



**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** René M. Vargas M.

HUBBLE

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Simon Buettner, UNOG

## **Introduction**

1. By application filed on 6 March 2014, the Applicant contests the decision to appoint a male candidate other than him to one of the two posts of Senior Interpreter (English) at the Interpretation Service, Department of Conference Management (DCM), published under Job Opening (“JO”) No. 13-LAN-UNOG-27767-R-GENEVA (L) (P-5 level).

2. He requests the rescission of the decision to select the other candidate for one of the posts (“the selected candidate”) and that the selection procedure be restarted. At the oral hearing, he clarified that he did not seek compensation for moral damages.

## **Facts**

3. From 16 April to 15 June 2013, two posts of Senior Interpreters, P-5 (English), Interpretation Service, DCM, were advertised in Inspira, under JO 13-LAN-UNOG-27767-R-GENEVA (L). This JO was identical to a prior JO advertised in 2012 and for which the selected candidate and the Applicant had been rostered after review by the Central Review Board (“CRB”). The Applicant who is a P-4 Interpreter, applied to JO 13-LAN-UNOG-27767-R-GENEVA (L) on 24 May 2013.

4. On 1 August 2013, the incumbent of the D-1 post of Chief, IS, DCM, who was to act as hiring manager for the above-mentioned JO, was laterally transferred.

5. By memorandum dated 20 August 2013 addressed to a Senior Human Resources Officer, HRMS, through the Director, DCM, the then Officer-in-Charge (“OIC”), IS, DCM, recommended two rostered candidates, namely the selected candidate and a female candidate, for final selection by the Director-General, UNOG, without further review by the CRB, for the two posts opened under JO 13-LAN-UNOG-27767-R-GENEVA-(L).

6. On 11 September 2013, the Associate Human Resources Officer, HRMS, UNOG, in charge of preparing the submission to the Director-General, UNOG, sent an e-mail to the OIC, IS, DCM, indicating, *inter alia*, that a more detailed comparative analysis of all considered rostered candidates was needed.

7. The D-1 post of Chief, IS, DCM—vacant since 1 August 2013—was transferred on loan to the Department for General Assembly and Conference Management (“DGACM”), upon request of the Under Secretary-General, DGACM, effective 27 September 2013 through 30 June 2014. Since beginning of 2013, the D-1 post of Chief, IS, DCM, has been advertised three times: a first time under JO 26430, with a closing date of 12 March 2013, without generating a successful candidate; subsequently, under JO 28846, which was cancelled upon the temporary loan of the post to DGACM; finally, under JO 32508, with a closing date of 23 March 2014.

8. By a “Note de service” dated 3 October 2013 referring to the loan of the post of Chief, IS, to DGACM until 30 June 2014, the Director, DCM, announced that the responsibility for the Interpretation Service from 4 October 2013 through 30 June 2014 would be assigned to five Chiefs of Section, IS, for periods of approximately two months each. Therefore, for the first period—from 4 October 2013 through 5 December 2013—the responsibility was assigned to one of the Chiefs of Section, IS, DCM. On 3 December 2013, the Director, DCM, decided that said Chief of Section would continue to serve as “OIC of the [IS] until the selection of the new Chief of Service”.

9. By memorandum of 29 November 2013 addressed to the Sectoral Assembly of UNOG Staff Interpreters, DCM, the Under Secretary-General, DGACM, conveyed the reasons for the decision to temporarily loan the D-1 post of Chief, IS, DCM, to DGACM. He further noted that in view of the concerns expressed by staff to ensure continuity, it had been agreed to appoint one OIC, IS, UNOG, for the whole duration of the loan and stated that all Chiefs of Section, IS, DCM, were competent to act as OICs during that period.

10. On 9 December 2013, the Chief of Section, explicitly acting as “Officer-in-Charge Interpretation Service, DCM”, sent a memorandum to HRMS, UNOG,

with the comparative analysis of all seven rostered candidates considered under JO 13-LAN-UNOG-27767-R-GENEVA (L) and recommended two of them, the selected candidate and a female candidate, for selection to the two posts opened under said JO.

11. On 10 December 2013, the Director of Administration, UNOG, transmitted the recommendation for the two posts opened under JO 13-LAN-UNOG-27767-R-GENEVA (L), including the list of the rostered candidates, to the Acting Director-General, for the final selection decision. The above-mentioned memorandum of 9 December 2013 was an integral part of the submission to the Acting Director-General.

12. On 12 December 2013, the Acting Director-General selected the two recommended candidates for the two posts. They were notified of their selection on 13 December 2013. The Applicant became aware of this decision when he logged into his INSPIRA account on 17 December 2013.

13. The Applicant filed a request for management evaluation of the decision on 24 January 2014, with a supplement filed on 11 February 2014. Also on 11 February 2014, he filed a request for suspension of action of the same decision, pending his request for management evaluation. The Tribunal rejected the request for suspension of action by Order No. 29 (GVA/2014) of 20 February 2014, on the grounds that the response to the Applicant's request for management evaluation, dated 4 February 2014, had been sent to the Applicant on 19 February 2014.

14. The Applicant filed the present application on 6 March 2014, and it was served on the Respondent on 10 March 2014, who filed his reply on 9 April 2014.

15. By Order No. 44 (GVA/2014) of 11 March 2014, the Tribunal ordered that the selected candidate be joined to the application under art. 11 of the Tribunal's Rules of Procedure; by the same Order, the selected candidate was invited to submit comments on the application, which he did on 20 March 2014.

16. By Order No. 59 (GVA/2014) of 25 April 2014, the parties were convoked to a hearing in the present case, which was heard together with Case No. UNDT/GVA/2014/003 concerning another applicant who had contested the same decision. The hearing took place on 15 May 2014, in the presence of the parties. The selected candidate, who had been invited to attend the hearing as a joint party under art. 11, did not attend in this capacity but was present in the public.

### **Parties' submissions**

17. The Applicant's principal relevant contentions are:

a. The appointment of the Hiring Manager was irregular and his independence could not be guaranteed; he was appointed as OIC on 6 December 2013 by the Head, DCM, UNOG, at the P-5 level. Prior to that, in August 2013, the D-1 post of Chief, Interpretation Service, UNOG, had been temporarily transferred to the New-York office of the Under-Secretary General for General Assembly and Conference Management, until 1 June 2014; the Interpretation Service, DCM, was thus knowingly deprived of a Chief for a period of 11 months, while the D-1 post was deployed to DGACM, in violation of the Controller's memorandum of 15 March 2012 and for illegitimate reasons;

b. The OIC was therefore not an Acting Director but a mere "caretaker" of the Service, and as a P-5 Interpreter did not have the authority to act as Hiring Manager for a P-5 post; under such circumstances, any OIC assigned to Interpretation Service, UNOG, could not be invested with the authority to act as Hiring Manager for the contested post; the extension of the capacity as OIC for more than three months against a non-existent post was done in violation of the practice according to which, in the absence of a post and related Special Post Allowance, no staff member may act as OIC for more than three months;

c. Since the OIC was solely and directly appointed by the Director, DCM, who also signed the memorandum recommending the successfully

candidate, due process and the independence of signatories were not respected in the selection process;

d. The Hiring Manager, by failing to give full and fair consideration to the Applicant's candidature, did not execute the duties and responsibilities of staff members invested with delegated authority under staff rule 3.10(a);

e. He seeks rescission of the decision to appoint the selected candidate to the contested post and that the selection process be reinitiated in a fair and transparent way; he also requests publication of the comparative analysis of all candidates.

18. The Respondent's principal relevant contentions are:

a. The decision to temporarily loan the D-1 post to DGACM is not an administrative decision which could have or was the subject of the Applicant's request for management evaluation and is therefore not properly before the Tribunal; in the same line, the decision to appoint the Chief of Section as OIC does not have any direct legal effects on the Applicant who therefore has no standing to contest said decision;

b. The Appeals Tribunal held that "[t]he Secretary-General enjoys broad discretion in selection matters and it is not the function of the UNDT or [the Appeals Tribunal], in the absence of evidence of bias, discriminatory practices or mala fides, to substitute its judgment for that of the Secretary-General" (*Bofill* 2013-UNAT-383);

c. Therefore, the Tribunal is limited to examine whether the procedure was properly followed, and whether the Applicant was given fair and adequate consideration (*Majbri* 2012-UNAT-200; *Abassi* 2011-UNAT-110); a selection decision "should be upheld when candidates have received full and fair consideration, when discrimination and bias are absent, when proper procedures have been followed, and when all relevant material has been taken into consideration (*Charles* 2013-UNAT-286);

d. The Applicant did not show any procedural error or present a clear and convincing evidence of bias towards him, to question the validity of the discretionary selection decision;

e. The provisions of Administrative instruction ST/AI/2010/3 (Staff Selection System) and of the Inspira Manual for the Hiring Manager on the Staff Selection system were respected;

f. The appointment of the Chief of Section as Hiring Manager was in accordance with staff rule 3.10(a) which provides that staff members “shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts”; further, the final decision was made by the Acting Director-General, within his delegation of authority; the “rotation” of OIC’s at the Interpretation Service was revoked on the grounds of concerns expressed by staff of the service, and it is unfair to now use management’s good faith in order to question the legitimacy of the Hiring Manager; the Applicant failed to show how the assignment of the Chief of Section as Hiring Manager impacted the consideration of candidates in the selection process;

g. The Administration has broad discretion in assessing the respective qualifications of candidates and the Tribunal cannot substitute its assessment to that of the Secretary-General;

h. It does not fall on the Applicant to determine the operational needs of the post which falls within the discretion of the Secretary-General;

i. The selection decision by the Acting Director-General was based on the selection memorandum and its attachments, to wit, the JO, the PHPs of the selected candidates, and the recommendation of the Hiring Manager of 9 December 2013; no other factors were taken into account and the decision constitutes a proper exercise of discretion;

j. Based on the documentary record he received, which included the memorandum of the Hiring Manager of 9 December 2013 containing the

names of all rostered candidates—including the Applicant—and the PHPs of the recommended candidates, the Acting Director-General took an informed decision;

k. The selection decision was made in accordance with the Charter of the United Nations; the Respondent met the standard set by the Appeals Tribunal in judgment *Rolland* (2011-UNAT-122) to make a minimal showing that the Applicant's candidature was given full and fair consideration; the presumption of regularity should stand and the application be rejected in its entirety.

19. The successful candidate, who was joined to the application under art. 11 of the Tribunal's Rules of Procedure, alleges that his qualifications and experience are superior to those of the other rostered candidates and that he fulfils all the requirements of the post.

### **Consideration**

20. The Tribunal recalls the jurisprudence of the Appeals Tribunal in appointment and promotion matters, whereby a selection decision should be upheld when candidates have received full and fair consideration, when discrimination and bias are absent, when proper procedures have been followed and when all relevant material has been taken into account (*Rolland* 2011-UNAT-122; *Charles* 2013-UNAT-286). In addition, the Appeals Tribunal has clarified that the "direct effect of an irregularity will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation" (*Bofill* 2011-UNAT-174).

### *OIC, IS and Hiring Manager*

21. The Tribunal finds that the procedure leading to the contested selection decision is marked by a serious shortcoming, namely the role of one of the Chiefs of Section as OIC, IS, and Hiring Manager in the selection process.



22. With respect to the person who acted as Hiring Manager, the Respondent argues that a Chief of Section could legitimately be appointed as OIC, IS, in accordance with staff rule 3.10(a), and from there derive his capacity to act as Hiring Manager in the selection process for the contested post; he further notes that in any event, the final selection decision was taken by the Acting Director-General, UNOG, who, under the terms of ST/AI/2010/3/Amend.1, could have chosen any of the five remaining rostered candidates—including the Applicant—who were not recommended for selection by the Hiring Manager.

23. The Tribunal wishes to emphasize that it results from various provisions of ST/AI/2010/3/Amend. 1 that the Hiring Manager plays an important role at all the stages of the selection process, from the initiation of the job opening to the recommendation to the head of department: the Hiring Manager is responsible for creating the job opening (sec. 4.4); once eligible candidates have been pre-screened/pre-approved, they are released to the Hiring Manager for consideration for selection (sec. 7.2); moreover, the Hiring Manager prepares a reasoned and documented record of the evaluation of the proposed candidates for review by the central review body and for selection by the head of department (sec. 7.6); under sec. 7.7, the Hiring Manager transmits his/her proposal of one or several (unranked) candidates to the appropriate central review body; sec. 9.2 provides that once candidates are “approved” by the central review body, the selection decision shall be made by the head of department on the basis of proposals made by the responsible Hiring Manager, whereas sec. 9.3 states that the Hiring Manager shall support the recommendation of candidates for selection by a documented record. Finally, sec. 9.5 provides with respect to eligible and suitable roster candidates on occupational rosters that “the hiring manager may recommend his/her immediate selection to the head of department ... without reference to the central review body”.

24. In view of the overall powerful and crucial role of the Hiring Manager throughout the selection process described above, ensuring that the Chief of Section—who drafted the recommendation memorandum of 9 December 2013 as OIC, IS—did in fact have the necessary legal authority to do so is an essential element of the procedural regularity of the selection process under review.

25. To undertake such an assessment, the Tribunal finds it necessary to recall the main events in the chronology leading to the final selection decision: the VA was advertised in April 2013. At that time, the Hiring Manager was the Chief, IS, who was laterally transferred to another D-1 post at UNOG on 1 August 2013. Thereafter, effective 27 September 2013, the post of Chief, IS, was temporarily loaned to DGACM and on 3 October 2013, the Director, DCM, decided that the responsibility for IS, DCM, be assigned to one of the Chiefs of Section, for an initial period of two months which was subsequently extended, by “Note de service” of 3 December 2013, until the selection of the new Chief, IS.

26. Soon thereafter, on 9 December 2013, the Chief of Section, as “Officer-in-Charge Interpretation Service, DCM” signed the recommendation memorandum transmitted to the Acting Director-General for final selection as an integral part of the submission by the Director, Division of Administration, UNOG, dated 10 December 2013, which explicitly referred to the memorandum of 9 December 2013.

27. It results from the foregoing that the selection decision by the Acting Director-General was in fact implementing the recommendation of the Hiring Manager. Indeed, the Acting Director-General selected the two candidates who had been recommended by the Hiring Manager. Furthermore, the above shows that it was the Administration’s clear understanding that the Hiring Manager for the selection exercise was the incumbent of the D-1 post of Chief, IS, or whoever acted as OIC for that position. The Respondent, in his defence, noted that the respective Chief of Section had been assigned as OIC, IS, and that he derived his capacity to act as Hiring Manager from his status as OIC, IS.

28. The Tribunal notes that at the time of the recommendation of 9 December 2013, the post of Chief, IS, did not exist at UNOG, since it had been explicitly transferred to DGACM in New York, effective 27 September 2013. Legally speaking, this transfer created a vacuum in UNOG. It is the Tribunal’s considered view that each appointment of an OIC requires at least that the OIC’s duties be clearly defined against an *existing* post. In other words: where there is no post, the position of an OIC lacks its essential fundament.

29. As a matter of fact, upon the transfer of the post of Chief, IS, to DGACM at the end of September 2013, IS was deprived of the D-1 post, though the Respondent noted and admitted that the need of service for that post continued to exist. In that situation, the Administration of UNOG acted as if the D-1 post had not been transferred, to the extent that it appointed an OIC to whom it extended, *de facto*, the same authority vested on the Chief, IS, that is, *inter alia*, to act as Hiring Manager for the contested post.

30. The Tribunal notes that the Administration cannot have it both ways: either the D-1 post of Chief, IS, was still available, and the need of service continued to exist or, as it was the case, the D-1 post was temporarily loaned to DGACM. Under the former scenario, pending the regular recruitment of the D-1 post, the Administration should have published a temporary vacancy announcement for it, in accordance with sec. 3 of ST/AI/2010/4/Rev.1 (Temporary appointments),<sup>1</sup> and could have therefore appointed someone as OIC, IS, who could have legally acted on and finalised the selection process initiated by the former Chief, IS, as Hiring Manager. Under the latter scenario, the temporary loan of the D-1 post created a vacuum at the IS, which was deprived of a Chief for almost one year. This decision, which is a question of organisation of service, certainly falls within the discretion of the Administration. However, by choosing to transfer the post, the Administration was precluded from acting as if the post was still available at UNOG.

31. In view of these considerations, the Tribunal concludes that in the present case, in the absence of a D-1 post against which an OIC, IS, could have been legally appointed, the Chief of Section lacked the legal authority to act as Hiring Manager for the contested post. On that ground alone, the selection decision is illegal. In addition, it has to be acknowledged that the Applicant, being a rostered candidate, had a significant chance to be selected for the post. Therefore, the contested decision has to be rescinded, as requested by the Applicant.

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<sup>1</sup> Sec. 3 of ST/AI/2010/4/Rev.1 provides: Temporary job opening, selection and appointment process, Temporary job opening, “3.1 When a need for service for more than three months but less than one year is anticipated, a temporary job opening shall be issued by the programme manager. 3.2 While the decision to issue a temporary job opening for a need for service for three months or less is made at the discretion of the programme manager, any extension beyond three months shall require the issuance of a temporary job opening.”

*Consequences of the rescission*

32. Since the rescinded decision concerns a promotion, art. 10.5(a), of the Tribunal's Statute applies, which provides that where the Tribunal orders the rescission of a promotion decision, the Judge shall set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision.

33. As per the jurisprudence of the Appeals Tribunal, in determining the amount for compensation under art. 10.5 of its Statute in non-promotion cases, the decision must take into account two factors, namely the nature of the irregularities on which the rescission of the contested decision was based and the chance that the staff member would have had to be promoted had those irregularities not been committed (*Solanki* 2010-UNAT-044; see. also *Mezoui* 2012-UNAT-220 and *Appleton* 2013-UNAT-347). The Appeals Tribunal also held that when calculating such compensation, on the basis of the probability for an Applicant to be promoted but for the procedural breach, the period of the difference in salary between an Applicant's grade and that of the contested post that can be taken into account should be limited to a maximum of two years (*Hastings* 2011-UNAT-109).

34. In the case at hand, the Tribunal has decided to rescind the selection decision on the basis of a serious procedural irregularity, to wit, the fact that the Hiring Manager lacked the authority to act as such. With respect to the Applicant's chances to be selected, the Tribunal notes that after the selection of one female candidate to one of the posts, six rostered candidates remained, therefore, the Applicant had one out of six chances to be promoted, had the irregularities not been committed. In view of the above-referenced principles and the absence of any parameter or information allowing the Tribunal to have a concrete indication as to when the Applicant will be able, in the future, to assert his right to seek promotion, it considers that it is appropriate to assess compensation, under art. 10.5(a) of its Statute, on the basis of the estimated difference between the P-4 grade and the P-5 grade, for a period of two years, which then has to be divided by six.

35. Upon the Tribunal's express inquiry at the hearing, the Applicant confirmed that he did not request compensation for moral damages.

**Conclusion**

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

- a. The decision to select the selected candidate for one of the posts advertised under JO 13-LAN-UNOG-27767-R-GENEVA (L) (P-5 level) is rescinded;
- b. In case the Respondent elects to pay compensation instead of the rescission, the amount of compensation to be paid to the Applicant is set at USD2,000;
- c. The aforementioned compensation shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable;
- d. All other claims are rejected.

*(Signed)*

Judge Thomas Laker

Dated this 19<sup>th</sup> day of June 2014

Entered in the Register on this 19<sup>th</sup> day of June 2014

*(Signed)*

René M. Vargas M., Registrar, Geneva