



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

KRIOUTCHKOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests his non-selection for the post of Chief, Russian Translation Unit (“RTU”) (P-4), with the United Nations Office at Nairobi (“UNON”), advertised under Job Opening (“JO”) 11-LAN-UNON-18526-R-NAIROBI.

2. As remedies, he requests to be “afforded the UN obligations of good faith and due process in the full and fair consideration of [his] case”, as well “as any relief customary in such instances at the discretion of the Tribunal”. He further requests the rescission of the contested non-selection decision, and submits that if the selection of the successful candidate is rescinded, the decisions that he subsequently made are null and void.

Facts

3. At the beginning of 2011, the Contractual Services Unit, Planning and Coordination Section (“PCS”), Division of Conferences Services (“DCS”), UNON, launched the creation of the above-referenced JO. An internal email of 25 January 2011 indicated that the Chief, Translation and Editorial Services (“TES”), UNON, although “on assignment in Bangkok for the next six months”, would be the Hiring Manager for the Nairobi-based position, while the Chief, PCS, would be “alternate Hiring Manager in order to facilitate actions required” on the JO.

4. With effect from 29 January 2011, the Chief, TES, UNON, was temporarily assigned to the position of Chief, Conference Services Section, Economic and Social Commission for Asia and the Pacific (“ESCAP”), keeping a lien to his post in UNON, until he was officially transferred to ESCAP on 5 September 2011. Effective 9 March 2011, a Reviser of the RTU, UNON, was appointed as O-i-C, TES.

5. In late February-early March 2011, the recruiters had correspondence with the O-i-C, TES, concerning the development of the above-referenced JO.

6. On 17 April 2011, the above-referenced JO was advertised, with 18 June 2011 as the deadline for applications. The Applicant applied on 31 May 2011.

7. On 22 June 2011, the candidates for the JO were released to the Chief, PCS.

8. The Applicant and another candidate underwent a competency-based interview on 5 September 2011, although due to technical problems, the Applicant's interview had to be resumed on 27 September 2011.

9. In October 2011, the panel submitted a signed "Report of the Departmental Panel", recommending the other candidate—namely, the Reviser of the RTU, UNON, who had been appointed as O-i-C, TES—for the position, as the one candidate who "met all the criteria laid down in a most satisfactory manner". Only at an undetermined posterior date was a "Comparative Analysis Report" filled in Inspira, reflecting the different competencies and ratings.

10. Upon retirement of the then Chief, RTU, the same Reviser, RTU, who was already performing as O-i-C, TES, became O-i-C, RTU, UNON, from 1 November 2011 until 20 December 2011.

11. By memorandum dated 20 December 2011, the Secretary, Central Review Committee ("CRC"), UNON, forwarded to the Chief, DCS, the minutes reflecting the discussion on the candidates for the JO at stake, requesting him to proceed with the selection of the candidate and, subsequently, to forward a written confirmation to the local human resources office to process the administrative details of the selection.

12. On 22 December 2011, the Chief, DCS, selected the Reviser, RTU—then acting simultaneously as O-i-C, RTU, and O-i-C, TES, UNON—for the post of Chief, RTU, UNON.

13. More than two years later, as of the beginning of 2014, Inspira continued to show that the post was under consideration. On 27 January 2014, the Applicant requested an update on the vacancy to the Director, Business Re-engineering Group, Umoja (United Nations ERP Project), who forwarded his message to the

Chief, RTU, UNON. The latter replied, on the same day, that he should “patiently wait for a selection decision”.

14. On 17 April 2014, after sending two follow up emails, where he reiterated that he was inquiring about the post of Chief, RTU, the Applicant received an email response from a Human Resources Officer, Recruitment & Planning Section, Human Resources Management Service (“HRMS”), UNON, explaining that the selection process in question had been completed, the position filled “some time back” and that upon closing of a JO, Inspira sends an automated email to applicants, although that was not technically possible in the system earlier.

15. The Applicant replied on 18 April 2014 reminding that Administrative Instruction ST/AI/2010/3 clearly requires the Administration to inform of the outcome of the selection process those candidates who were convoked for assessment but not selected for the post.

16. On 29 April 2014, the Applicant requested management evaluation of the impugned decision. The decision was upheld by letter dated 10 June 2014 of the Under-Secretary-General for Management, on behalf of the Secretary-General.

17. The Applicant filed this application on 18 July 2014. He requested the disclosure of the selection dossiers.

18. The Respondent filed his reply on 25 September 2014, annexing the main documents recording the selection procedure, whilst redacting the other candidate’s name.

19. On 6 October 2014, the Applicant filed unsolicited comments on the Respondent’s reply.

20. Pursuant to Order No. 161 (GVA/2014) of 1 October 2014, the Respondent submitted, on 21 October 2014, additional information on the role of the then O-i-C, TES, in the litigious selection process.

21. A case management discussion took place on 2 June 2015, where the Tribunal inquired on the parties’ readiness to undertake mediation.

22. Pursuant to Orders Nos. 122 (GVA/2015) of 18 June 2015, 176 (GVA/2015) of 21 September 2015 and 209 (GVA/2015) of 22 October 2015, this case, together with a number of other cases filed by the Applicant, was referred to mediation and the proceedings before the Tribunal were suspended for that purpose. However, mediation efforts were unsuccessful and the proceedings before the Tribunal resumed.

23. A hearing on the merits took place on 23 March 2016.

24. On 7 April 2016, the Respondent filed additional information on several points raised during the hearing, in response to Order No. 62 (GVA/2016) of 24 March 2016.

25. On 1 May 2016, the Applicant filed unsolicited comments on the Respondent's reply. However, as they were filed without seeking leave from the Tribunal and after both parties had had a proper chance to fully make their case, including at the substantive hearing, this last submission was not taken into account by the Tribunal in reaching its decision.

Parties' submissions

26. The Applicant's principal contentions are:

- a. Inspira did not reflect the completion of the selection process more than 30 months after, in breach of the Administration's clear obligation to promptly inform assessed candidates. As ruled in *Skourikhine* UNDT/2013/113, "when the Administration fails to provide notification of an individual decision, it creates legal uncertainty for itself and for the staff member; it cannot then object if some of its decisions are contested long after they were taken". While, well after the contested decision was implemented, the Applicant maintained email correspondence with the successful candidate denoting that the latter headed RTU, UNON, this does not mean that he was aware of his official selection for the post; instead, he believed that he acted in his capacity as O-i-C, as he had done for a lengthy period prior to his appointment;

b. At the time of the decision, the selected candidate was discharging the duties of three posts:

- i. Russian Reviser (P-4), with RTU, UNON;
- ii. Officer-in-Charge (“O-i-C”), RTU, UNON, after retirement of the former incumbent in mid-2011;
- iii. O-i-C, TES, DCS, UNON, after departure of the former incumbent to ESCAP in February 2011;

c. Hence, during the selection process, the successful candidate effectively performed the duties of the Hiring Manager as O-i-C, TES, UNON. At the relevant time, the former Chief, TES, UNON, had already taken up functions in another duty station and the successful candidate declared at the interview to have been responsible for all recruitments in RTU for many years before the litigious selection process. In appointing as O-i-C, TES, the staff member that was eventually selected for the post of Chief, RTU, a conflict of interest was created;

d. For the third time since 2005, the successful candidate “hired himself” for a position and then engaged in highly questionable managerial actions;

e. Some of the panel members were under the successful candidate’s supervision as O-i-C, TES, thus not completely objective in appraising the Applicant’s competencies; notably, he was assessed as only partially meeting the planning and organizing competency;

f. The Applicant was not informed about the panel’s composition, hence, he could not dispute the presence of certain of its members. The panel that conducted the interviews in September 2011 did not include any representative from any other language service to ensure objectivity;

g. The panel’s composition did not conform to ST/AI/2010/3. Besides the absence of a female member, there was no subject matter expert in Russian translation/self-revision, one of the major competencies required for

the post. The panel did not perform an accurate, complete and objective evaluation of the most important competencies;

h. The successful candidate had an unfair advantage due to the fact that he had acted as *de facto* O-i-C of the concerned unit for seven years, given the continuous health problems of its official chief;

i. Against the mobility requirement proclaimed by General Assembly resolution 53/221, over the last 25 years, all P-3 and P-4 promotions for Russian translators were done strictly within the same services/units at all five duty stations where Russian translation services/units exist;

j. The Applicant has over 30 years of professional experience as a Russian translator (24 within the UN system) with excellent performance records, and has been rostered for promotion to the P-4 level since 2008. However, he has no real chance of promotion. He has been unsuccessfully applying for various Nairobi language posts for some ten years. He is a victim of duty station-based discrimination. Serving at ESCAP, whose Russian Language Unit, unlike the Translation Services/Units in Geneva, Nairobi, New York and Vienna, is not part of the Department for General Assembly and Conference Management, he is harmed by the aforesaid practice of promoting translators strictly within the same services/units at all duty stations. This disadvantage linked to the duty station was noted by his then supervisor back in 23 February 1992;

k. The promulgation of Administrative Instruction ST/AI/2010/3 (Staff selection system) further diminished the Applicant's chances of a lateral move to another duty station, as its sec. 2.5 allows Heads of departments/offices to transfer staff members at the same level within their departments or offices, including in a different location, without advertising the vacancy or any review by a central review body. Since then, all P-3 Russian Translators posts were filled without a competitive process;

l. Sec. 2.5 of ST/AI/2010/3, coupled with the system-wide practice of promoting to P-3 and P-4 posts staff within each unit, eliminated any career

development and mobility chances for the Applicant. In Bangkok, he has little prospect of career advancement, as the only P-4 Russian Reviser post is not foreseen to become vacant until 2022. However, while being a P-3 translator, the Applicant translates and self-revises his work, which by the Organization's own standards corresponds to the P-4 level tasks;

m. The Applicant has suffered long-term discrimination, humiliation, frustration, mental anguish and moral suffering.

27. The Respondent's principal contentions are:

a. The Applicant waited until 2014 to request management evaluation of the decision, which is far beyond the mandatory time limit to this effect. While he argues that he was not aware of the decision, he exchanged emails with the successful candidate, who had by then been appointed as Chief, RTU, UNON, which by their content leave no doubt that the Applicant knew about the successful candidate discharging such duties;

b. The Organization enjoys wide discretion in selection matters and there is a presumption of regularity with regard to such decisions. Staff members have a right to full and fair consideration, but no legal right to promotion to a higher grade;

c. The selection process was consistent with ST/AI/2010/3, and the Applicant's right to full and fair consideration was fully respected. He was shortlisted, along with another candidate, and assessed against the post's requirements. The panel determined that he only partially met the planning and organizing competency, as he provided an inadequate answer in this respect. Also, the Applicant relies on his personal opinion that the selected candidate displayed a lack of planning and organization skills to claim that panel's assessment was not objective. The Hiring Manager transmitted the panel's report to the CRC, with a reasoned and documented record of the evaluation of the proposed candidates. After review, the CRC endorsed the Hiring Manager's recommendation and advised the Chief, PCS, UNON, to select the recommended candidate;

d. The selected candidate played no role in the conduct of the selection exercise. The Chief, TES, albeit temporarily at ESCAP (P-5), was assigned the role of Hiring Manager, but for practical reasons, the Chief, PCS, (P-5), who was based in Nairobi, was assigned the role of alternate Hiring Manager to facilitate the conduct of the process. The assignment of the Hiring Manager to Bangkok had no impact on his eligibility to participate in the selection exercise, as there is no geographic requirement for the composition of the panel. He is a subject-matter expert from outside the work unit where the job opening was located;

e. As to the panel's composition, the absence of a woman would not vitiate the process; her presence is not an absolute requirement, as sec. 1(m) of ST/AI/2010/3 reads that the panel will "normally" include one. Expertise of the Russian language was not required;

f. The selected candidate was not part of the panel and did not take part in the final decision. None of the panel members were under his supervision; all were senior officers from different sections or duty stations;

g. ST/AI/2010/3 does not require the notification of the names of panel members prior to an interview, and provides for no right of appeal against its composition during the selection process. While para. 9.3.2 of the Inspira Hiring Manager's Manual (May 2012 (Release 2.3)) ("Manual") instructs so, it is only a guide;

h. Although the communication of the decision to the Applicant some 28 months after the conclusion of the selection process violates sec. 10.1 of ST/AI/2010/3, this delay did not cause any prejudice to the Applicant, who continued to apply for vacancies. At the material time, Inspira was not fully functional, which is why he did not receive a notification through the system;

i. The Applicant's claims regarding other recruitment procedures fall beyond the scope of this case;

j. In line with para. 15.6 of the Manual, placement in the roster does not confer a right to be selected over non-rostered candidates;

k. The Applicant has failed to discharge his burden of proof regarding his allegations of duty station-based discrimination and of a long lasting practice of promoting exclusively within each duty station, as well as for the claim of personal retribution by the Hiring Manager. Any complaint for retribution or retaliation should be directed to the competent authorities under ST/SGB/2005/21 and ST/SGB/2005/22. Also, the claim that he is unable to be laterally moved under ST/AI/2010/3 is unfounded;

l. The mobility policy is not an element that the panel is required to look at for P-4 positions. The desire for a mobile workforce cannot undermine the necessity of securing the highest standards of efficiency and competency;

m. No unlawful act is demonstrated, nor any compensable harm.

Consideration

Receivability

28. Pursuant to art. 8 of the Tribunal's Statute, for an application to be receivable, management evaluation must be requested within the prescribed time limit. As per staff rule 11.2(c), this time limit is of "sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested".

29. It is undisputed that the Applicant received no express notification of the impugned decision until 17 April 2014. Yet, the Respondent contends that the Applicant must have been aware of the outcome of the recruitment, since he had exchanged messages with the selected candidate, which, in the Respondent's view, made it clear that the Applicant knew the latter was performing the functions of Chief, RTU, UNON.

30. In the Tribunal's view, considering that the successful candidate already discharged the functions of the litigious post as O-i-C, RTU, prior to his selection, it is fully plausible to assume that he continued to head the section *ad interim*, especially since the emails exchanged did not mention his functional title. In the absence of a notification of the decision—which the Applicant was entitled to expect—and since in the meantime, Inspira wrongly reflected that the recruitment process was still open, the Applicant had no reliable means to know that a final selection had been made.

31. Hence, no date earlier than 17 April 2014 has to be considered as the date when the Applicant came to know about his non-selection and, counting from this date, he respected all statutory time limits.

Scope of the dispute

32. It is well-known that, under art. 2.1(a) of its Statute, the Tribunal is competent to review exclusively administrative decisions affecting the concerned staff member's terms of employment. The material scope of a given case is defined by the specific decision or decisions that an applicant chose to appeal. In this case, such decision is the Applicant's non-selection for the post of Chief, RTU, UNON, advertised under the JO referenced in para. 1 above.

33. Accordingly, the Applicant's submissions regarding other recruitments are not subject to judicial scrutiny in these proceedings. The Tribunal understands that the Applicant put them forward *colorandi causa*, to provide some context and background, but wishes to underline that it cannot and will not examine them.

34. Similarly, the Tribunal is not the proper instance to bring general complaints about systemic issues. Such matters will therefore not be addressed in this Judgment.

Hiring Manager

35. The Applicant expressed concern that the selected candidate, as O-i-C of TES and of RTU, may have *de facto* acted as the Hiring Manager in the procedure that led to his own promotion. This line of argument implies that the two officials

cited as Hiring Manager and “alternate” Hiring Manager, respectively, may have been only nominally appointed to this role for the record, while the procedure and the decision-making was in fact driven by an individual with a major vested interest in its outcome.

36. Based on the documents before the Tribunal, the Chief, TES, was initially designated for that purpose, despite having already left for Bangkok on a temporary assignment at the time the JO was in preparation, in February 2011. Simultaneously, the Chief, PCS, was named “alternate” Hiring Manager, obviously anticipating the accrued difficulties of performing the Hiring Manager’s duties from a distance. Later, the Chief, PCS, assumed the functions typically discharged by the Hiring Manager; as such, in June 2011, he received the list of pre-screened candidates for the post.

37. According to sec. 1(m) of ST/AI/2010/3, the Hiring Manager is:

[T]he official responsible for the filling of a vacant position. The Hiring manager is accountable to his/her head of department/office to ensure the delivery of mandated activities by effectively and efficiently managing staff and resources placed under his or her supervision ...

38. This provision implies that the Hiring Manager must belong to the department/office where the post to be filled is located, whereas the Chief, TES, was effectively serving at ESCAP as of approximately one month before the JO was created. However, insofar as he kept a lien to his post in UNON while in Bangkok, the Tribunal is ready to accept that he could still be regarded as an official accountable to the Chief, PCS, in line with the above-cited sec. 1(m). Although he relinquished such lien before the end of the selection procedure (on 5 September 2011), the Respondent holds and the record appears to support that, by then, he no longer carried out the Hiring Manager’s tasks. He remained involved exclusively as a panel member, a capacity that does not require serving in the same department/office.

39. Sec. 4.4. of ST/AI/2010/3 provides that the Hiring Manager is responsible for creating the JO and for promptly requesting its inclusion in the compendium

“with the assistance of the executive or local human resources office”. An email exchange with the recruiters show that the Chief, TES, approved the creation of the JO. When it was time, pursuant to sec. 7.2 of the instruction, to release the pre-screened candidacies to the Hiring Manager, the Chief, PCS, took over as the primary Hiring Manager. Inspira shows the Chief, PCS, as the primary responsible among the list of “recruiters” for the selection process, who is known to usually be the Hiring Manager, although it is impossible to know with any certainty when this change was introduced in the system.

40. While ST/AI/2010/3 does not cater for a shared exercise of the Hiring Manager’s authority, it does not forbid it and the Manual provides for the existence of a multiple Hiring Team, with a primary Hiring Manager as the main officer responsible for the procedure.

41. In sum, if the choices made in assigning and discharging the Hiring Manager’s functions might seem peculiar, they do not reveal any flaw in the procedure. The record indicates that either the Chief, TES, or the Chief, PCS, fulfilled the duties falling within the Hiring Manager’s remit, save for the transmittal of a recommendation to the Chief, DCS, for final decision (see paras. 74 to 76 below).

42. The Appeals Tribunal ruled in *Rolland* 2011-UNAT-122 that official acts are presumed to have been regularly performed; accordingly, in a recruitment procedure, if the management is able to even minimally show that the staff member’s candidature was given a full and fair consideration, the burden of proof shifts to the candidate, who must be able to show through clear and convincing evidence that she or he was denied a fair chance. The Tribunal considers that the documents made available to it satisfy this minimal showing.

43. The Tribunal also recalls the well-known principle that any applicant alleging that improper motives have tainted a certain decision bears the burden of proving it (see, e.g., *Beqai* 2014-UNAT-434). The Applicant emphasises that, as recorded in the interview report of the panel, the selected candidate stated that for seven years he, as the “de facto head of unit”, had been “entrusted with all recruitment of staff”. However, this statement alone falls short to prove that he

had conducted this particular selection process. Indeed, it would be a matter of basic common sense and integrity to refrain from doing so, as no one could ignore that taking part to any extent in the conduct of a recruitment while participating in it as a candidate would obviously trigger a flagrant conflict of interest, gravely vitiating the resulting decision. Acknowledging precisely that, the Respondent denies that the selected candidate played any role in the process, and the Applicant adduces no tangible evidence to the contrary.

44. Against this background, the Tribunal cannot find it established that the candidate eventually selected, i.e., the then O-i-C of both RTU and TES, was the official truly exercising the prerogatives of the Hiring Manager, instead of the two staff members officially designated as such.

Composition of the assessment panel

45. Sec. 1(c) of ST/AI/2010/3 defines “assessment panel” as:

[A] 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.

Subject matter experts

46. The Applicant submits that the panel comprised no expert in Russian translation/self-revision. The Respondent opposes that expertise in Russian translation was required, since it was not the panel’s role to assess the candidates’ mastery of a given language, all the more since linguistic skills of translators in the Organization are tested by a specific exam conceived for this sole purpose.

47. Neither ST/AI/2010/3 nor the Manual give a definition of “subject matter experts”. Para. 9.3.3 of the Manual simply states that the panel members should possess, among other requirements:

- a. Professional knowledge and experience:
 - i. Years of professional work and intrinsic knowledge of the subject area or work in the job family.

- ii. Relevant occupational experience/employment for the previous five years is desirable.

48. In *Aliko* 2015-UNAT-540, the Appeals Tribunal affirmed the holdings in *Aliko* UNDT/2014/042 that:

The Administration disposes of considerable discretion in determining who is an “expert” for the purpose of [UNOPS Recruitment – Instructions and Procedures, section 14.7.3(b)(i)(2)] and considers that it can legitimately be argued that in view of the similarity of the management functions of the Director, IAIG, and those of the disputed post, the Director, IAIG, was an expert under the ... rule. Moreover, and maybe more importantly, the Tribunal finds that there can be no doubt that the Programme Manager ... though he was sitting on the Panel as a “client representative” – beyond what was required by the applicable rules – also fulfilled the criteria of a technical expert. ... Indeed, ... he certainly had in-depth knowledge with respect to the skills and expertise required for the disputed post. This is supported by the fact that it was in fact him, together with the Director, SWOC, who marked the written test which [Mr. Aliko] ... passed successfully.

49. In *Tiwathia* UNDT/2015/021, this Tribunal deemed that an expert sitting in a panel set up to recruit the senior head of a medical unit, did not necessarily need to be a doctor; an expert on management could be considered as a subject matter expert for this post, as it required managerial skills.

50. Based on this guidance, the Tribunal considers that it was not mandatory that the panel include a Russian translator and or reviser. This would be an extremely narrow understanding of the domain(s) of expertise that may be relevant for a certain post; the terms of sec. 1(c) of ST/AI/2010/3 leave room for a wider interpretation.

51. Beyond that, the Chief, TES, was certainly a subject matter expert as he was highly experienced in the field of translation and revision. As to the other two members, it is observed that they were senior staff managers whose respective duties led them to be in constant interaction, at least as clients, with the translation units. Following the standard outlined in *Aliko*, it is not unreasonable to conclude that at least one of them qualified as a subject matter expert and that, hence, the Panel was composed of two subject matter experts as required. In this respect, it is

noted that the Applicant did not make a case that the panel members did not possess expertise relevant for the position in question, but merely that at least one should have been an expert in Russian language.

Female member

52. As a matter of fact, the assessment panel in the case at hand did not include any woman. The Tribunal does not share the Respondent's view that the presence of a female member is not an absolute obligation, given the use of the word "normally" at the beginning of sec. 1(c) of ST/AI/2010/3.

53. A plain reading of the provision indicates that the term "normally" attaches to the first part of the sentence; hence, it relates only to the number of members (three, in principle). By contrast, the three conditions enunciated after the comma—to wit, two subject matter experts at the same or higher level of the job opening, at least one female member and one from outside the work unit where the job opening is located—are not nuanced by the adverb "normally", and thus amount to mandatory requirements.

54. The Tribunal holds that the absence of a female member in the panel constitutes a procedural flaw in the selection process.

Failure to disclose the composition of the panel

55. Sec. 2.6 of ST/AI/2010/3 provides:

This instruction sets out the procedures applicable from the beginning to the end of the staff selection process. Manuals will be issued that provide guidance on the responsibilities of those concerned focusing on the head of department/office/mission, the hiring manager, the staff member/applicant, the central review body members, the recruiter, namely, the Office of Human Resources Management (OHRM), the Field Personnel Division of the Department of Field Support, executive offices and local human resources offices as well as the occupational group manager and expert panel. Should there be any inconsistency between the manuals and the text of the present instruction, the provisions of the instruction shall prevail.

56. The Manual, adopted in accordance with this provision, reads in its relevant part (section 9.6):

Applicants convoked for interviews are normally notified at least five working days in advance. The invitation includes the date, time and means of the interview ... and also informs the applicant of the *names of the assessors*. (emphasis added).

57. However, the Appeals Tribunal ruled in *Asariotis* 2015-UNAT-496 that the Manual does not have legal force, recalling that “[r]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General’s bulletins and administrative issuances.” It pursued:

At most, the Manual in this appeal provides “guidance” on the “responsibilities” of the Hiring Manager, as envisaged by Section 2.6 of ST/AI/2010/3; it does not purport to vest a staff member with an entitlement to be apprised in advance of an interview of the names of the panel members.

58. Notwithstanding this finding, the Appeals Tribunal concluded that, in the specific circumstances of the case, the failure to inform the concerned staff member of the panel’s composition had improperly deprived her of the possibility to contest it. In that case, the Applicant had filed an application challenging a previous selection process with the same hiring manager, which the Dispute Tribunal had decided in her favour a few days before the scheduled interview. In view of it, she had written to the Administration conveying her concerns on the lack of impartiality of the panel, thus clearly showing the importance she attached to its composition.

59. No similar circumstances were present in the instant case. Based on the *Asariotis* jurisprudence, the omission to inform the Applicant of the assessors’ names in advance of his interview did not breach any of the Applicant’s rights.

Panel’s assessment

60. The Applicant takes issue with the assessment of the candidates conducted by the panel. He questions the panel’s ability to adequately appreciate their competencies, as well as its objectivity and impartiality.

61. It must be recalled 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).

62. The issue of the panel members' expertise has already been discussed (see paras. 47 to 52 above). Given its findings in this respect, the Tribunal deems unfounded the claim that the panel members lacked the knowledge and skills to properly evaluate the candidates' competencies.

63. Turning to the panel's impartiality, the Tribunal has had the opportunity to verify that, in terms of hierarchy, none of its members reported to the selected candidate, including when he acted as O-i-C, TES. Besides, nothing in the file suggests that the panel was biased or ill-disposed against the Applicant. The sole fact that the selected candidate obtained a better rating in the interview, or even that the Applicant was assessed as needing progress in one of the competencies and was not recommended, does not *per se* demonstrate a lack of impartiality by the panel.

64. In sum, the Tribunal sees no grounds to conclude that the panel's assessment was carried out in an improper manner, nor that the Applicant was denied full and fair consideration or that the resulting decision was tainted by undue considerations or was manifestly erroneous or unreasonable (see *Abbassi* 2011-UNAT-110, *Charles* 2012-UNAT-242).

The panel's recommendation to the CRC

65. Two different reports contained the panel's evaluations and conclusions:

- a. One, entitled "Report of the Departmental Panel", carried the signatures of the three members with the dates 4 and 14 October 2011, respectively, handwritten next to each of them;
- b. The other took the form of the standardised Inspira "Comparative Analysis Report", undated (with solely the date of its printing).

66. The Tribunal takes note that there were significant differences in content between the two reports. Suffice it to note, first, that the competencies assessed in

the first one were: Professionalism, Leadership and Teamwork, Communication, Commitment to Continuous Learning, Chargeback and Accountability and Computer and Other Skills, whereas in the second they were Planning and Organizing, Teamwork, Professionalism, Judgment/Decision-making. Second, the scale of notation changed, using Fully Competent, Competent, Learning and Fair in the first, as opposed to “successfully meets requirements” and “partially meets requirements” in the second.

67. In both reports, the Applicant was found not sufficiently strong at one competency, but in the first one it was Communication, whilst in the second it was Planning and Organizing, which was not even mentioned in the first report. The ratings did not keep any logical equivalency; for example, the two separate ratings of “competent” and “fully competent” in the first report were “translated” in the second report to one rating, i.e., “successfully meets requirements”. Also, the recommendation of the eventually selected candidate was subtly nuanced, going from asserting that he was “the most competent candidate and the one who *also* met all the criteria laid down in a most satisfactory manner” to “the most competent candidate and the one who *almost* met all the criteria laid down in a most satisfactory manner” (emphasis added).

68. Having sought additional information from the Respondent on this particular point, the Tribunal was advised that the “Report of the Departmental Panel” was emailed to the CRC, while the panel’s conclusions were later entered into the respective module for Inspira, rolled out in 2011, and reviewed by the CRC in the system. No details were provided as to exactly who filled the Inspira module to produce the second report, and when.

69. It stands, therefore, that the evaluation of the assessment panel, one of the cornerstones of the selection process, was substantially modified between its adoption by all three panel members—authenticated by their respective signatures—and its scrutiny by the competent CRC.

70. It is speculative to ascertain to what extent this alteration prejudiced the Applicant. The Tribunal will confine itself to finding that the candidates’ evaluation was distorted to a non-negligible degree, apparently, in an attempt to

convert the original evaluation into the Inspira format. As a result, the conclusions that the CRC reviewed and endorsed differed considerably from those adopted by the panel.

71. There is nothing to suggest that any—let alone all—of the panel members approved or at least were made aware of these changes. In fact, even if the changes had been brought to their attention, it is hard to imagine how they could have validly endorsed *a posteriori* ratings and comments on competencies they did not test during the interview, since it seems logical to assume that they asked no dedicated questions at the interview on competencies that they did not intend to assess at that point.

72. As the Tribunal held in *Zhao, Zhuang, Xie*, UNDT/2014/036 (upheld in *Zhao, Zhuang, Xie* 2015-UNAT-536), where similar “adjustments” were made to create an Inspira Comparative Analysis Report, the fact that the selection at issue was based on ratings which did not emanate from the panel members amounts to a serious violation of the legal framework governing staff selection.

73. The clearance of the procedure by the CRC does not cure this flaw. Not only its endorsement is not binding on the Tribunal, but in addition the circumstances tend to indicate that they did not look at the original report, and in any event, did not remark the differences between the two.

Recommendation of the Hiring Manager to the decision-maker

74. The memorandum of 20 December 2011 requesting the Chief, DCS, to proceed to take the final decision, reveals that it was not the Hiring Manager but the CRC Secretary who forwarded the record of the procedure to the competent head of office.

75. This departed from the clear exigency laid down in sec. 9.2 of ST/AI/2010/3 that “[t]he 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*” (emphasis added) (see also sec. 9.3 of the instruction).

76. The Tribunal concedes that, since only the selected candidate had been recommended to the CRC, there was no doubt as to who was the candidate of the Hiring Manager's choice and the motivation for his preference. Yet, the staff selection system was designed to assign specific roles and responsibilities among the different actors throughout the procedure, and this distribution of duties is not to be taken lightly, as it constitutes one of the main checks and balances put in place against arbitrary selections. The aforesaid failure to respect the strict separation of mandates was a procedural error.

Absence of notification

77. Sec. 10 (Notification and implementation of the decision) of ST/AI/2010/3, at sub-paragraph 1, stipulates, *inter alia*:

Other candidates convoked for assessments but not selected or placed on a roster shall be so informed by the hiring manager ... within 14 days after the selection decision is made in writing.

78. This prescription needs no interpretation. It creates a clear obligation to inform unsuccessful shortlisted candidates about their non-selection, and to do so within a precise timeframe. The Applicant received confirmation of the selection of another candidate nothing less than 28 months later. In these circumstances, the deadline cannot be said to have been exceeded; the obligation of notification was blatantly ignored. This breach of the Organization's duties is compounded by the subsequent lack of cooperation by the Administration. If the Applicant finally managed to be informed, that was only because he specifically and insistently inquired on the outcome of this recruitment. It was not before nearly three months and several follow up messages that he was given a true—and yet somewhat vague—answer.

79. The fact that the Inspira system was not fully operational at the material time and, in particular, that the notification function was unavailable is no justification to disregard the clear legal obligation to notify the Applicant of his non-selection. The introduction of the Inspira system was decided and implemented by the Administration; the Administration alone had the

responsibility to ensure its good functioning or palliate to its shortcomings by complying with its notification duty through other means. It is a well-established principle of law that no one can be allowed to invoke his own turpitude—*nemo auditur propriam turpitudinem allegans* (*Yakolev* UNDT/2014/040, *Roig* UNDT/2012/146, *Coulibaly* UNDT/2009/091).

80. Lastly, the Tribunal cannot entertain the Respondent's contention that the lack of notification caused no damage to the Applicant. As held in *Rolland* 2011-UNAT-122, failure of notification of non-selection may have a serious impact on the future career development of a staff member and, for that, may elicit compensation.

Remedies

81. Having identified several procedural flaws in the procedure leading to the impugned selection decision, the Tribunal rescinds the decision in accordance with art. 10.5(a) of its Statute. Said article does not provide for the rescission of decisions subsequent to that specifically contested. Pursuant to the same provision, and given that said decision unequivocally concerns promotion, the Tribunal is bound to set an amount that the Respondent may elect to pay as an alternative to its effective rescission.

82. There is no set way to calculate the *quantum* of such compensation, but it must be based on the circumstances of each particular case (see *Sprauten* 2012-UNAT-219). With this in mind, the Tribunal considered the Applicant's chances of being selected, knowing that only two candidates were shortlisted and interviewed, but also that he was not recommended by the panel (see, e.g., *Niedermayr* 2015-UNAT-603). In addition, it took account of the difference between the salary he is paid at his current grade and step and his potential income after promotion as of December 2011, when the selected candidate took up his new functions. Nevertheless, in view of *Hastings* 2011-UNAT-109 (para. 19), the Tribunal feels compelled to limit the projection of the difference in salary to two years, despite the fact that, at the time of this Judgment, more than two years—indeed, more than four years—have already elapsed since December 2011,

and, as a matter of fact, the Applicant remains at the P-3 level, step XV, as he has been unsuccessful in his applications for promotion.

83. After pondering all the above, the Tribunal sets the sum of the alternative compensation at USD2,000.

84. An award of moral damages is equally warranted, particularly in light of the uncertainty and sense of neglect occasioned to the Applicant by the inordinate delay in communicating his non-selection and the unresponsive and dismissive—not to say mocking—attitude of the concerned UNON officials towards the Applicant.

85. In this regard, the Tribunal stresses that, although art. 10.5(b) of its Statute was recently amended with the aim of hardening the standard of proof of the non-pecuniary harm suffered, the new rule does not apply to the present case, by virtue of the principle of non-retroactivity of norms (*Robineau* 2014-UNAT-396, *Nogueira* 2014-UNAT-409, *Hunt-Matthes* 2014-UNAT-444). As said amendment was adopted in December 2014 and did not enter into force before January 2015 (*Sutherland et al.* UNDT/2015/116, *Featherstone* UNDT/2015/117), it was not yet in effect at the time the application at bar was filed in 2014 (see *Gueben et al.* UNDT/2016/026).

86. On this account, the Tribunal deems fit that the Applicant be paid moral damages in the amount of USD3,000.

Conclusion

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

- a. The selection decision for the post of Chief, RTU (P-4), UNON, under JO 11-LAN-UNON-18526-R-NAIROBI, be rescinded;
- b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, the Applicant shall be paid the sum of USD2,000 as an alternative;

- c. The Applicant shall also be paid moral damages in the amount of USD3,000;
- d. 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 compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and
- e. All other claims are rejected.

(Signed)

Judge Thomas Laker

Dated this 4th day of May 2016

Entered in the Register on this 4th day of May 2016

(Signed)

René M. Vargas M., Registrar, Geneva