



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CHHIKARA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Nicole Washienko, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction

1. The Applicant has challenged a decision dated on or before 12 December 2014 not to roster or select him for the post of Senior Aviation Safety Officer in New York.

Procedural history

2. The Applicant filed an Application with the United Nations Dispute Tribunal (“UNDT”) on 13 July 2015. The Respondent filed his Reply on 17 August.

3. Pursuant to Order No. 353 (NBI/2015), the parties submitted a joint statement of agreed facts and issues on 16 November 2015. The Respondent filed a separate submission in which he moved the Tribunal to strike out Annexes 7¹ and 8² to the Application and the references to those annexes in the record.

4. By Order No. 172 (NBI/2016) the Tribunal rejected the Respondent’s motion.

5. On 31 March 2016, the Applicant filed a motion for leave to adduce further evidence in relation to the damages that he had suffered. His motion was granted by Order No. 185 (NBI/2016).

6. The Tribunal held an oral hearing in the matter from 19 – 21 April 2016.

Hearing on the merits

7. Counsel for the Applicant confirmed that ten allegations made in the Application were no longer in issue. The hearing and this judgment are therefore limited to the remaining two matters in contention: the conduct of the interview by the Assessment Panel (the “Panel”) and the consideration of the Panel’s Interview Assessment Report by the Hiring Manger.

¹ This was an interview transcript compiled by the Applicant.

² The original audio recording from which the transcript was made.

Facts

8. The following is taken from the statement of agreed facts and documents submitted by the parties, supplemented by the oral evidence of the Applicant, Mr. Mitchell Fox, one of the Panel members, and Ms. Catharina van den Berg, the Hiring Manager.

9. Since 2003, the Applicant, an Indian national, has been the Chief Aviation Safety Officer at the United Nations Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) first at the P-4 level and then, following reclassification of the post in 2012, at the P-5 level. He holds a fixed-term appointment.

10. The Applicant applied for the post of Senior Aviation Safety Officer in New York in mid-2013. He passed a written assessment in early January 2014.

11. Subsequently another candidate was shortlisted and passed the written assessment. Due to the lapse of time and the inclusion of the additional candidate, the Hiring Manager decided to administer a new written technical test, which took place at the end of May 2014.

12. The Applicant, together with four other candidates, successfully passed the second test and was invited to participate in a competency-based interview.

13. The competencies for the post prescribed in the Job Opening were Professionalism, Planning and Organizing, Communication, Leadership, Judgement/Decision Making.

14. The Applicant was interviewed by phone on 24 July 2014. The members of the Panel were:

- a. The Chief, Strategic Transport Service with the Logistics Support Division (“LSD”) of the Department of Field Support (“DFS”) at the D-1 level (Chief STS);

b. The Chief, Flight Operations Section of the International Civil Aviation Organization (“ICAO”) at the P-5 level, Mr. Mitchell Fox; and

c. The Chief, Recruitment Section of the Field Personnel Division (“FPD”) of DFS at the P-5 level who was female.

15. The Applicant recorded his own answers to the interview using a mobile phone. The questions by the interviewers were not recorded³. He made a transcript of that recording which the parties agreed was accurate.

16. Mr. Fox from ICAO gave evidence about how the Panel conducted itself and reached its recommendations. He said he was the sole subject matter expert on the Panel. The expertise of the other Panel members was in United Nations transport needs and Human Resources. He described himself as a recognized specialist in competency-based assessments of candidates, having developed the ICAO standards for competency-based training and assessment, which are identical to those that apply in the United Nations system. He said that the positive and negative indicators (the indicators) for each core competency, taken from the United Nations Competency Development - A Practical Guide⁴ (“Practical Guide”), are the objectively verifiable criteria used to assess the individual competencies.

17. Mr. Fox stated that each Panel member was at a different geographical location and before the interviews they met by phone to prepare the questions. He said he made copious notes of the interview which he later destroyed. He did not have a check list of positive and negative indicators during the interview but had the agreed questions and referred to ICAO guidelines which used the same indicators. He asked the candidates questions relating to the competency of professionalism.

18. Following the interview, the Panel had another teleconference in which they reflected on the interview performance of the candidates competency by competency. The FPD/DFS member of the Panel summarized the findings in an

³ This evidence was challenged and held to be admissible in Order No. 172 (NBI/2016).

⁴ Published by the Office of Human Resources Management (OHRM).

Interview Assessment Report and distributed these to the other Panel members. They reviewed them and agreed to the summary which they signed as a true reflection of the Panel's findings.

19. He said that the Panel members reached an easy consensus on each on of the competencies of the Applicant and all identified the same performance shortcomings.

20. The Interview Assessment Report recorded that the assessment criteria for the post were: Professionalism; Planning and Organizing; Communication; Leadership; and Judgement/Decision Making.

21. The Interview Assessment Report documented the Panels' assessment procedure for each competency by recording the questions asked of the Applicant, a summary of his answers, the Panel's observations and evaluation, and the overall rating for each competency.

Professionalism

22. The Panel's summary of the Applicant's answer to the question on professionalism read:

The candidate explained that Safety Officers interact with airlines only during investigations. In Kinshasa, the candidate was tasked to investigate an accident with 32 fatalities. He had the opportunity to enter into the premises of private companies with access to their data. He said he discovered that they did not have a good safety management system, so he discussed with different managers and recommended SMS implementation. It was revealed to him that the candidate found that crewmembers committed many errors at the time of the accident. He explained to managers the benefits of SMS, establishing accountability and good safety programmes. The candidate said that other elements that contributed to his success were his persistence during difficult times; his positive attitude and composure, his professionalism and his fellow colleagues' gradually trusting him. He concluded that he was proud of his achievements.

23. The Panel's observations and evaluation for professionalism reads:

The panel determined that the candidate requires development with regards to this competency. The panel determined that the

candidate failed to provide concise answers to the questions asked. The panel further noted that he was not able to identify either his specific role as part of the team or the team goals. The panel agreed that through his example, the candidate did not provide evidence in demonstrating most of the key indicators of this competency except for working collaboratively with colleagues to achieve organizational goals and soliciting inputs and valuing others' ideas and expertise. The panel agreed that the candidate meets less than half of the competency indicators.

24. The Interview Assessment Report did not refer to any of the indicators of professionalism including "mastery of subject matter". Mr. Fox agreed that the Panel should probably have noted the indicator of mastery of subject matter but denied that this omission negated the decision.

25. The only indicators referred to under the competency of professionalism were those relating to teamwork, which was not one of the competencies to be assessed for this post. Mr. Fox said that from his experience teamwork is an important part of the Safety Management System ("SMS") that the Applicant was questioned about.

Planning and Organizing

26. The Panel's summary of the Applicant's answer to the question on planning and organizing reads:

The candidate mentioned while in the mission in Congo, he proposed to the Director to have a Traffic Control simulator. He noticed the lack of training of pilots and air traffic controllers in DRC. He spoke and explained the project to his DMS; he also spoke with the local authorities to be involved. He finally convinced the administration and started the preparation of documents for such various assignments (RFP, bids, etc). He convinced the DMS and CAVO about the benefits of the simulator not only for MONUSCO but for the local air traffic controllers as well as the use in others missions. He also discovered that the World Bank was interested in financing this project. After the acceptance and approval of the Administration, local authorities and the World Bank, he started to document and analyse bids and get the simulator in place.

27. The Panel's observations and evaluation for planning and organizing reads:

The panel determined that the candidate is fully competent with regards to this competency. His answers to the question were thorough and insightful. The panel further noted that he responded in such a way that is in line with several of the key indicators of the competency such as developing clear goals that were consistent with agreed strategies, adjusting priorities and plans as necessary; as well as allocating appropriate amount of time and resources for completing work.

Communication

28. The Panel's summary of the Applicant's answer to the question on communication read:

The candidate mentioned while in the Air Force there were many accidents of the MIG-21 Aircraft. He was appointed as leader of a special task force to investigate the reasons why these accidents were occurring. He put a plan together to analyze the reasons for the accidents, studied experiences of the aircrew, particularly the pilots, and discovered a lack of maintenance and spare parts. Based on the records he developed a plan and presented it to managers.

29. The Panel's observations and evaluation for communication reads:

The candidate requires development with regards to this competency. The panel determined that the candidate failed to provide concise answers to the questions asked. The panel agreed that through his example, the candidate did not provide evidence in demonstrating most of the key indicators of this competency except for working collaboratively with colleagues to achieve organizational goals and soliciting inputs and valuing others' ideas and expertise, and is willing to learn from others.

30. The only indicators referred to under the communications competency related to teamwork which was not one of the competencies for the post. Mr. Fox could not explain this or why no indicators for communication were referred to in the assessment but added that through his answers the Applicant did not demonstrate most of the key indicators for communication.

Leadership

31. The Interview Assessment Report recorded the Applicant's answer to questions on this competency as follows:

The candidate explained that while flying a Boeing 737-800 for Air India Express, he noticed that the pilots' schedules were done manually which he stated were not an efficient method. He thought a better way to prepare the schedules in a very professional manner was by soliciting support from his MBA studies programme. He stated that along with the scheduling department, they designed and implemented a brand new scheduling system. He presented it to the CEO and suggested they utilize it in the company. Improvements and control of flying hours would now be readily available. He used all the resources from the company (software, computers, etc) to prepare this new programme. The system enhanced efficiency and Pilots' flying hours were finally accurate. The system was well accepted by the Managers and Pilots.

32. The Panel's observations and evaluation for leadership reads:

The panel determined that the candidate is fully competent with regards to this competency. The panel determined that the candidate provided a clear and detailed answer for his example of building support for his project. Furthermore, answers to the follow-up questions were concise and concurred with the key indicators of the competency. The panel agreed that the candidate meets most of the competency definition. He empowers others to translate vision into results.

Judgement/Decision Making

33. The Interview Assessment Report recorded the Applicant's answer to questions on this competency as follows:

The candidate said that he was part of many investigations; specifically one in Afghanistan that resulted in fatalities, a helicopter crashed on top of a mountain so he collected information from several sources (air traffic, radar images, flight following, witness statements, etc) as part of the investigation. He developed a methodology on performing an investigation. He realized he was the only expert on the team and started to redraft the 28-page report that was previously drafted by the government authorities. The final report was uploaded into the web.

34. It was accepted by the Respondent that during his interview the Applicant (who had never been to Afghanistan) had not mentioned an investigation he had undertaken in Afghanistan but instead referred to an investigation of an air accident in DRC. Mr. Fox told the Tribunal that he had no answer as to how this

“slip up” occurred but maintained that the error did not play any part in the Panel’s overall assessment or recommendations.

35. The Panel’s observations and evaluation for Judgement/Decision Making reads:

The panel determined that the candidate requires development with regards to this competency. The panel determined that, through his example, the candidate provided a very broad explanation of the situation. The panel further noted that he failed to demonstrate several key indicators of the competency. While he was able to develop clear goals with the situation he had at hand, he provided little evidence on crucial elements such as identifying priority activities and adjusting them as necessary, allocating appropriate amount of time and resources for completing work, foreseeing risks and allowing contingency planning. The panel agreed that the candidate meets less than half of the competency indicators.

36. When asked why the indicators for planning and organizing were referred to under this competency rather than the indicators of Judgement/Decision Making, Mr. Fox acknowledged that the indicators were not specifically quoted but said that the observations provided evidence of the Applicant not meeting the indicators and the intent was to show this.

37. Mr. Fox was particularly concerned that the Applicant had published the report on the web. The Applicant took issue with this during the hearing but as it is a matter which goes to the substantive evaluation of his suitability for the post, it is not a matter that can be determined by the Tribunal.

38. Mr. Fox said that the competencies were interrelated and that developing priorities was essential in complex situations.

39. The summary of the Panel’s assessments of the Applicant at the end of the Interview Assessment Report stated that the Panel agreed that the Applicant did not demonstrate mastery in all five competencies. It was pleased with his coordinated answers to Planning and Organizing and Leadership, in which he was rated fully competent, his responses to Professionalism, Communication and Judgement/Decision Making provided little evidence on the key indicators required for the position. He was not recommended for the position.

40. Ms. Van der Berg, the Director of Logistics Support Division (LSD) DFS, was the Hiring Manager for this selection exercise. In her evidence to the Tribunal she said that the post of Chief Aviation safety officer is a critical position in DFS as it is entrusted with the management and oversight of ensuring safety and security of DFS air operations.

41. Her role was to ensure that the recruitment process was followed in accordance with the staffing policies and procedures to recruit a qualified candidate for the position. She was not involved with the evaluation of the candidates for the position but endorsed the two candidates recommended by the Panel and submitted them for further review and decision after being briefed verbally by one of the panelists and browsing through the Panel's observations and evaluation of each candidate "for a minute or two".

42. Ms. Van der Berg described the process to be undertaken by an assessment panel. The competencies of the candidates were to be evaluated against the positive and negative indicators listed against each competency in the Practical Guide. She said that the Panel members have sheets where they make notes and note down positive or negative indicators as the case may be. The indicators however are not referred to in their observations and assessments in the Interview Assessment Report. Instead they put a summary of their findings.

43. She explained that the reference to the inclusion of positive indicators for the unrelated competency of teamwork under the Panel's assessment of the Applicant's professional and communication competencies showed that although he did not have any positive indicators for professionalism he did have some positive indicators for teamwork even though this was not a competency against which he could be evaluated.

44. She agreed that the overall assessment of "requires development" which was recorded in the Interview Assessment Report differed from the assessment uploaded into Inspira and shown on the Inspira Comparative Analysis Report but explained that although the forms were different the assessments were in sync with all the competencies of the Interview Assessment Report.

45. On 12 December 2014, the Applicant was informed that he had been neither selected for the post nor included in the roster of qualified candidates for future similar positions.

46. The Applicant told the Tribunal that he only saw the Interview Assessment Report and the Comparative Analysis Report which was entered into Inspira after he filed his challenge to the decision with the Tribunal. At that stage he noted that the answers attributed to him in the Interview Assessment Report did not reflect the answers he provided during the course of the interview as recorded on his phone.

47. For example, in response to a question related to the competency of Judgement/Decision Making the Interview Assessment Report stated that he had discussed an investigation that he had purportedly conducted in Afghanistan. He said that he had never set foot in Afghanistan and was not involved in the investigations described in the Interview Assessment Report.

48. He also noticed that the evaluation of his competencies in both the Interview Assessment Report and the Comparative Analysis Report repeatedly applied the wrong key indicators to each of the three values/competencies for which he was graded “requires development”.

49. He stated that the moral damage he has suffered was caused by the impact on his job security as the post in New York is more stable than the one he holds at MONUSCO, which is in the process of downsizing; damage to his professional reputation, and loss of opportunity to serve in a family duty station after 13 years at a non-family duty station; professional embarrassment; and disappointment at not being posted to a family duty station.

50. The Applicant said that he has had great respect for the United Nations, which stands for the principles of fairness, equality of all peoples, justice and transparency. He said that the arbitrary and flawed manner in which the selection process was handled has left him feeling disillusioned by the very Organization he has dedicated so much of his life serving.

51. As his primary concern in bringing this case was never about money he requested USD1 for moral damages if his claim is supported.

Issues

52. The issues to be determined are:

- a. Whether the competency-based interview of the Applicant was conducted and assessed lawfully;
- b. Whether the Organization acted unlawfully in deciding not to roster or select the Applicant for the post of Senior Aviation Safety Officer in New York following the recruitment exercise; and
- c. If the Tribunal determines that the Organization acted unlawfully under any of the heads stated above, what, if any remedies are due to the Applicant.

Submissions

Applicant

53. The decision to consider the Applicant unsuccessful in the core value of “Professionalism” and the core competencies of “Communication” and “Judgement/Decision Making” was arbitrary, unfair and unreasonable.

54. With reference to the positive and negative indicators in the competency based methodology he submits that throughout the interview record there is: (i) no indication that he exhibited any of the negative indicators and (ii) ample evidence of him exhibiting most and, perhaps all of the positive indicators.

55. He was rated “requires development” in Professionalism, Communication and Judgement/Decision Making but such rating is not included in the Recruiters Manual 2012.

56. As at the date of the Application, the Administration had not produced the interview record. When no rational reasons are given the Tribunal is permitted to

draw adverse inferences.

57. Composition of the Panel:

a. The assessment panel included only one subject matter expert instead of the two required by section 1 of ST/AI 2010/3 (Staff selection system). The result was that the Applicant's technical and specialized answers had little chance of being properly understood and assessed.

b. Section 9.3 of the Recruiters Manual specifies the criteria for the composition of the assessment panel. They should have completed the training module on competency based selection and interviewing skills. If not this is a procedural flaw.

c. Section 9.3 of the Recruiters Manual suggests that the members participating in evaluating the assessment exercise be the same members as the panel conducting the competency based interview. If they were not this could be considered a major procedural flaw.

58. The eligibility criteria for the post were inadequate. The failings enable candidates with inadequate knowledge and or experience to apply. The Job Opening required candidates to hold either an Airline Transport Pilot License or a Commercial Pilot License, or equivalent but these licenses are not interchangeable. A Commercial Pilot License is manifestly insufficient for the role.

Respondent

59. It is not the role of the Tribunal to undertake a merits-based review and it should not substitute its own judgment for that of the decision-maker. It is the conscientious opinion of the panel members that is the essential element of the selection process⁵.

⁵ *Abbassi* UNDT 2010/086 and 2011-UNAT-110.

60. The Applicant was given full and fair consideration for selection for the position.

61. A reasoned and documented record of the evaluation of the candidates against the applicable evaluation criteria was prepared. It shows that all candidates were asked the same questions and all were assessed against the same competencies.

62. The Applicant did not fully meet the competencies of professionalism and judgement/decision making based on his responses to the questions. Two other candidates fully met the competencies of the job opening and were recommended for selection.

63. The rating of “Requires development” appears in the Panel’s interview notes; the Panel recorded its final assessment in Inspira as “Partially Satisfactory” for the competencies of professionalism, communication and judgment/decision making. This rating is in line with the recommended rating scale in the Recruiters Manual and reflects the same qualitative assessment of the Applicant’s performance. “Requires development” is the second lowest rating in the interview notes and is equivalent to “Partially satisfactory”.

64. The Panel was properly composed of three members; two of whom were subject matter experts. In any event even if it comprised one subject matter expert the ST/AI does not mandate the number but advises.

65. There were no procedural flaws in the selection process.

66. The Inspira Recruiter’s Manual is an internally developed manual and is a guideline only which creates no legal rights.

67. The Applicant has not demonstrated how he was prejudiced or denied a promotion because a procedure or guideline was applied in such a way to unfairly deprive him of the promotion or any proximate cause between the alleged irregularities and the outcome of the selection process.

68. There is no requirement for a technical expert to be from the same or

higher level as the job opening.

69. The Applicant has confused suggestions and guidelines for Rules. Even if any of his assertions are found to be procedural violations, none of them entitle him to the rescission of the decision. He was not disadvantaged by the alleged violations. He was assessed as eligible, shortlisted, passed two written assessments and invited to participate in a competency based interview.

Considerations

70. The scope of the Tribunal's competence and the legal principles to be applied in considering whether a decision concerning selection or rostering is lawful are well settled. They were summarised by the Appeals Tribunal in *Aliko* 2015-UNAT-540:

[I]t is not the function of the Dispute Tribunal [...] to take on the substantive role with which the interview panel was charged." Rather, the Dispute Tribunal reviews the challenged selection process to determine whether a "candidate [] ha[s] received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration". The burden is on the candidate challenging the selection process to "prove through clear and convincing evidence" that he or she did not receive full and fair consideration of his or her candidacy, the applicable procedures were not followed, the members of the panel exhibited bias, or irrelevant material was considered or relevant material ignored.

71. The Secretary-General has broad discretion in matters of staff selection⁶.

72. The selection process is governed by ST/AI/2010/3. Section 1(c) of this administrative instruction defines an "assessment panel" as:

[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....

73. Section 9.2.5 of the Inspira Hiring Manager's Manual reads:

⁶ *Ljungdell* 2012-UNAT-265.

5. Each Assessment Panel is to be composed of a minimum of three assessors, and every effort should be made to obtain geographical diversity and gender balance:

- a. The Hiring Manager, who is usually the chair;
- b. Two subject matter experts.
- c. One of whom is preferably from a non-related office within the Organization, or if not available from another United Nations agency, international organization or established partner institution, who is at the same or a higher level of the position under review. The individual shall hold a fixed-term contract.
- d. One assessor should be a female who is also at the same level as the position under review.
- e. [...].

74. Section 5.4.5 of the Inspira Recruiter's Manual states:

5. Each Assessment Panel is to be composed of a minimum of three assessors and every effort should be made to obtain geographical diversity and gender balance:

- a. The Hiring Manager, who is usually the chair;
- b. Two subject matter experts:
 - i. One of whom is preferably from a non-related office within the Organization, who is at the same or a higher level of the position under review.
 - ii. The individuals shall hold a fixed-term appointment, a permanent appointment or a continuing appointment.
 - iii. At least one of the assessors should be a female at the same or higher level of the same level as the position under review.
 - iv. [...].

75. Section 1(e) ST/AI/2010/3 defines a "documented record" as: "a record consisting of written printed or electronic material that provides information or evidence. The record must be reasoned and objectively justifiable".

76. Section 1(f) defines "evaluation criteria" as: "criteria used for the evaluation of applicants for a particular position. Evaluation criteria must be objective and related to the functions of the generic job profile or the individually classified job description and must reflect the key competencies that will be assessed".

77. Pursuant to paragraph 7.5 of the ST/AI, candidates are to be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview.

78. Paragraph 7.6 states that: “[...] the hiring manager [...] shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria [...]”.

79. Para 9.3 of the Recruiter’s Manual states that all assessment panels must be composed of staff members holding a fixed-term appointment, a permanent appointment or continuing appointment and serving at the same or higher level than that of the job opening....should any of the assessment panel be retirees, consultants, contractor or interns or staff members holding a temporary appointment, the interviews will be void. The interviews would have to be held again.

80. The Practical Guide lists the core values and competencies of the United Nations and set outs the positive and negative indicators for each competency. These are the evaluation criteria against which candidates are assessed. As noted by the Appeals Tribunal in *Asariotis* 2015-UNAT-496, such a manual provides “guidance” but does not purport to vest a staff member with an entitlement. However in this case the Panel and the Hiring Manager both proceeded with this selection process on the understanding that the candidates would be evaluated according to these positive and negative performance indicators. The question is whether they did this fully and fairly.

Issue 1

Was the competency-based interview of the Applicant conducted and assessed lawfully?

81. In order to establish the lawfulness of the interview and assessment process the Tribunal is to consider whether the Applicant has met the burden of proving through clear and convincing evidence that he did not receive full and fair consideration of his or her candidacy, that the applicable procedures were not

followed, that the members of the panel exhibited bias, or that irrelevant material was considered or relevant material ignored.

The Assessment Panel

82. The first question is whether the Assessment Panel was correctly constituted in accordance with section 1(c) of ST/AI/2010/3 and section 9.3 of the Recruiter's Manual. Two issues arise: was Mr. Fox competent to be a panel member and did the panel have the required number of subject matter experts?

83. The Tribunal queried whether, as an employee of ICAO, Mr. Fox was a United Nations staff member for the purpose of Para 9.3 of the Inspira Manual. Having considered submissions from Counsel on this point the Tribunal is satisfied that Mr. Fox was not disqualified from being a member of the Panel as ICAO is part of the United Nations common system.

84. The Panel was comprised of three members, as normally required. One was from outside the relevant work unit and one was female. To this extent it complied with Section 1(c) of the ST/AI. However, according to the evidence, the Tribunal finds that Mr. Fox was the sole subject matter expert for the post of Senior Aviation Safety Officer. The Chief STS was a logistics expert but not an expert in ensuring the safety and security of DFS air operations.

85. The definition of an assessment panel in section 1(c) of ST/AI/2010/3 is "a panel normally comprised of at least three members, with two being subject matter experts [...]". This definition is open to interpretation in relation to the required number of subject matter experts. The word 'normally' could apply only to the total number of members of the panel (normally comprised of three members) or may be interpreted as attaching to the other provisions of the section including the number of subject matter experts. Is the requirement for two subject matter experts and a female member mandatory or is this provision advisory in nature? Both of these interpretations are reasonably possible.

86. Given the ambiguity of the section, the Tribunal refers to the other provisions relating to selection procedures which, given their place in the

legislative hierarchy of the Organization⁷ are not of themselves enforceable, but nevertheless provide insight into the intention of the section as promulgated by the OHRM. The Hiring Manager's Manual section 9.2.5 and the Recruiter's Manual section 5.4.5 both refer to the requirement for two subject matter experts. In fact the Hiring Manager's Manual states that two (of the panel members) **must** be subject matter experts.

87. On the basis of the context and requirements of these administrative guidelines, the Tribunal holds that of the two possible interpretations of section 1(c) of ST/AI/2010/3 the most reasonable⁸ is that an assessment panel should normally have three members but must include a female and two subject matter experts.

88. Given this interpretation, the Tribunal concludes that the Panel was not properly constituted as it did not have two subject matter experts. The Interview Assessment Report produced by the Panel is therefore null and void. However even if this is not the case there are serious issues that undermine the substance of the Interview Assessment Report.

The Interview Assessment Report

89. The Interview Assessment Report was a very brief summary of the full answers given to each question as recorded by the Applicant. The Respondent accepted that some sections of the Interview Assessment Report contain errors and anomalies. The most significant of the factual errors was the reference to the non-existent service of the Applicant in Afghanistan in the assessment of Judgement/Decision Making. This error went unnoticed by the three Panel members who signed the Interview Assessment Report and was not drawn to the attention of the Hiring Manager.

90. The Interview Assessment Report revealed two types of anomalies in relation to the application of the relevant indicators: (i) assessment of competencies without reference to the specific indicators for that competency

⁷ Villamorán UNDT/2011/126.

⁸ Guedes 2014-UNAT-418, paragraph 19.

while referring references to indicators of competencies that were not one of the four competencies for the post; and (ii) inconsistent assessments of the same indicators.

91. For the competency of professionalism, the Panel said the Applicant met less than half the competency indicators without specifying what these were. On the other hand, the Panel found he did provide evidence that he met indicators such as working collaboratively and valuing others' ideas which related to the competency of teamwork that was not one of the four competencies for the post.

92. The Panel used these same positive indicators for teamwork to evaluate his competency in Communication but did not refer to any of the indicators for the competency in communication which they said he had not demonstrated.

93. For the competency of Judgement/Decision Making, the Panel stated that the Applicant did not demonstrate most of the key indicators of the judgement/decision making competency and listed the indicators which he did not demonstrate. These included identifying priority activities and adjusting them as necessary, allocating time and resources, foreseeing risks and allowing for contingencies. These are not indicators for judgement/decision making but for planning and organizing.

94. In contrast, in evaluating the Applicant's competency in planning and organizing, the Panel found him to be fully competent. It said that he had responded in line with several key indicators of the competency including developing clear goals that were consistent with agreed strategies, adjusting priorities and plans as necessary as well as allocating appropriate amount of time and resources for completing work. These were the same indicators he had failed in Judgement/Decision Making.

95. The errors and anomalies in the Panel's written assessments of the indicators of the Applicant's competency in Judgement/Decision Making and planning and organizing were particularly egregious. It used the incorrect indicators for judgment/decision making and its two assessments of the Applicant using the same indicators were completely different.

96. The Tribunal accepts that in evaluating candidates for selection there is inevitably some overlap of the competencies and that there is no legally enforceable requirement for an assessment panel to spell out each of the indicators used to evaluate candidates for a post. However, when it does refer to indicators in the Interview Assessment Report, as it did in this case, the Tribunal is able to assess whether the objective criteria reflecting the relevant key competencies as required by section 1(f) of ST/AI/2010/3 were in fact applied and whether, pursuant to section 1(e) of ST/AI/2010/3, the Interview Assessment Report is reasoned and objectively justifiable.

97. The Tribunal finds that the Interview Assessment Report shows that the Panel had regard to incorrect indicators for three of the competencies meaning that the evaluation was marred by irrelevant considerations. The errors and anomalies referred to above mean that the assessment of the Applicant's competencies is not objectively verifiable.

98. The witnesses for the Respondent attempted to give *ex post facto* justifications for the anomalies in the Interview Assessment Report and, in effect, invited the Tribunal to ignore much of the written record of the Panel in favour of verbal assurances that the errors did not affect the outcome of their assessment. In fact, it was the written observations, evaluations and recommendations in the Interview Assessment Report that the Panel certified as a true reflection of its findings and which were relied on by the Hiring Manager as the basis for the ultimate decision not to recommend the Applicant for selection.

99. The Tribunal holds that the number and quality of the anomalies and the inaccurate summary of the Applicant's answers to the Panel's questions on the competency of Judgement/Decision Making are sufficient in this case to negate the presumption of regularity accorded to the actions of the Administration. The Interview Assessment Report was so flawed that it cannot be taken as an objectively justifiable record of the assessment of the Applicant and was inherently unreliable.

100. For these reasons the Tribunal concludes that the Applicant did not receive

full and fair consideration of his candidacy during his competency-based interview and the Panel's assessment of the Applicant was unlawful.

Issue 2

Did the Organization act unlawfully in deciding not to roster or select the Applicant for the post of Senior Aviation Safety Officer in New York.

101. The decision not to select or roster the Applicant was based on the recommendation of the Panel in an Interview Assessment Report that was fundamentally flawed and unreliable.

102. The Tribunal holds that the decision not to roster or select the Applicant for the Senior Aviation Safety Officer post was unlawful as it was tainted by procedural errors.

Issue 3

If the Tribunal determines that the Organization acted unlawfully under any of the heads stated above, what if any compensation is due to the Applicant?

103. In his evidence, the Applicant stressed that his desire was to be afforded a fair opportunity to compete for the post in question and that his primary concern has never been about money.

104. In *Bofill* 2011-UNAT-174, the United Nations Appeals Tribunal ("Appeals Tribunal") held 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. That was the case here.

105. In this case two of the candidates were found to have met all of the competencies and were recommended for selection. The Applicant was found to have met two of the five competencies. In spite of the procedural irregularities, the Tribunal has no basis to find that, but for the irregularities, he would have been recommended for the post.

106. The facts in this case can be distinguished from those in *Hersh* 2014-UNAT-433/Corr.1 where the evidence of “blatant and reckless abuse of power” and “the manipulation of the ...process” by wrongly subjecting the candidate to a comparative review justified rescission and a substantial award of compensation.

107. In the present case, the Applicant alleged that the presence of the sole subject matter expert of the Panel led to undue influence by him on the other Panel members but this was not substantiated at the hearing.

108. While the conduct of the interview and the preparation of the Interview Assessment Report was at best careless there was no evidence of the factors, including blatant abuse of power, which led to the decision in *Hersh*.

109. It is not for the Tribunal to conduct an assessment of the Applicant’s competencies or to order that he should be rostered for the post. Two recommended candidates met all of the competencies. Even if the Applicant had been one of the two recommended candidates there is no certainty that he would have eventually have been selected for the post. For these reasons the Tribunal declines to order the rescission of the decision and no compensation can be awarded for any of the alleged harm claimed by the Applicant as a result of his non-selection.

110. In relation to moral damages the Tribunal is guided by the principle that compensation may only be awarded if it has been established that the staff member actually suffered damages⁹.

111. The Tribunal finds that the Applicant has good reason to be disturbed and upset about the process which was not conducted with the care and rigor that staff members are entitled to. Having heard the Applicant’s oral evidence, the Tribunal is satisfied that his justified sense of outrage and disillusionment at the way his candidacy was treated amounts to moral damage which warrants the award of the nominal sum he sought of USD1.

⁹ *Antaki* 2010-UNAT-095.

Conclusions

112. The competency-based interview of the Applicant was not conducted by a properly constituted assessment panel or assessed lawfully in accordance with ST/AI/ 2010/3. The decision not to recommend him for selection was tainted by procedural defects.

113. The Tribunal declines to order that the impugned decision be rescinded but orders that moral damages in the sum of USD1 be paid by the Respondent to the Applicant.

(Signed)

Judge Coral Shaw

Dated this 23rd day of June 2016

Entered in the Register on this 23rd day of June 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi