hiring manager had not given any concrete guidance to his Administrative Assistant on how to carry out the conversion.

11. On 17 July 2013, the hiring manager sent the list of the five recommended candidates to the Central Review Board (“CRB”).

12. On 31 July 2013, the CRB considered this recommendation, along with a Comparative Analysis Report generated in Inspira. The CRB found that it was not

in a position to endorse the list of recommended candidates. Having noted several inconsistencies in the Comparative Analysis Report between the competency ratings and the write-up of the evaluations, the CRB sought additional clarifications and details on the evaluations, and requested, in particular, that the write-up of the evaluations should be reviewed to clearly indicate how the panel had reached its conclusions.

13. By emails dated 5 August 2013, the Chief of the Arabic Interpretation Section, followed by the Chief of the Chinese Interpretation Section, sent their comments to the hiring manager in response to the CRB request.

14. The hiring manager then requested his Administrative Assistant to make adjustments to the Comparative Analysis Report. Once the changes had been made, the hiring manager again submitted his recommendations to the CRB, along with the amended report. At its meeting on 14 August 2013, the CRB endorsed the list of recommended candidates, and the hiring manager was notified by the CRB secretariat via email on the same day.

15. By memorandum dated 20 August 2013, the hiring manager sent the names of the five endorsed candidates to the Human Resources Management Service (“HRMS”), UNOG, to be forwarded to the Director-General of UNOG. In the same memorandum, he recommended the candidate who was ultimately selected giving reasons for his choice.

16. On 28 August 2013, the Director-General of UNOG selected the candidate recommended by the hiring manager. The Applicants were informed on 2 September 2013, by emails generated by Inspira, that they had not been selected for the post but had been placed on a roster of pre-approved candidates. On the same day, the selected candidate was informed, by a memorandum from the Senior Human Resources Officer, HRMS, that he had been selected for the post of Senior Interpreter (Chinese) effective 1 March 2014, date of retirement of the incumbent of the post.

17. On 17 October 2013, the Applicants submitted a request for management evaluation of the decision not to select them for the post in question. On 17 and 18 October 2013, respectively, the Applicants filed applications with the Tribunal for suspension of action on the same decision. By Orders Nos. 163, 164 and 165 (GVA/2013) of 25 October 2013, the Tribunal granted the requested suspension of action.

18. By letters dated 18 November 2013, received by the Applicants on 29 November 2013, the Management Evaluation Unit upheld the contested decision.

19. The present applications were filed on 13 and 20 December 2013. The Respondent submitted his replies on 15 and 17 January 2014.

20. By Orders Nos. 6, 7 and 8 (GVA/2014) of 17 and 20 January 2014, the Tribunal invited the Applicants to submit comments on the Respondent's replies, which they did on 31 January 2014. In the same Orders, the Tribunal informed the selected candidate of the proceedings, pursuant to article 11 of the Tribunal's Rules of Procedure, and requested him to submit any comments he might wish to make, which he did on 7 February 2014.

21. On 7 February 2014, the Respondent requested leave to submit additional comments on the Applicants' latest comments. The request was granted by Order No. 23 (GVA/2014) of 10 February 2014, in which the Tribunal scheduled a hearing for the three cases on 26 February 2014.

22. At the Applicants' request, the Tribunal authorized them, by Order No. 24 (GVA/2014) of 12 February 2014, to submit comments on the comments made by the selected candidate, which they did on 17 February 2014. On 17 February 2014, the Respondent submitted further comments.

23. On 26 February 2014, a hearing was held with the participation of the Applicants, Counsel for the Applicants, Counsel for the Respondent, and the selected candidate, as a joined party to the proceedings.

24. Following the discussion at the hearing, on 27 February 2014, the Tribunal requested the Respondent, by Order No. 38 (GVA/2014), to provide additional documents and information and requested Mr. Zhuang to submit brief comments on any errors that might have been made in considering his professional experience. The above-mentioned parties submitted their comments on 4 March 2014.

25. On 6 March 2014, the three Applicants submitted comments on the Respondent's comments of 4 March 2014. The Respondent submitted comments only on Mr. Zhuang's submission.

Parties' contentions

26. The Applicants' principal contentions are:

- a. Section 1(a) of administrative instruction ST/AI/2010/3 (Staff selection system) was not observed in that the hiring manager advertised the job opening 11 months before the incumbent's retirement, not six as that provision stipulates. The very fact that the selection process was completed in five months demonstrates that advertising the post so early was unjustified. Although the Respondent cites the report of the Secretary-General of 22 August 2012 (A/67/324) and General Assembly resolution 67/255, the aforementioned report has no legal effect and does not supersede administrative instruction ST/AI/2010/3. The resolution does not endorse any specific measure to accelerate recruitment and, moreover, was adopted after the post in question was advertised. As the Tribunal concluded in its Orders Nos. 163, 164 and 165 (GVA/2013), such a way of proceeding is contrary to the obligation imposed on the Administration to select the best-qualified candidate for a position, since it prevents potential candidates from being able to apply for the position; moreover, it reveals that it was the intention of the hiring manager to organize the selection process while he was still serving in that capacity in order to influence the final choice in favour of the successful candidate. Although the hiring

manager was the Chief of the Interpretation Service when the recruitment process began, he knew that he would soon be transferred to other functions;

b. The documents submitted by the Respondent tried to show that the practice of UNOG and of the hiring manager is to advertise job openings more than six months prior to the incumbent's retirement indicate that it is in fact most unusual to advertise such posts 11 months in advance;

c. The composition of the panel was biased. Given that the selected candidate is francophone and the other candidates are anglophone, the choice of the Chief of the French Translation Section, who himself acknowledged a "natural affinity" for French-speaking candidates, as a member of the panel, while failing to include any native English speakers, reveals an intention to favour a specific candidate;

d. The *Instructional Manual for the Hiring Manager on the Staff Selection System (inspira)* (hereafter the "Inspira Manual", available in English only) stipulates that the interview invitation informs the applicant of the names of the assessors (sec. 9.6.1) and the scoring/ratings to be used (sec. 9.3.4 (d)). Had that been done, the Applicants would have been in a position to challenge the composition of the panel;

e. While the panel assured the candidates at the beginning of the interview that the language they used would have no bearing on the outcome, only those who used both English and French received the highest ratings for "Communication";

f. There are serious discrepancies between the Comparative Analysis Reports submitted by the hiring manager to the CRB on 31 July and 14 August 2013, on the one hand, and the write-up of the evaluation approved by the members of the panel, on the other. The comparative report prepared by the hiring manager was not a faithful reflection of the panel's conclusions;

g. The Respondent admits that the panel made an error in using a rating scale different from the Inspira rating scale, which in itself constitutes an irregularity. Given the hiring manager's lengthy experience, he could not have been unaware of the Inspira rating categories, yet he allowed the panel to use another rating scale. The procedure was therefore manifestly illegal. Furthermore, the message of 5 August 2013 from the Chief of the Chinese Interpretation Section indicates that he was unaware of the changes to the ratings which, according to the hiring manager, were generated automatically by Inspira, and the latter failed to explain in his reply the reasons for those changes;

h. The conversion of the initial rating scale to the Inspira scale had the effect of upgrading the rating of the selected candidate. The claim that all the ratings needed to be upgraded in order to prevent one candidate from being excluded lacks credibility. Based on the Inspira Manual, the correct conversion of "Basically meets", "Meets" and "Fully meets" would have been "Successfully meets" for all three, with nuances reflected only in the write-ups. In addition, the conversion was not applied consistently to all candidates. In fact, the first candidate and Mr. Zhuang received a rating of "Fully meets" for "Communication" and "Teamwork", respectively, in their initial evaluations; that rating was converted to "Successfully meets", while the selected candidate, rated "Fully meets" in four of the five competencies, was rated "Exceeds" in the end. The result was that the adjustments were made in a manner that benefited the selected candidate;

i. Had the ratings been applied in an objective and transparent manner, Mr. Zhuang would easily have received an overall rating of "Exceeds". The hiring manager's intention was to avoid that eventuality by distorting the ratings;

j. It is doubtful that the Inspira system automatically converts ratings, as maintained by the Respondent;

k. Some of the questions asked by Mr. Zhao and Ms. Xie during their respective interviews irritated the panel members, and this had an impact on their ratings;

l. The Director-General of UNOG did not receive the files of all the candidates approved by the CRB, in violation of section 9.3 of administrative instruction ST/AI/2010/3. The hiring manager did not have the right to recommend a candidate after the CRB had approved the list of recommended candidates, as he did in his memorandum of 20 August 2013. Furthermore, the reasons given therein for the selection recommendation are inaccurate, subjective and irrelevant. Some are factually inaccurate and others are extraneous to the criteria specified in the job opening. As for professional experience, that of Mr. Zhuang and Ms. Xie was calculated incorrectly, as their years of teaching interpretation at the university level were not taken into account, whereas they should have been given full weight, according to the *Recruitment for entry level language staff: Grading Guidelines*;

m. With regard to Ms. Xie's application specifically, this Applicant, as the only female candidate, should have been selected in implementation of section 1.8 of administrative instruction ST/AI/1999/9 (Special measures for the achievement of gender equality). This provision stipulates that, when the objective of gender parity has not been reached, a woman candidate shall be selected provided that her qualifications are "substantially equal or superior to those of competing male candidates". In the Chinese Interpretation Section, the percentage of P-5 women interpreters is 25 per cent, and since none of the candidates received a rating of "Exceeds", the Applicant received the same rating. Contrary to what the Respondent maintains, the Applicant possesses qualifications that are superior in several respects to those of the selected candidate. Furthermore, the Administration failed to submit the written analysis required under section 1.8(d) of the aforementioned administrative

instruction in the event that a male candidate is recommended when a female candidate possesses the required qualifications;

n. The contested decision deprived the Applicants of a serious opportunity for promotion and did harm to their professional reputation. Moreover, it caused them moral injury, manifested in the form of anxiety, difficulty in sleeping and demotivation at work. These factors are aggravated by the fact that the selected candidate and several members of the panel work in the same service. The Applicants were forced to sacrifice time, effort and family life to prepare and follow up on their applications.

27. The Respondent's principal contentions are:

a. The Applicants' candidacies received full and fair consideration. The Secretary-General has a broad discretion in selections and it is not the role of the Tribunal to substitute its own decision for that of the Secretary-General;

b. With regard to the allegation that the Comparative Analysis Report does not reflect the panel's conclusions, the fact that the CRB requested clarifications does not mean that there were irregularities in the procedure. Upon obtaining clarifications, the CRB concluded that the candidates had been evaluated on the basis of the pre-approved evaluation criteria and the applicable procedures had been followed;

c. In error, the panel used the ratings "Minimally/basically meets", "Meets" and "Fully meets", including in its initial evaluation reports, which were drafted by a panel member. However, Inspira has four categories: "Unsatisfactory", "Partially Satisfactory", "Satisfactory" and "Outstanding". In order not to exclude from recommendation the candidate who received a rating of "Minimally meets", he was given a rating of "Satisfactory" in Inspira, which then made it necessary to upgrade the other candidates' ratings. The rating adjustments did not

change the ranking of the candidates. Furthermore, when “Satisfactory” and “Outstanding” ratings are entered in Inspira, the system automatically converts them to “Successfully meets” and “Exceeds”, respectively; this resulted in inconsistencies with the write-up of the evaluations, which is why the CRB asked for clarification;

d. The unanimous intention of the panel was to give the selected candidate the highest rating, as indicated by the candidate evaluation reports approved by all panel members, and as reflected in the Comparative Analysis Report submitted to the CRB. Moreover, this is confirmed by the messages sent by two panel members to the hiring manager after the CRB asked for clarification. While it is acknowledged that the ratings were adjusted, these adjustments had no impact on the Applicants’ rights or on the outcome of the recruitment process;

e. Section 1(a) of administrative instruction ST/AI/2010/3 does not prohibit advertising a job opening more than six months in advance of a retirement. Such an interpretation would be inconsistent with recent General Assembly resolutions and would lead to poor human resources management. The report of the Secretary-General of 22 August 2012 (A/67/324) recommended that the start of the recruitment process for a retiree should be moved from six months to 12 months before retirement. The recommendation was endorsed by the Advisory Committee on Administrative and Budgetary Questions in its report of 14 November 2012 (A/67/545). Finally, the General Assembly adopted the proposal in its resolution 67/255, which need not be transposed in order to have legal effect. The Inspira Manual mentions that positions becoming vacant due to the imminent retirement of an incumbent should be advertised “at least” six months in advance, which indicates that they may also be advertised earlier than that. Moreover, it is the practice of UNOG and of the hiring manager to advertise a job opening of this kind at least six months in advance;

f. The above demonstrates that advertising the post 11 months in advance was based not on improper motives but on a concern for the proper functioning of the Service. In that regard, when the post was advertised and when the interviews took place, the hiring manager was not the Officer-in-Charge of the Service but its Chief; it was only later that he was transferred to another position. In any event, the Applicants, having been interviewed and subsequently recommended for the post, have not demonstrated how their candidacies were affected by the fact that the job opening was advertised more than six months before the post was expected to become vacant;

g. The Applicants have not substantiated their allegations of bias against them, while the burden of proof lies with them;

h. The contention that the presence of the Chief of the French Translation Section rendered the panel biased in favour of the (francophone) selected candidate is unsubstantiated. The panel was composed of 80 per cent anglophones, and the francophone member is not a native French speaker. Furthermore, there was a second francophone candidate who was not selected;

i. Although they invoke their right to be informed in advance of the composition of the panel, the Applicants have failed to demonstrate the existence of a conflict of interest that would have justified replacing one of its members. It is not sufficient for an applicant to point to a flaw in the process; she or he must also show that this flaw affected her or his legal rights;

j. The reasons given by the hiring manager for recommending the selected candidate, contained in his memorandum to HRMS, UNOG, are proper. The selected candidate obtained the best rating from the panel, based on the pre-approved evaluation criteria;

k. The calculation of the candidates' relevant experience was not inaccurate. The *Recruitment for entry level language staff: Grading Guidelines* do not apply to cases of promotion. The criterion that should be given the most weight in determining such experience is that specified in the job opening; excluding experience in teaching is acceptable as long as the criteria are applied to all candidates in the same manner. If years of teaching experience were counted, the selected candidate would have five additional years of professional experience, the longest of all the candidates;

l. With regard to Ms. Xie's application alone, and in particular the argument based on administrative instruction ST/AI/1999/9, while the Applicant meets the requirements of the post, the selected candidate possesses superior qualifications in the five competencies that were assessed. The latter received a rating of "Exceeds", while the Applicant received an overall rating of "Successfully meets". As a result, the Applicant cannot claim that her qualifications are "substantially equal or superior to those of competing male candidates".

28. The selected candidate's comments are:

a. The selection process was completely clear and transparent. All candidates were treated equally, and the composition of the panel was balanced;

b. His training is more solid and complete, and his interpreting experience more comprehensive and extensive, than those of the Applicants. His work as Programming Officer, a role he has often been called upon to assume, constitutes an indispensable competency for a P-5 interpreter. French is at least as important as English at a francophone duty station such as Geneva.

Consideration

Preliminary issues

29. Given that the three applications are challenging the same administrative decision, i.e., the decision to select a candidate for a post for which the three Applicants were also candidates, and as they involve similar issues, the Tribunal considers that they should be joined and ruled upon in a single judgment, in the interest of the proper administration of justice.

30. Pursuant to article 11 of its Rules of Procedure, the Tribunal invited the candidate selected in the contested selection process to join the proceedings, as the Applicants were requesting rescission of the decision to select him, and he thus had a legitimate interest in the maintenance of the contested decision.

31. As the Tribunal has not noted any grounds for finding that any of the three applications is not receivable, it will proceed immediately to consider the merits.

Irregularities in the contested selection process

32. In challenging the decision at issue, the Applicants have raised several procedural irregularities that should be considered.

Advertisement of the Job Opening

33. The Applicants contend, first, that advertising the job opening 11 months before the incumbent's retirement is contrary to section 1(a) of administrative instruction ST/AI/2010/3. That section defines "Anticipated job openings" as:

job openings relating to positions expected to become available as identified through workforce planning or forecasting, for example due to the retirement of the incumbent within six months or for meeting future requirements.

34. While the Applicants have based their contentions on the Tribunal's decision in its Orders Nos. 163, 164 and 165 (GVA/2013) concerning the applications for suspension of action submitted by the same Applicants with regard to the same

selection process, the Tribunal recalls that it is not bound by its decision in the context of an application for suspension of action, which is ruled upon in urgent proceedings, and that when it rules on the merits it is entitled to take account of any new information that may be brought to its attention.

35. In the present case, the Tribunal considers that, in view of the documents cited by the Respondent, in particular General Assembly resolution 67/255, notwithstanding its adoption after the job opening in question was advertised, the six-month time frame referred to in the above-mentioned section 1(a) seems to be purely indicative. Accordingly, the fact that the hiring manager advertised a job opening for the post in question some 11 months before the position became vacant does not in itself reveal an intention on the hiring manager's part to involve himself in the process for the sole purpose of influencing the choice of the successful candidate. This contention must therefore be rejected.

Lack of information in the interview invitation

36. The second irregularity alleged by the Applicants is the fact that they were not informed, in the interview invitation, of the composition of the panel or the rating system that would be used, whereas the Inspira Manual clearly stipulates that the interview invitations sent to the candidates should contain the names of the assessors, pursuant to section 9.6.1, and the ratings to be used, pursuant to section 9.3.4 (d).

37. The Respondent does not deny the failure to meet this obligation, although he submits that the Applicants have not demonstrated that this failing was in any way prejudicial to them.

38. While it is true that the Administration is bound to respect its own rules, it is also true that, as the Appeals Tribunal has held, only an irregularity affecting the outcome of a selection process to the detriment of the applicant may result in the rescission of a selection decision (*De Saint Robert* 2012-UNAT-259). Thus, as it did in its decision in *Asariotis* UNDT/2013/144, the Tribunal must consider

whether the two irregularities might have affected the candidates who were not selected.

39. The sole purpose of the obligation to inform candidates of the composition of the assessment panel is to enable them to identify any conflicts of interest between the candidate and particular members of the panel or other anomalies, in order that, where necessary, one or more panel members may be replaced. In the present circumstances, considering that the reasons adduced by the Applicants for the possible recusal of the Chief of the French Translation Section concern the fact that he is proficient in French rather than in English, there is no indication that they would have succeeded in obtaining the recusal of this panel member on the sole ground that he is a native French speaker.

40. Moreover, while the Applicants Mr. Zhao and Ms. Xie allege that the panel was ill-disposed towards them during their interviews, these Applicants have not even claimed that they could have foreseen such behaviour prior to the interviews. On the contrary, they state that the panel may have been irritated by some of the remarks they made during the interviews.

41. Regarding the obligation to inform candidates in advance of the ratings to be used, it emerges from the case file that, prior to the interviews, the Applicants were not aware of the differences between the Inspira rating scale and the rating scale used by the panel. Thus, they were *a fortiori* unaware that their ratings would be converted from one scale to the other in a manner that could work to their detriment.

42. In light of the foregoing, the Tribunal considers that the violations of the rules set out in chapter 9 of the Inspira Manual were not such as to be effectively prejudicial to the Applicants' rights and that this contention must therefore be rejected.

Composition of the panel

43. The third irregularity alleged by the Applicants is the unbalanced composition of the panel. They contend that, as most of the candidates were English-speaking and the panel included one native French speaker, a native English speaker should have been included on the panel to ensure equity. Nevertheless, there is no rule which imposes such a requirement, and the Tribunal notes that four of the five panel members had English rather than French as their dominant foreign language. The Applicants thus cannot claim that the panel's composition was such as to disadvantage anglophone candidates, especially as the panel was not tasked to assess the candidates' linguistic knowledge. This contention must therefore be rejected.

Misleading instructions from the panel

44. The fourth irregularity alleged by the Applicants concerns the instructions they were given by the panel at the start of the interviews. They state, and the Respondent does not deny, that the panel told the candidates that they could answer questions in either English and French and that their choice of language would not affect their assessment. The Applicants claim, however, that the Panel did take language into account, particularly with regard to the competency "Communication". They complain that they were misled.

45. Documents in the case file show that the panel did indeed take favourable note of the fact of answering questions in English or French, depending on the language in which they were asked. The evaluations show that the two candidates who spoke in both languages were rated more highly than the others under "Communication". In addition, both the evaluation reports drawn up after the interviews and the Comparative Analysis Report include an indication, under the competency "Communication", of whether each candidate answered questions in both languages or only in English. Finally, in his email of 5 August 2013 addressed to the hiring manager, the Chief of the Chinese Interpretation Section cited the use of both languages as a positive factor in the summary of his assessment of each candidate.

46. The Tribunal must therefore find that the instruction given by the panel may have led the Applicants to make a choice that had a direct impact on their ratings, at least under one of the five competencies evaluated. This contention must therefore be upheld.

Assessment of the candidates

47. In accordance with sections 1(c) and 7.5 of administrative instruction ST/AI/2010/3, an assessment panel was formed for the purpose of interviewing the candidates in order to assess the competencies required for the post, namely “Professionalism”, “Leadership”, “Teamwork”, “Communication” and “Continuous Learning”. The Applicants contend that the panel’s assessment of the competencies of the different candidates was inaccurate and biased, in that the ratings assigned did not reflect their qualifications.

48. The Tribunal recalls that it is not the role of the Tribunal to substitute its own assessment of the candidates for that of the panel (*Abbassi* 2011-UNAT-110). Its oversight in this area is confined to any factual errors made by the panel or any manifest errors of judgement. The Tribunal has compared the panel’s ratings of the Applicants under each competency to the ratings of the selected candidate. It has also compared the write-ups of the evaluations and the references to periodic performance appraisals. However, it does not emerge from all these documents that the panel manifestly erred or reached an unreasonable conclusion.

49. In addition, the Applicants claim that the assessment ratings were changed and even manipulated, to their detriment.

50. An initial evaluation report was prepared after the interviews by one of the panel members, the Chief of the Chinese Interpretation Section. The correspondence between the panel members from 4 to 9 July 2013 confirms that all members of the panel received and approved a copy of that report. After the report had been approved, the Chief of the Chinese Interpretation Section emailed it to the hiring manager’s Administrative Assistant on 11 July 2013. Having examined an electronic copy of that email, the Tribunal has verified that the

candidate evaluation reports attached thereto are in fact the same ones submitted by the Respondent as the initial candidate evaluation reports approved by the panel.

51. On instructions from the hiring manager, his Administrative Assistant entered the panel's approved conclusions into Inspira. But the Inspira rating scale is different from the one used by the panel. In particular, in the fields provided for each competency and for the overall rating, the system offers a closed menu of options strictly limited to "Unsatisfactory", "Partially Satisfactory", "Satisfactory", "Outstanding" and "N/A" (not applicable). The Tribunal has verified directly in Inspira that it is materially impossible to enter any other rating and that when the ratings "Satisfactory" and "Outstanding" are entered into the system, they automatically appear as "Successfully meets" and "Exceeds", respectively. The Tribunal has also verified that, contrary to the Respondent's assertion, it is not true that when a candidate receives the highest rating twice, the system automatically converts this to "Exceeds".

52. Given that there were two rating scales, the Administration choose to convert the candidates' ratings as follows: "Minimally/basically meets" was converted to "Satisfactory", "Meets" was also converted to "Satisfactory", and "Fully meets" was converted to "Outstanding". While the hiring manager has expressed the view that the two scales use different words to designate essentially equivalent categories, in particular in his email of 6 August 2013 addressed to two of the panel members, in which he writes that "it seems more semantic than substantive", these categories are in fact substantially different, to the point where the conversion from one scale to the other was not without consequences for the candidates.

53. Furthermore, while the scale used by the panel in the initial report has three different categories for ranking candidates who meet the basic requirements, namely "Minimally/basically meets", "Meets" and "Fully meets", in the Inspira scale the only positive ratings are "Satisfactory" and "Outstanding": according to the Inspira Manual (sec. 12.1.4(c)), any rating lower than "Satisfactory" for any

competency assessed will result in an overall rating of “Not recommended”. This difference was in fact noticed when the ratings were converted, since the Respondent explains that the candidate rated as “Minimally/basically meets” was given a rating of “Satisfactory” in Inspira so that he could be recommended.

54. Lastly, as the Applicants note, “Fully meets” was converted to “Outstanding”, even though section 12.1.4 (c) of the Inspira Manual specifies that the rating “Satisfactory” means “applicant fully meets the requirements”; it is thus reasonable to conclude that “Satisfactory” is a closer equivalent to “Fully meets” than the higher category of “Outstanding”.

55. It is not the Tribunal’s role to determine how the ratings should most appropriately have been converted. It will thus confine itself to finding that a conversion was carried out between two different rating scales, the consequence of which was to distort the candidates’ ratings. If the hiring manager had no choice but to recommend to the panel that the ratings should be converted to the new rating scale, given the error made with regard to the rating scale used by the panel, the panel members should have been consulted and asked to approve the resulting ratings (see *Fayek* UNDT/2010/113). The Respondent has not produced any evidence that the panel endorsed these changes, despite a request to that effect from the Tribunal. Contrary to the Respondent’s submission, the hiring manager’s email of 6 August 2013 addressed to the Chief of the Arabic Interpretation Section and the Chief of the Chinese Interpretation Section does not provide such evidence; at most, it shows that the hiring manager informed only two of the panel members of his intention to make some adjustments, and it contains no indication that he sent the details of the intended adjustments to the panel members for approval. In fact, the comment made by the Chief of the Chinese Interpretation Section in his message of 5 August 2013, expressing surprise at the CRB reference to a rating of “Exceeds” when the panel had not used that term, seems to show the opposite.

56. Subsequently, after the CRB refused to endorse the recommendation initially submitted, the hiring manager made further changes, again without the panel’s

approval. Three ratings were downgraded from “Exceeds” to “Successfully meets”: that of a non-selected candidate under “Communication”, that of Mr. Zhuang under “Teamwork” and that of the selected candidate under “Communication”. These are precisely the ratings about which the CRB had expressed reservations. However, the selected candidate’s other ratings, i.e., the overall rating and four of the competency ratings, which were also “Exceeds” in the initial Comparative Analysis Report, were left unchanged. Consequently, since only three of the eight “Exceeds” ratings were converted to “Successfully meets”, the conversion rule chosen for the transposition of the panel’s initial rating scale to the Inspira scale was applied inconsistently.

57. It flows from the foregoing that the candidates’ initial ratings were significantly altered on two occasions without formal approval by the panel.

58. The Respondent maintains that these rating adjustments did not in any event affect the choice of the successful candidate, as they did not change the ranking of the candidates as a result of the initial ratings approved by the panel. However, a simple comparison of the different evaluation reports contradicts this assertion. While it is true that the selected candidate is the most highly rated in all three reports, the differences among the other four candidates are essentially erased. All of the non-selected candidates have exactly the same rating in the final Comparative Analysis Report, which thus represents a considerable departure from the panel’s more nuanced assessments.

59. The Respondent stresses, moreover, that the CRB finally endorsed the list of recommended candidates, thus indicating that it deemed the process to have been properly conducted. The Tribunal wishes to recall that it is in no way bound by the views of the CRB, which is a body of the Administration.

60. It follows that the ratings on which the decision to select the successful candidate was based were not approved by the members of the assessment panel and that this constitutes a serious violation of the rules governing the selection process. This contention must therefore be upheld.

Consideration of professional experience

61. Two of the Applicants complained that their years of experience as university-level interpreter teachers were not taken into account.

62. The Applicants allege that the teaching of a language profession should be counted as years of experience in that profession for the purpose of calculating relevant experience, on the basis of *Recruitment for entry level language staff: Grading Guidelines*. The Tribunal nevertheless notes that the job opening specifically calls for “[a]t least ten years of internationally recognized professional interpreting experience”. This very precise wording indicates an intention to consider only work experience as an interpreter. The job opening takes precedence over the text invoked by the Applicants, which is not specific to the post in question, is not binding and, moreover, is meant to apply not to the present situation, i.e., promotion to P-5, but to the initial appointment of new interpreters.

63. Based on these considerations, and given that the Administration has a broad discretion to determine the necessary qualifications for a given post, the Administration was within its rights to exclude teaching experience. Having done so, however, it was bound to apply that standard equally. In the present case, the Tribunal found, upon examining the selected candidate’s personal history profile, that he was not credited with any comparable experience.

64. Accordingly, without considering the appropriateness of the decision to draft the job opening so as to exclude teaching from the experience taken into account for the post in question, the Tribunal finds that the Administration has committed any irregularity in this respect. The Applicants’ contention must therefore be rejected.

Bias against the Applicants

65. The Applicants maintain that they were victims of bias. The Applicants Mr. Zhao and Ms. Xie state that they were penalized in the assessment of their competencies because they made remarks that irritated the panel. Mr. Zhao reports

that he asked whether all the panel members had received the mandatory training in competency-based interviewing, while Ms. Xie states that she drew attention to her status as a female candidate and to the gender parity requirements of the Organization.

66. Even if the panel was in fact displeased at these remarks, the Applicants have provided no evidence that this led to lower ratings. Furthermore, part of the task of an assessment panel is to evaluate and draw conclusions from the remarks made by the candidates during the interviews, for example in terms of professionalism, maturity and judgement.

67. In addition, the three Applicants consider that the hiring manager showed a bias towards the selected candidate throughout the selection process. However, the many errors and irregularities committed throughout that process, as identified above by the Tribunal, do not in themselves show that they were motivated by such favouritism. Therefore, this contention cannot be upheld.

Recommendation submitted to the Director-General of UNOG

68. The Applicants maintain that section 4.7 of Secretary-General's bulletin ST/SGB/2011/7 on central review bodies, section 1(x) of administrative instruction ST/AI/2010/3 and section 3.2 of the Inspira Manual, taken together, indicate that after the CRB endorsed the list of recommended candidates, the hiring manager did not have the authority to intervene by recommending a particular candidate, as he did by his memorandum of 20 August 2013.

69. Chapter 2 of the Inspira Manual, which lists the roles and responsibilities of the Hiring Manager, clearly states (sec. 2.1.12) that the hiring manager, after the central review body has completed its review, recommends to the head of department/office the selection of one candidate and supports such recommendation by a record. While the Manual has less legal force than administrative instruction ST/AI/2010/3, this passage is applicable insofar as it is in no way inconsistent with that administrative instruction (*Korotina* UNDT/2012/178). In this connection, section 9.2 (Selection decision) of the

instruction states that “[t]he selection decision ... shall be made by the head of department/office on the basis of proposals made by the responsible hiring managers ...”. Accessorily, while section 7.7 of the instruction requires that the list of qualified candidates transmitted to the central review body be unranked, this condition is not stipulated in section 9 with regard to the recommendation made to the head of department/office. Accordingly, the hiring manager in this case was fully entitled to recommend the selection of one of the candidates in his memorandum of 20 August 2013.

70. The Applicants also allege that the memorandum on the selection of the successful candidate was sent to the Director-General without the evaluations of all the recommended candidates.

71. Section 9.3 of administrative instruction ST/AI/2010/3, in the form that was in force prior to its amendment on 16 December 2013, provided as follows:

When recommending the selection of candidates for posts up to and including at the D-1 level, the hiring manager shall support such recommendation by a documented record. The head of department/office shall select the candidate he or she considers to be best suited for the functions.

72. The Tribunal finds that, if the head of department/office, in this case the Director-General of UNOG, is to be put in a position to take an informed decision, he or she must have the opportunity to consider all the documentation concerning the skills and qualifications of all the recommended candidates. This interpretation is supported by the English version of the above-cited provision and by section 2.1.12 of the Inspira Manual, both of which require the hiring manager to provide a documented record.

73. While the Respondent claims that this obligation was met, since several documents, including the final version of the Comparative Analysis Report, were submitted as attachments to the memorandum of 20 August 2013, he has not, despite an express request to that effect from the Tribunal, provided any evidence that that document was in fact attached to the memorandum when the latter was

submitted to the Director-General of UNOG. The Applicants' contention must therefore be upheld.

Respect for gender parity

74. One contention that concerns only Ms. Xie is related to measures for achieving parity between men and women within the Organization.

75. Section 1.8(a) of administrative instruction ST/AI/1999/9 on special measures for the achievement of gender equality provides that:

1.8(a) Vacancies in the Professional category and above shall be filled, when there are one or more women candidates, by one of those candidates provided that:

(i) Her qualifications meet the requirements for the vacant post;

(ii) Her qualifications are substantially equal or superior to those of competing male candidates.

76. The Applicant asserts that, as no male candidate was properly assigned an overall rating higher than hers, i.e., "Successfully meets", her qualifications were at least substantially equal to those of the competing candidates. Accordingly, as the only female candidate, and considering that gender parity is far from being achieved in the Chinese Interpretation Section, she states that she should have been selected for the post at issue.

77. In this connection, it is useful to recall the jurisprudence of the Appeals Tribunal, which has held that priority consideration cannot be interpreted as a promise or guarantee of a candidate's selection. To hold otherwise would compromise the principle, set out in Article 101 of the Charter of the United Nations, that the paramount consideration in the employment of the Organization's staff is the necessity of securing "the highest standards of efficiency, competence, and integrity" (*Megerditchian* 2010-UNAT-088).

78. Leaving aside the Comparative Analysis Reports, since the Tribunal has already found that they do not reflect the conclusions of the panel, and focusing

solely on the initial evaluation report, which was the only one approved by all five panel members, the Tribunal notes that three other candidates had higher ratings than Ms. Xie in the evaluations. Not only did the selected candidate receive a rating of “Fully meets” both for his overall rating and for each of the competencies considered, while she received a rating of only “Meets”, but Mr. Zhuang and a third candidate received “Fully meets” for one of the competencies, while Ms. Xie received “Meets” for all of the five competencies assessed. Although the Applicant seems to suggest that the concept of “substantially equal” qualifications should be interpreted exclusively with reference to the overall rating, the Tribunal does not share this view insofar as it entails disregarding perfectly useful information (see, in this regard, *Seyidova* UNDT/2012/168).

79. The Administration has thus not infringed section 1.8(a), since the evaluations show that in her interview the candidate did not demonstrate qualifications that were substantially equal to those of most of the other candidates.

80. It has nonetheless been acknowledged that the Applicant is qualified for appointment to the post, since she was recommended. Section 1.8(d) of the administrative instruction requires that:

When the qualifications of one or more women candidates match the requirements for the vacant post and the department or office recommends a male candidate, the department or office shall submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation, indicating how the qualifications and experience of the recommended candidate, when compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended.

81. Under the selection system currently in force, this requirement is meaningless unless the written analysis so required is submitted to the head of department or office when the hiring manager recommends a particular candidate from among those recommended at the stage immediately preceding the final selection decision. The absence of such a written analysis has been established, since the Respondent, who was requested by the Tribunal to produce the attachments to the

hiring manager's memorandum of 20 August 2013, has submitted a list of the documents that were allegedly attached to the memorandum. This list makes no mention of such a written analysis. The contention that the above-mentioned instruction was not followed must therefore be upheld.

82. In view of the irregularities identified above by the Tribunal, which it finds to be such as to have influenced the choice of the successful candidate by the Director-General of UNOG, the Tribunal decides to rescind the decision to appoint the selected candidate to the post in question.

Consequences of the rescission

83. As the rescinded decision concerns a promotion, article 10, paragraph 5, of the Tribunal's Statute is applicable, under which, where the Tribunal orders the rescission of a decision concerning promotion, the Judge must set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested decision.

84. In determining the amount of such compensation, the Tribunal must be guided by two factors: the nature of the irregularities on which the rescission is based, and the likelihood that the applicant would have been appointed to the post in question if those irregularities had not been committed (*Solanki* 2010-UNAT-044; *Mezoui* 2012-UNAT-220; *Appleton* 2013-UNAT-347). In the present case, these factors may vary from one Applicant to another. Consequently, the Tribunal must set the compensation amounts in accordance with the situation of each Applicant.

85. The irregularities noted are identical for Mr. Zhao and Mr. Zhuang. In the case of Ms. Xie, the absence of the written analysis required by administrative instruction ST/AI/1999/9 must be taken into account as well. The Tribunal considers that each Applicant's chances of being selected should be estimated in accordance with the initial ratings assigned to the candidates by the panel and formally approved by all the members thereof. Given the number of recommended candidates (five), the differences in their respective ratings under each competency, the fact that the selected candidate was undeniably the most

highly rated by the panel, and the prescribed measures for the achievement of gender parity, the Tribunal finds that Ms. Xie, the only female candidate, had a strong chance of being selected; that Mr. Zhuang, the most highly rated of the three Applicants and the candidate with the second-highest ratings, together with another candidate who is not a party to these proceedings, had a reasonable chance of being selected; and that Mr. Zhao, albeit a recommended candidate, had very little chance of being selected.

86. Should the Administration elect not to rescind the decision, as ordered by the Tribunal, the compensation to be paid as an alternative should correspond to the material injury suffered as a result of the irregularities committed. This injury corresponds to the difference in salary between the P-5 level and the P-4 level from the date on which the selection decision was implemented, 1 March 2014, to the date on which the Applicants may be selected for another P-5 post, adjusted in accordance with each Applicant's real chances of being selected. The Appeals Tribunal has held that, except in very compelling cases, the duration of damages awarded should be limited to two years (*Hastings* 2011-UNAT-109).

87. In the present case, in view of the material injury estimated in accordance with the criteria set out above and the chances that each Applicant had of being selected, as assessed in paragraph 85 above, the Administration is ordered to pay the sum of USD4,000 to Ms. Xie and USD3,000 to Mr. Zhuang. Given that Mr. Zhao had very little chance of being promoted, there are no grounds for awarding him compensation for material injury (see *Vangelova* 2011-UNAT-172).

88. If, on the contrary, the Administration elects to carry out the rescission decision, it will have to restart the selection process for the post in question. In that case, the Applicants will have the opportunity to be selected and, if they are successful, they will be entitled to have their promotion backdated to 1 March 2014, and thus will have suffered no material injury.

89. On the other hand, the moral injury they have suffered will be the same regardless of the option chosen by the Administration. Damages for moral injury

may arise from a breach of an applicant's entitlement to a proper procedure. Where the breach is of a fundamental nature, it may of itself give rise to an award of moral damages (*Asariotis* 2013-UNAT-309; *Goodwin* 2013-UNAT-346). In the three cases in the present proceedings, the Applicants were deprived of the equal opportunity to which they were entitled. At the hearing, the Applicants described the anxiety they felt as a result of these irregularities. In addition, the panel included two of their immediate superiors and a colleague, and all the candidates, including the one selected, work in the same section; this is likely to have increased the discomfort they have felt in their workplace since the decision. In light of the above considerations, the Tribunal awards moral damages in the amount of USD4,000 to each Applicant.

Conclusion

90. In view of the foregoing, the Tribunal DECIDES:

- a. The selection decision concerning the post of Senior Interpreter (Chinese), P-5, advertised as job opening No. 13-LAN-UNOG-27762-R-Geneva (L), is rescinded;
- b. If, rather than executing the decision in subparagraph (a) above, the Administration elects to pay compensation, it shall pay material damages in the amount of USD3,000 to Mr. Zhuang and USD4,000 to Ms. Xie;
- c. Moral damages in the amount of USD4,000 are awarded to each Applicant;
- d. The above amounts shall bear interest at the United States prime rate with effect from the date on which this Judgment becomes executable until payment of the said compensation. If the sum is not paid within 60 days from the date on which this Judgment becomes executable, an additional 5 per cent shall be added to the United States prime rate until the date of payment.

Case No. UNDT/GVA/2013/070

UNDT/GVA/2013/071

UNDT/GVA/2013/073

Judgment No. UNDT/2014/036

(Signed)

Judge Jean-François Cousin

Dated this 28th day of March 2014

Entered in the Register on this 28th day of March 2014

(Signed)

René M. Vargas M., Registrar, Geneva