



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

TIWATHIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Duke Danquah, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Senior Medical Officer in the Medical Services Division (“MSD”), Office of Human Resources Management (“OHRM”), Department of Management (“DM”), contests her non-selection for the post of Deputy Director, MSD, at the D-1 level (“DD/MSD”). She submits that the selection process was tainted by numerous procedural irregularities in violation of the Staff Regulations, Rules and other issuances.

Factual background

2. The selection decision for the DD/MSD post was made during a period of transition within the division. The Director of MSD, a D-2 level position, resigned in late 2011 to take up a new position and separated from service on 22 January 2012. The incumbent of the DD/MSD post, Dr. Pasquier-Castro, was due to retire in late 2012 and did so on 31 August 2012. Consequently, job openings were issued for both director positions in the division and the posts were advertised simultaneously between 15 December 2011 and 13 February 2012.

3. Job Opening 11-MED-DM-OHRM-22070-R-NEW YORK (G) was issued for the DD/MSD post. Under the heading “Assessment Method” the JO listed “Competency based interview”. The requirements for the Professionalism competency were as follows:

Professionalism: Knowledge of Internal medicine, occupational medicine, travel and tropical medicine; first hand knowledge of worldwide health conditions and medical facilities and health-related travel requirements; analytical skills and ability to make timely and appropriate decisions in any medical situation[;] shows pride in work and achievements; is motivated by professional rather than personal concerns; shows persistence when faced with difficult problems or challenges; remains calm in stressful situations.

4. Seventy-two applications were received for the DD/MSD vacancy of which 43 were rejected as ineligible. A further 23 candidates were found not suitable. One applicant withdrew from the selection process. The remaining five candidates, including the Applicant, were short-listed and invited to take part in a competency-based interview. Four of the five short-listed candidates, including the Applicant and the selected candidate, were found to satisfactorily meet the competencies for the DD/MSD post and were recommended to Ms. Pollard, the then Assistant Secretary-General, OHRM (“ASG/OHRM”) by the panel who conducted the interview (“Interview Panel”).

5. The Interview Panel found that the Applicant met the requirements for each of the competencies listed in the job description, namely Communication, Teamwork, Professionalism, Judgement/Decision-making, and Leadership. Her rating for each of the individual competencies, and her overall rating, was “satisfactory”. The selected candidate received the same ratings as the Applicant except on the competency of Professionalism for which he received a rating of “outstanding”. His overall rating was also “satisfactory”.

6. Ms. Pollard, ASG/OHRM, conducted second interviews with three of the recommended candidates on 29, 30 and 31 May 2012. The fourth recommended candidate, who had applied for both the D-1 and D-2 posts within MSD, was not interviewed by Ms. Pollard because she was selected for the D-2 post.

7. On 4 June 2012, Ms. Pollard submitted a memorandum to the Under-Secretary-General for Management (“USG/DM”), noting that she had interviewed the candidates put forward by the Interview Panel and agreed with the Panel’s conclusion that they should be recommended. After providing a brief summary of the qualifications and experience of the four recommended candidates, she requested agreement from the USG/DM on the recommendation before referring the case to the Central Review Board (“CRB”). She then stated: “... I will send you

separately a recommendation for selection for the job opening once the process of selection for the D-2 Medical Director is completed”.

8. By memorandum dated 27 June 2012, the recommendations for the DD/MSD post were submitted to the CRB. The memorandum stated that the Assessment Panel consisted of Ms. Lopez, Director, Strategic Planning and Staffing Division (“SPSD”), OHRM; Mr. Mitrokhin, Programme Officer, Division of Regional Operations, Department of Safety and Security; and Dr. Pasquier-Castro, the incumbent of the DD/MSD post. The memorandum included a description of the process by which the substantive assessments determined if applicants were “Recommended” or “Not Recommended”, stating:

At the conclusion of the competency-based interviews, four candidates were recommended to the ASG for Human Resources Management for second interview ... Three of those candidates were interviewed by the ASG ... The fourth candidate ... was not interviewed for the post by the ASG, as she was selected for the D-2 Medical Director post [in MSD/OHRM] ...

9. On 5 July 2012, Ms. Tabourian, Chief of the CRB Secretariat, notified Ms. Lopez and Ms. Pollard that the CRB had “endorsed the proposal for filling” the DD/MSD post.

10. On the same day, Ms. Lopez, acting as Officer-in-Charge of OHRM, notified the USG/DM that the CRB had approved the recommended candidates, and added that, “[b]ased on the results of the interviews and a thorough review of the personal history profiles of the three recommended candidates”, OHRM wished to proceed with the selection of the selected candidate. She further stated:

In making this proposal, OHRM has taken into consideration the staff member’s previous service as Chief Medical Services in UNAMI (Iraq) where he was responsible for the day-to-day administration of medical staff of the UNAMI Medical Service as well as the fact that he is the most senior P-5 among the three.

11. On 10 July 2012, the Applicant was informed by email from Ms. Pollard that she had not been selected for the DD/MSD post but that she had been placed on a roster of pre-approved candidates for consideration for future job openings with similar functions at the same level. Later that day, Dr. Pasquier-Castro informed the Applicant and other colleagues by email that the selected candidate had been appointed as DD/MSD.

12. On the same day, Dr. Pasquier-Castro also met the Applicant to discuss the selection decision. The Applicant raised concerns about the geographical diversity of hiring practices within MSD. The Applicant alleges that Dr. Pasquier-Castro then made comments which indicated a geographical bias against doctors from certain countries. In an email to the Respondent, Dr. Pasquier-Castro provided the following summary of the exchange:

Dr Tiwathia stated that the decision amounted to racism, the proof being that all D1s and D2s nominated at MSD [in NewYork] since its creation had been white people. I proceeded to tell her that, although this was not entirely true, it was in fact mostly true and could probably be explained by the fact that medical positions being a [sic] highly technical ones, it would be logical that most of the best qualified doctors would have come from countries where the field of medicine is most advanced.

Procedural background

13. On 12 July 2012, the Applicant submitted a request for management evaluation of the decision not to select her for the post of DD/MSD.

14. On 13 September 2012, the Applicant was informed that the Secretary-General had decided to uphold the contested selection decision.

15. On 19 November 2012, the Applicant filed the application.

16. The Respondent filed his reply on 20 December 2012.

17. A case management discussion (“CMD”) was held on 1 July 2014 to discuss the claims and issues in the case and to issue any Orders necessary in preparation for a hearing.

18. After reviewing the issues with the parties, it appeared to the Tribunal that they would be well advised to explore, with the assistance of the Director of MSD, the possibility of an alternative resolution to the dispute. The Tribunal adjourned the CMD to allow for such discussions to take place.

19. At the request of the parties, by Order No. 200 (NY/2014), dated 21 July 2014, the Tribunal referred the case to the United Nations Office of the Ombudsman and Mediation Services and suspended all further proceedings until 4 August 2014. By consent, the suspension of proceedings was extended through two further Orders.

20. In a joint submission dated 3 October 2014, the parties advised the Tribunal that mediation efforts had been unsuccessful.

21. On 14 November 2014, a second CMD was held to resolve all outstanding issues, including the disclosure of documents filed with the Tribunal on an *ex parte* basis and the prospects, if any, of alternative dispute resolution. At the CMD, the Tribunal agreed to suspend proceedings for one week pending attempts at alternative dispute resolution.

22. On 24 November 2014, the parties informed the Tribunal that an informal resolution had not been reached.

23. A hearing was held on 3, 4, 5, and 9 December 2014. The Applicant and the following witnesses gave evidence: Mr. Kwon, Chief of Staffing, OHRM; Ms. Lopez, Director, SPSD, OHRM; and Ms. Pollard, ASG/OHRM at the relevant time.

24. On 9 January 2015, the parties filed their closing submissions.

25. On 23 January 2015, the parties filed responses to the closing submissions of the opposing party.

Applicant's submissions

26. The Applicant contends that the selection process was flawed for the following reasons:

a. The Organization hired Dr. Narula, a retiree, to complete a preliminary assessment of candidates for the DD/MSD post and to participate as a *de facto* panel member and assessor at the competency-based interview, despite clear rules against such a hiring.

b. The assessment panel did not have two subject-matter experts, which calls into question the objectivity and reliability of the panel's assessment, particularly in regard to the competency of Professionalism.

c. Ms. Pollard conducted a second interview of the recommended candidates without seeking approval from the CRB for such interviews, including the criteria for evaluation. She did not form a full interview panel to conduct the second interview.

d. Ms. Pollard, as hiring manager, failed to disclose to the CRB the participation of Dr. Narula, a retiree, in the selection process.

e. The use of seniority as a selection criterion was impermissible.

f. The decision-maker failed to apply the Organization's gender policy and the Organization failed to have due regard to the importance of recruiting staff on a wide geographical basis as required by art. 101.3 of the United Nations Charter and staff regulation 4.2. Of the seven appointments in MSD at the P-5, D-1, and D-2 level over the two years prior to the application, the successful candidates came from three countries, namely Germany (2),

France (3), and Australia (2), which are all countries from the group of nations referred to as Western Europe and Other Group (“WEOG”). This pattern of hiring establishes a *prima facie* case of discrimination on the basis of geographical bias.

g. Dr. Pasquier-Castro, the DD/MSD, made comments indicative of bias in favour of candidates from WEOG countries.

h. The “coupling” of the D-1 and D-2 posts—i.e. the alleged influence of the outcome of the selection decision for the D-2 post on the selection decision for the D-1 post—was inappropriate and discriminatory.

27. The Applicant requests that the Tribunal:

a. Order rescission of the contested decision;

b. Order the Administration to award the post to the Applicant; or in the alternative to order that, if and when a D-1 post becomes vacant, she should be appointed to that post;

c. Award her compensation for loss of remuneration as a result of the numerous “illegal” decisions; and

d. Award her compensation for the irregularities in the selection process and for the concomitant violations of her rights to due process, fair treatment, and good faith.

Respondent's submissions

28. The Respondent's principal contentions may be summarized as follows:
- a. The staff rules relevant to the selection exercise and ST/AI/2010/3 (Staff selection system) were properly applied and the Applicant was fully and fairly considered for the DD/MSD post.
 - b. There is no credible evidence that the selection process was tainted by extraneous considerations.
 - c. The Applicant's contention regarding the disclosure of confidential information to Dr. Narula, a non-staff member, is not receivable as it was not addressed in her request for management evaluation.
 - d. The Applicant's claim that Dr. Narula was a member of the Interview Panel is incorrect. She was a technical expert who provided technical guidance on the substance of the DD/MSD post but did not contribute to the conclusions of the panel.
 - e. The competency-based interviews were conducted in accordance with ST/AI/2010/3. The Applicant was one of four candidates recommended for the DD/MSD post. The Applicant has not met her burden of showing that she did not receive full and fair consideration as part of the competency-based interview process.
 - f. The additional interview with the ASG/OHRM was not unlawful or improper.
 - g. The Applicant's claims regarding comments allegedly made by Dr. Pasquier-Castro about reasons for the selection decision are baseless. The Applicant has not met her burden of showing that any statements made by Dr. Pasquier-Castro were prejudicial to her candidacy.

- h. ST/AI/2010/3 (Staff selection system) supersedes ST/AI/1999/9 (Special measures for the achievement of gender equality). Section 9.3 of ST/AI/2010/3 states that the head of department shall select the candidate “best suited to the functions”.
- i. The Applicant was not entitled to preferential consideration on account of her nationality. If a candidate is not considered to be the best suited candidate for the position, there is no requirement that the staff member be recruited solely because he or she is from an under-represented country.
- j. The record does not establish that the selection decision was based on seniority.

Considerations

Applicable law

- 29. Article 101.3 of the United Nations Charter provides:

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

- 30. Staff regulation 4.2 of ST/SGB/2012/1 provides:

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

31. ST/AI/2010/3 (Staff selection system), which entered into force on 22 April 2010, provides:

Section 1

Definitions

The following definitions apply for the purposes of the present instruction:

...

(c) *Assessment panel*: a panel normally comprised of at least three members, with two being subject matter experts at the same or higher level of the job opening, at least one being female and one being from outside the work unit where the job opening is located, who will undertake the assessment of applicants for a job opening. ...

...

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

...

Section 2

General provisions

...

2.3 Selection decisions for positions up to and including the D-1 level are made by the head of department/office/mission, under delegated authority, when the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed. If a list of qualified candidates has been endorsed by the central review body, the head of department/office/mission may select any one of those candidates for the advertised job opening, subject to the provisions contained in sections 9.2 and 9.5 below. ...

...

Section 7

Pre-screening and assessment

...

7.5 Shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written tests, work sample tests or assessment centres.

...

Section 8

Central review bodies

8.1 The central review bodies shall review proposals for filling a position-specific job opening or for placing candidates on the roster following a generic job opening, made by the department/office or mission concerned, to ensure that applicants were evaluated on the basis of the corresponding evaluation criteria and that the applicable procedures were followed in accordance with sections 5.2 to 5.6 of ST/SGB/2002/6 [footnote reads as follows: “as may be amended or replaced by a new bulletin on the same subject”].

8.2 Authority to make a selection decision with respect to a particular job opening shall be withdrawn when a central review body finds that the evaluation criteria have not been properly applied and/or the applicable procedures have not been followed. ...

...

Section 9

Selection decision

...

9.2 The selection decision for positions up to and including at the D-1 level shall be made by the head of department/office on the basis of proposals made by the responsible hiring managers (for position-specific job openings) and occupational group managers (for generic job openings) when the central review body finds that the candidates have been evaluated on the basis of approved evaluation criteria and the applicable procedures have been followed. ...

9.3 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. Prior to selection of an external candidate, that decision must be justified in writing to, and approved by, OHRM. In the final selection due consideration should also be given to staff members who are victims of malicious acts or natural disasters; serving staff members who have served under the former 200 and 300 series of the Staff Rules; candidates from troop- or police-contributing countries for positions in a peacekeeping operation or Headquarters support account-funded positions in the Department of Peacekeeping Operations, the Department of Field Support and other departments with support account resources; and prior service or employment of candidates in field duty stations, for positions for which relevant field experience is highly desirable, as applicable and as stipulated in General Assembly resolution 63/250.

...

Section 13

Final provisions

...

13.3 The provisions of the present administrative instruction shall prevail over any inconsistent provisions contained in other administrative instructions and circulars currently in force.

32. ST/AI/1999/9 (Special measures for the achievement of gender equality), which entered into force on 1 October 1999, provides:

Selection/appointment

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;

...

(d) 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;

...

33. In matters of selection and promotion, the Secretary-General has broad discretion and it is not the role of the Tribunal to substitute its own decision for that of the Secretary-General (*Abbassi* 2011-UNAT-110). However, the exercise of managerial prerogative is not absolute and the Tribunal may examine whether the selection procedure was carried out in an improper, irregular or otherwise flawed manner, as well as assess whether the applicant was given full and fair consideration or whether the resulting decision was tainted by undue considerations or was manifestly unreasonable (*Abbassi* 2011-UNAT-110, *Charles* 2012-UNAT-242).

34. The Appeals Tribunal has also held that “[n]ot every violation will necessarily lead to an award of compensation. Compensation may only be awarded if it has been established that the staff member actually suffered damage” (*Antaki* 2010-UNAT-095).

35. The crux of the Applicant’s case is that she did not receive full and fair consideration for the post, that she was discriminated against as a staff member originating from a developing country, and that there were a number of violations of the selection procedure, which were intended to produce a pre-determined outcome.

36. It is understandable that the Applicant’s suspicions were raised when the DD/MSD, Dr. Pasquier-Castro, made a comment suggesting that “the best qualified doctors would have come from countries where the field of medicine is most advanced”. The suspicions of the Applicant appear to have been reinforced by what she regards as a series of procedural errors that vitiate the outcome of the selection process. The question for the Tribunal is, first, whether there were any material breaches of procedure and, second, whether there is any evidence that the Applicant’s candidacy for the post of DD/MSD was prejudiced or disadvantaged, either as a result of any procedural breaches, or as a result of other improper

considerations or influences on the selection process. The Tribunal must then consider whether, taking into account its findings, the Applicant received full and fair consideration for the DD/MSD post.

37. The record shows that having applied for the vacant post, the Applicant was found to have met all the requirements of the position, was accordingly short listed, and participated in a competency-based interview. The Interview Panel found that she met the required competencies for the post and recommended her, along with three other candidates. The only possible disadvantage at this stage of the selection process was that the Applicant received a rating of “satisfactory” on the Professionalism competency while the selected candidate received a rating of “outstanding”. However, in evidence Ms. Pollard stated that when she reviewed the list of recommended candidates, as far as she was concerned, all were equally appointable. She conducted an interview with the candidates before making her recommendation to the USG/DM.

The involvement of Dr. Narula in the pre-screening, short-listing and competency-based interview

38. Ms. Pollard stated in evidence that she asked Dr. Pasquier-Castro, the incumbent DD/MSD at the time, to carry out the short-listing exercise, and hired Dr. Narula, a retiree and former Director of MSD, to assist Dr. Pasquier-Castro. She stated that normally the incumbent of a role should not be involved in selecting her replacement, but because Dr. Pasquier-Castro was covering both the D-1 and D-2 posts in MSD at the time, there was no one else who could provide the required technical expertise. Therefore, she hired Dr. Narula to “supplement” Dr. Pasquier-Castro and to ensure a rigorous and transparent process.

39. Dr. Narula also attended the competency-based interview and, according to the Applicant, was introduced to her as a “technical expert”. The Applicant submits that Dr. Narula participated as a *de facto* member of the Interview Panel. She further

submits that the participation of Dr. Narula in the selection process violated the following provisions:

a. Section 5.1(a) of ST/AI/2003/8 (Retention in service beyond the mandatory age of separation and employment of retirees), which states that former staff members above the mandatory separation age shall not be employed by the Organization unless the operational requirements cannot be met by staff members who are qualified and available to perform the functions;

b. Section 2(b) of ST/AI/1997/7 (Consultants and individual contractors), which was in effect at the relevant time and stated that consultants may only be hired when the need for the required services cannot be met from within the staff resources of the Secretariat;

c. Paragraph 5, Part XI of A/RES/63/250 (Human resources management), in which the General Assembly reiterated that employment of retirees in decision-making positions should occur only in exceptional circumstances; and

d. Paragraph 9.3.1 of the Manual for Hiring Managers, which states that if any of the members of an assessment panel are retirees, the interviews will be void.

40. Paragraph 9.3.5(b)(iv) of the Manual for Hiring Managers states:

In situations where the assessment exercise is technical, a technical expert may be invited to evaluate the assessment exercise. The technical expert is required to be at the same or higher level of the position under review and should preferably be from a non-related office within the Organization, or if not, available from another United Nations agency, international organization or established partner institution.

41. While it is true that retirees should generally not be hired by the Organization if other options are available, the Tribunal finds that the involvement of Dr. Narula did not in any way prejudice the candidacy of the Applicant. The Applicant was found to have met all the requirements for the post, was short-listed and was invited to participate in a competency-based interview. Further, the Applicant was found to have met all of the competencies for the DD/MSD post and, according to Ms. Pollard's evidence, had an equal chance of being appointed, following recommendation for further consideration by the Interview Panel.

42. The Applicant has not proven that Dr. Narula's participation went beyond the remit of a technical expert so as to amount to *de facto* membership of the Interview Panel and vitiate its findings in accordance with para. 9.3.1 of the Manual for Hiring Managers. Further, the Applicant has not shown that Dr. Narula exerted undue influence over the conclusions of the panel members. The Tribunal finds that the Applicant suffered no disadvantage as a result of Ms. Pollard's decision to hire Dr. Narula.

The composition of the Interview Panel

43. The Applicant submits that the Interview Panel did not have two subject matter experts as required by the definition of "assessment panel" in sec. 1(c) of ST/AI/2010/3 (Staff selection system). She submits that the Interview Panel was therefore not competent to assess the Professionalism competency, which is the only area in which the assessment of the Applicant and the selected candidate differed. In evidence, Ms. Pollard stated that there was only one subject matter expert, Dr. Pasquier-Castro, but that all members of the panel were responsible for assessing the Professionalism competency. If the candidates gave an answer that was technical in nature, Dr. Narula would be in a position to explain it to them as the technical expert.

44. In his reply, the Respondent claims that all members of the panel were subject matter experts:

Due to the substantive nature of the Post in the area of occupational medicine and management, the Interview Panel included subject matter experts in both fields. They were Dr. Pasquier-Castro, expert in medicine and management of occupational medicine, and Ms. Lopez and Mr. Mitrokhin, experts in managing diverse divisions and units.

45. Neither ST/AI/2010/3 (Staff selection system) nor the Manual for Hiring Managers explicitly define “subject matter experts”, though para. 9.3.5(b)(ii) of the Manual for Hiring Managers states that they “shall hold a fixed-term appointment, a permanent appointment or a continuing appointment”, thereby ruling out Dr. Narula from being considered one of the subject matter experts. The Tribunal accepts the Respondent’s submission that Ms. Lopez was suitably qualified to act as a subject matter expert in the field of management, which is a crucial component of any director level post.

Is there any evidence that geographical bias infected the assessment of the Interview Panel?

46. The Applicant alleged that on 10 July 2012, Dr. Pasquier-Castro made comments demonstrating outdated stereotypes and bias against doctors from particular countries and asserted that this bias was likely to have infected the selection process. Dr. Pasquier-Castro explained her comments in an email to the Respondent quoted at para. 12. The Tribunal was unable to come to any definitive conclusions about the exact detail of this exchange given that Dr. Pasquier-Castro was not called as a witness. In any event, Dr. Pasquier-Castro was a member of the Interview Panel that recommended the Applicant as one of four candidates which Ms. Pollard considered equally appointable when she received the recommendations.

47. The Applicant conceded that, with the exception of Dr. Pasquier-Castro (France), the staff members involved in evaluating her candidacy for the DD/MSD

post were all from non-WEOG countries, including Guinea, Colombia, Russia, India, and Japan.

48. The Applicant has not shown that the comments of Dr. Pasquier-Castro, made after the selection decision had been finalized, or any pre-conceived notions that she may have held about the practice of medicine in different countries, infected the selection process or influenced Ms. Pollard's decision to recommend to the USG/DM the appointment of the selected candidate.

49. The Tribunal notes that para. 11.1.2 of the Manual for Hiring Managers states that "it is imperative to eliminate from the assessment process any stereotyped ideas based on the applicant's nationality or gender". While the Tribunal has not found that any stereotypical notions or attitude infected the selection exercise in this case, it is understandable that the Applicant should have entertained such a suspicion based on the comments at para. 12 of this Judgment.

Was the second interview by the ASG/OHRM lawful?

50. The Applicant submits that the second interview conducted by Ms. Pollard was an "assessment exercise" that lacked procedural safeguards, was unlawful, and was intended to grant Ms. Pollard disproportionate influence over the outcome of the selection process in favour of the selected candidate.

51. In evidence, Ms. Pollard described the second interview as a short meeting with each of the three candidates of no more than twenty minutes duration. She asked the candidates "very similar" questions. She sought the views of the candidates on three main topics: the strategic direction of MSD, particularly by reference to the recommendations of a recent study by the Joint Inspection Unit; the involvement of MSD in emergency preparedness; and how the division could do more in terms of its field presence.

52. The Tribunal asked Ms. Pollard whether, at the point when the recommendations were passed on to her, she considered that all of the candidates were equally appointable, subject to her interview. She responded “yes”.

53. Counsel for the Applicant questioned Ms. Pollard as to the legal authority for the second interview. She responded by stating that the staff selection system is silent as to how the head of department is to make a determination as to who is the most suitable candidate. She further explained:

In this situation, a recommendation came from the Interview Panel with four recommended candidates. There was no recommendation or view of the Interview Panel which of the candidates should be selected. There was no comparative analysis as to what were their comparative strengths or weaknesses. There were four recommended candidates, all whom met the criteria set out in the vacancy, and who had come through satisfactorily the competency-based interview. So each of them was deemed to be meeting the criteria for the vacancy. It is only one position. Someone has to get it. The head of department has to make that determination as to who is suitable ... So in order to make my decision, for me to have a view as to who was the most suitable candidate for the position, I had those short follow-up interviews of 15-20 minutes each to come to my own judgment as to who in my view was the most suitable candidate for the position.

She later added: “It was a question of which one, in my view, was going to be most suitable in terms of how I wanted the medical division to be run”.

54. Having considered the reasons and explanations put forward, the Tribunal accepts that, in this case, Ms. Pollard’s decision to hold a second interview was a proper exercise of discretion as a hiring manager faced with three equally appointable candidates.

The role and function of the CRB

55. Section 8.1 of ST/AI/2010/3 states that central review bodies shall review the filling of job openings to ensure that applicants have been evaluated on the basis of the corresponding evaluation criteria and that the applicable procedures have been

followed in accordance with the Secretary-General's bulletin on central review bodies.

56. The Applicant submits that the CRB was not aware of procedural irregularities in the selection process. She says that because the CRB was not aware of flaws in the process, its approval of the recommended candidates is not valid, and the delegated authority to make the selection decision is called into question. Ms. Pollard's answer was that the role of the CRB is to review the process by which the list of recommended candidates was arrived at and that the central review bodies have no role in the final selection by the Head of Department. The Tribunal finds that there were no breaches of procedure material to the outcome of the selection decision and accordingly dismisses this ground of appeal.

Did the Administration breach the Organization's policies on gender parity?

57. Section 13.3 of ST/AI/2010/3 (Staff selection system) states that its provisions shall prevail over any inconsistent provisions contained in other administrative instructions in force at the time of issuance. The Tribunal considers that sec. 1.8 of ST/AI/1999/9 (Special measures for the achievement of gender equality) is inconsistent with sec. 9.3 of ST/AI/2010/3, which clearly states that the head of department "shall select the candidate he or she considers to be best suited for the functions". Consequently, in accordance with sec. 13.3 of ST/AI/2010/3, the Tribunal finds that sec. 9.3 of ST/AI/2010/3 prevails, and the head of department has broad discretion to choose the candidate they consider best suited to the position.

58. Although the definition of "selection decision" contained in the sec. 1(x) of ST/AI/2010/3 states that the decision is to be made taking into account "the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, *especially with regard to geography and gender ... (emphasis added)*", there is no requirement in ST/AI/2010/3 that gender be given such overriding importance as suggested by sec. 1.8 of

ST/AI/1999/9. In evidence, Ms. Pollard gave a detailed and cogent account of the evolution of the Organization's gender parity policies in regard to staff selection since the issuance of ST/AI/1999/9. She stated that, while still technically "on the books", ST/AI/1999/9 is "outdated" and its principles have been "incorporated into other management tools".

59. It is worthy of note that sec. 9.3 of ST/AI/2010/3 specifically states that, prior to selection of an external candidate, such a decision must be justified in writing to, and approved by, OHRM. However, there is no reference in sec. 9.3 to the similar requirement set out in sec. 1.8(d) of ST/AI/1999/9 (Special measures for the achievement of gender equality). The Tribunal finds that there was no breach of the Organization's policies on gender parity.

Did the Administration comply with the Organization's policies on geographical diversity?

60. The Applicant submits that the Administration failed to give effect to legal instruments, including art. 101.3 of the UN Charter and Staff Regulation 4.2, which provide that "due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible".

61. It was not disputed that of the last seven appointments in MSD at the P-5, D-1, and D-2 level over the two years prior to the application, the successful candidates came from three WEOG countries—Germany (2), France (3), and Australia (2). The Applicant submits that this pattern of hiring constitutes *prima facie* evidence that due regard was not paid to recruiting on a wide geographical basis. In addition, she submits that this pattern of hiring, when considered alongside the comments of Dr. Pasquier-Castro on 10 July 2012, establish a *prima facie* case of discrimination.

62. However, in evidence the Applicant also confirmed that during her first nine years of service with the Organization, her first and second reporting officers—senior

staff within MSD—were all from non-WEOG countries, including Ethiopia, India, and Russia. The Tribunal has already established that the Applicant did not adduce sufficient evidence to show that the selection exercise was infected by bias or discrimination. Ms. Pollard gave evidence as to the geographical diversity within OHRM at the time of the selection decision and noted that both herself and Ms. Lopez, senior managers within the Office involved in this selection exercise, are from developing countries. The Tribunal is satisfied that the Administration complied with art. 101.3 of the UN Charter and staff regulation 4.2.

Conclusion

63. The involvement of a retiree of the Organization in the selection process, the comments made by Dr. Pasquier-Castro, and the conduct of the second interview, which is not explicitly provided for in ST/AI/2010/3 (Staff selection system), are all matters which, taken together, led to a reasonable suspicion and belief on the part of the Applicant that she did not receive full and fair consideration.

64. Having examined the documentary and oral evidence, the Tribunal finds that each of the Applicant's grounds for suspicion have been satisfactorily explained. It might be a matter of regret for all concerned that the case was not resolved at the earliest possible occasion as suggested by the Tribunal.

65. The Applicant will know that suspicion that cannot be supported by evidence does not meet the legal test of establishing a compensable breach. The Tribunal observes that, in this case, it is clear that the comments made by Dr. Pasquier-Castro (see para. 12) would leave any reasonable person to entertain more than a mere suspicion, but in fact a belief, that the interview process lacked the essential character of integrity, such that a challenge before the Tribunal was merited. However, in this case the Tribunal finds that any procedural error identified by the Applicant did not, of itself or collectively, account for the decision to appoint the successful candidate rather than the Applicant or the other recommended candidate. Nevertheless, the

Tribunal would urge the Respondent to take the necessary steps to repair such damage as may have been caused to morale, within MSD, by the comments recorded at para. 12.

Judgment

66. The application is dismissed in its entirety.

(Signed)

Judge Goolam Meeran

Dated this 17th day of March 2015

Entered in the Register on this 17th day of March 2015

(Signed)

Hafida Lahiouel, Registrar, New York