



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

HUBERT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Kara D. Nottingham, UNOG

## **Introduction**

1. The Applicant contests his non-selection for the post of Chief, Vehicles Regulation and Transport Innovation Section (P-5), with the Transport Division, United Nations Economic Commission for Europe (“UNECE”), advertised under Job Opening (“JO”) 14-ECO-ECE-34201-R-Geneva (R).

2. As remedies, the Applicant seeks to benefit from a fair, merit-based and transparent selection process at each stage, as well as from financial compensation.

## **Facts**

3. The post of Chief of Section (P-5), Transport Division, UNECE, was published from 15 May to 14 July 2014 under JO 14-ECO-ECE-34201-R-Geneva (R). The Applicant applied on 17 June 2014.

4. Pending recruitment under the above-mentioned JO, the post was also advertised under Temporary Vacancy Announcement (“TVA”) TVA-14-ECE-037. On 17 July 2014, the Applicant was selected for the TVA, effective 28 July 2014, and discharged such duties until December 2014. The Director, Transport Division, UNECE, i.e., the Applicant’s supervisor and Hiring Manager for the filling of the JO, stated in a memorandum of 17 July 2014, that she had made it clear to the Applicant that his selection on the TVA did not constitute a promise for his selection for JO 14-ECO-ECE-34201-R-Geneva (R).

5. Ten candidates were shortlisted regarding JO 14-ECO-ECE-34201-R-Geneva (R), including the Applicant. They underwent a written test on 20 August 2014. The test was prepared by the Hiring Manager and administered anonymously; the passing grade was set at 70 out of 100 points. The Applicant scored 65.75 points.

6. Five candidates passed the test and were invited to a competency-based interview that took place on 22 September 2014. The Applicant was not one of them.

7. According to the Applicant, in the same week, the Hiring Manager—during an informal discussion with the Applicant and two other colleagues—shared her view that an internal candidate working at the concerned service had to undergo a stricter evaluation of the written test than an external one, to compensate the considerable advantage that the internal candidate naturally enjoys.

8. On 20 October 2014, two candidates were recommended to the Central Review Board, which endorsed the recommendation. One of them was eventually selected, he had not served within the Transport Division prior to his selection.

9. The Applicant was informed of his non-selection for the post by email of 4 November 2014. On 10 November 2014, he met with the Hiring Manager, who, at his request, clarified the reasons why the Applicant had failed the test.

10. On 3 January 2015, the Applicant requested management evaluation of the contested decision, which the Management Evaluation Unit upheld by letter dated 11 February 2015.

11. The present application was filed on 13 May 2015. The Respondent filed his reply on 19 June 2015, with five annexes submitted on an *ex parte* basis. Pursuant to Order No. 129 (GVA/2015) of 23 June 2015, all documents filed *ex parte* by the Respondent were made available to the Applicant on an under seal basis, and redacted by the Tribunal as appropriate to protect third parties' personal data.

12. On 21 October 2015, the Applicant submitted signed witness statements by three former staff members of the Transport Division, UNECE, asserting that the Hiring Manager had manifested, well before the recruitment process was launched, her intention to recruit a candidate coming from outside the Transport Division, referring to it with the expression “fresh blood”.

13. A case management discussion was held on 17 November 2015.

14. By Order No. 237 (GVA/2015) of 18 November 2015, this case's proceedings were suspended to allow mediation efforts. These efforts were not successful and the proceedings resumed on 15 February 2016.

15. By motion of 7 March 2016, the Respondent requested that an additional witness be heard at the hearing and provided the respective witness statement.

16. A substantive hearing was held on 16 March 2016, at which the Applicant, the three witnesses proposed by him and the witness suggested by the Respondent testified, as well as the Hiring Manager for the litigious post, called on the Tribunal's initiative.

17. At the hearing, the Tribunal instructed the Respondent to submit additional information, namely the original communications conveying the scores of the written test to the Administrative Assistant who assisted with the recruitment procedure within the Transport Division, UNECE. The Respondent was unable to retrieve all of these communications but submitted some of them on 22 March 2016.

18. On 29 March 2016, the Applicant provided further comments, particularly in relation to the anonymity of the evaluation of the written test and some alleged links between the Hiring Manager and the successful candidate.

### **Parties' submissions**

19. The Applicant's principal contentions are:

- a. The selection process was biased. The Hiring Manager misused the provisions in the administrative issuances applicable to the selection procedure to eliminate undesired candidates. This resulted in the selection of her favourite candidate;
- b. Although it was indicated that the written test would be rated anonymously, it is easy for the Hiring Manager, after years of close cooperation, to identify candidates working in her Division through their writing style in the answers provided. The Hiring Manager's stance that internal candidates should be rated by a more demanding standard tends to confirm that she could recognise them;

c. The Hiring Manager shared with several third parties, both members of the team and delegates of Member States, that she intended to fill the litigious post with a candidate from outside the service. This indicates that the Hiring Manager wilfully eliminated the Applicant through the written test;

d. The Hiring Manager's failure to take appropriate measures for the Applicant to be recorded in Inspira as eligible for P-5 posts, despite having encountered the same inaccuracy in the past, further shows that she intended to exclude his candidacy;

e. The Hiring Manager's grading of the Applicant's test was abnormally harsh. She gave him an undeserved "0" in one of the two questions, which was key in him not reaching the minimal mark to pass to the interview stage. Whenever there is an important difference between the marks of one assessor and another's, some corrective mechanism should be applied. Furthermore, those members of the panel who had substantive technical expertise in the matter rated him higher than those with less technical knowledge; and

f. The Hiring Manager knows and shares the same national origins with the successful candidate's supervisors in his previous job.

20. The Respondent's principal contentions are:

a. The Applicant's candidature was fully and fairly considered;

b. The Organization disposes of broad discretion in making decisions on promotion and appointment, and it is not for the Tribunal to substitute its own decision for that of the Secretary-General. In particular, the Tribunal has ruled that it may not substitute any scores to those of the panel who tested or interviewed candidates in a given selection process;

c. According to the presumption of regularity of administrative acts, the contested selection decision should stand. The outcome of the selection exercise was not manifestly unreasonable and the record shows that the

candidates were thoroughly assessed and the procedures set out in Administrative Instruction ST/AI/2010/3 (Staff selection system) were adhered to;

d. The written test assessment was properly administered. It was designed to evaluate the professional and communication competencies specified in the JO. A written test is an assessment tool provided for in sec. 7.5 of ST/AI/2010/3. The Applicant obtained the scores of 55, 58, 83 and 67; therefore, in average, he was rated 67.75, i.e., below the passing grade;

e. The test was completely anonymous. The allegation that the test was designed to differentiate internal from external candidates is unsubstantiated. The candidates were coded with a number by the Administrative Assistant in charge, then sent to all four panel members individually to be marked independently. The Administrative Assistant then compiled the scores and later provided the names of the successful candidates based on the scores. Insofar as none of the assessment panel members knew the identity of the candidates, the safeguards described were sufficient to ensure full and fair consideration;

f. The allegation of bias is nullified by the fact that the written test was anonymous and that the Applicant was not invited to an interview simply because he failed the written test. The test questions were objective and pertinent. Since the Transport Division had 47 staff members at the time of the scoring, it is unlikely that a panel member could identify one candidate by his writing style. Moreover, one of the recommended candidates had worked in the Transport Division in the past;

g. Regardless of whether the Applicant was performing functions of Chief of Section by virtue of his selection to the related TVA, he was required to participate in a competitive selection process, just like all other candidates. He was subject to the same assessment exercise as the rest of the candidates, in accordance with the applicable rules. An assessment panel is not bound by a candidate's performance evaluations, position and/or ability

to perform his or her current functions. Furthermore, the Applicant was made aware that his selection on the TVA was no promise or indication of his eventual selection under the JO; and

h. The members of the assessment panel for the written test had the required technical expertise to grade it. They were all senior officials in UNECE—specifically, the Chief, Transport Division, UNECE (D-1); the Chief, Statistics Division, UNECE (D-1); the Chief, Transport Facilitation and Economics, Transport Division, UNECE (P-5); and the Chief, Dangerous Goods and Special Cargoes Section, UNECE (P-5)—three of whom were members of the Transport Division and were familiar with issues relevant to the position.

### **Consideration**

21. The Applicant's core assertion is that the Hiring Manager for the post had a prejudice against candidates who, like him, were already serving at the Transport Division and that she fashioned and conducted the recruitment procedure in such a manner to ensure that he was not selected. Notably, he believes that the written test was used to eliminate him from the selection process as, despite its theoretical anonymity, the Hiring Manager was easily able to recognise his answers.

#### *Alleged bias or prejudice by the Hiring Manager*

22. The Applicant argues that he was not fairly considered inasmuch as the Hiring Manager was strongly inclined to select an external candidate for the post. In claiming so, he relies first and foremost on a number of statements that the Director, Transport Division, UNECE, who acted as the Hiring Manager for the selection at issue, made well in advance of the recruitment process. More precisely, the Applicant submits that the Hiring Manager announced openly and repeatedly, months before the post was even advertised, her preference for filling it with a candidate coming from outside the Transport Division, referring to it with the expression "fresh blood".

23. The Applicant averred that a number of colleagues and State delegates advised him that the Director, Transport Division, had on different occasions stated that she wished some “fresh blood” at the period when the previous incumbent of the post was due for imminent retirement.

24. The Tribunal heard evidence in this respect from three different former staff members of the Transport Division, who have since then left its service. All three of them testified that, many months before the post selection procedure was launched, the Director, Transport Division, said in their presence that she wished “fresh blood” to fill the upcoming vacancies. These witnesses confirmed that she had used this expression, and that, in the context of the respective conversations, there was no doubt that she was alluding to external candidates, that is, applicants who were not already part of the Transport Division’s staff. They added that, even though the Director, Transport Division, did not refer to a specific post, it was clear to them that she meant particularly the post of Chief, Vehicles Regulation and Transport Innovation Section, since it was in everyone’s minds as the one senior (P-5) post in the Division that was to become vacant shortly.

25. When put to the Hiring Manager, who was also called as a witness, the latter did not deny having commented on the upcoming recruitment process and having made reference to bringing “fresh blood” to the Transport Division, but she qualified her sayings explaining that the idea she intended to convey was that the recruitment procedures were genuinely open and that external candidates had a true and equal chance of being considered.

26. One of the witnesses, who happened to be the previous incumbent of the post, corroborated the Applicant’s assertion that some State representatives brought to their attention that the Hiring Manager had made similar statements in front of them.<sup>1</sup> Furthermore, this same witness testified that he had mentioned that the Applicant would be a strong candidate to replace him and that the Hiring Manager had appeared to be annoyed by his comment. However, the Hiring Manager explained in her evidence that she was displeased to what she perceived

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<sup>1</sup> The Applicant advised at the hearing that he did not request any diplomat to testify before the Tribunal, noting that this would have been inappropriate and politically sensitive.



as his outgoing supervisee taking the liberty of dictating to her an important staffing decision.

27. After careful consideration of all matters before it, the Tribunal concludes, not without concern, that the evidence before it supports a finding that the Hiring Manager had publicly expressed on more than one occasion a preference for external candidates, if not a pre-determined opinion against the Applicant's suitability for the post. On this point, the Tribunal attaches significant weight to the testimony of the above-mentioned former staff members of the Transport Division, since all three provided relatively detailed, consistent and mutually corroborating evidence. Also, given that none of them any longer works at UNECE, as one has retired and two have left the Organization, the Tribunal has no reason to believe that their statements could be influenced, in one sense or the other, by any career interest or external pressure.

28. In addition, the Applicant contends, and the witnesses supported the view to some extent, that the Hiring Manager's prejudice against internal candidates can be inferred from the fact that, out of five P-5 posts in the Division, three were filled in recent years under the tenure of the current Director, Transport Division, and in all but one case external candidates were hired. He added that this only exception was not representative as this particular staff member entertained an obviously privileged relationship with the Hiring Manager. To counter this contention, the Respondent submitted a "Non-exhaustive List of Internally Recruited Candidates Where [the Hiring Manager] was acting as Hiring Manager and/or Member of the Evaluation Panel", citing eight recruitment processes where staff of the Transport Division were successful. The Tribunal has considered this list, although it bears only limited relevance, considering that in many, and probably most, of these recruitments the Director, Transport Division, participated merely as a member of the panel—as opposed to being the hiring manager—and that all selection instances, save for the very same cited as exceptional by the Applicant, concerned more junior posts than the one at stake in this case. The Tribunal finds that three recruitment examples are too small a sample to statistically demonstrate any trend, especially when they do not all point in the

same direction. Hence, no meaningful conclusion can be drawn from the figures advanced by either party.

29. In any event, by her own statements and by her attitude and her staffing decisions, the Hiring Manager left the Tribunal with a quite clear impression that she was generally opposed to promoting, particularly to P-5 positions, those members of the team who have been serving in the Transport Division before her arrival in general, and the Applicant in particular. Such perception was not belied by the final outcome of the recruitment under review, given that an external candidate was indeed selected.

30. The Applicant further submitted that, after the initial screening of candidates, he was deemed ineligible since Inspira—the Organization’s electronic recruitment system—did not reflect that he met the legal requirement of two lateral moves prior to applying to a P-5 position (see sec. 6.3 of ST/AI/2010/3). The Applicant had to point this inaccuracy to the Human Resources Management Section. After verification, he was accepted as eligible and, as such, his candidature was released to participate in the next round of the selection process. Nonetheless, the Applicant stressed that he had faced the same problem in the past, further to his application to a different P-5 post. On that occasion, it had already been detected that his two lateral moves had not been recorded in Inspira and his supervisor, the Hiring Manager, had been made aware at the time of this inaccuracy in the system. In the Applicant’s view, the fact that, despite this precedent, the Hiring Manager had not taken action to have it rectified once and for good, further indicated her prejudice against the Applicant, as well as of her intent to use the recruitment procedure to eliminate him from the competition for the post.

31. The Tribunal finds this contention unfounded. Sec. 7 of ST/AI/2010/3 reads:

Applicants applying to job openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job opening.

... the local human resources office or the Field Personnel Division of the Department of Field Support will release electronically to the hiring manager ... within or shortly after the deadline of the job

opening, the applications of candidates who have successfully passed the pre-screening process, together with the names of pre-approved eligible candidates, for consideration for selection.

32. Pursuant to these provision, the eligibility pre-screening of candidates is systematically carried out by the human resources office in charge of the recruitment in question. It follows that the Hiring Manager was not involved and had no control over the pre-screening. The Tribunal is, however, of the view that if the Hiring Manager knew that in the past there had been an issue with the release of the Applicant's candidature because of the lack of recording of his lateral moves, she should have inquired with Human Resources about the reasons for his non-release this time. By not doing so there is some support for the conclusion that the Hiring Manager was content with not having the Applicant as a candidate. The Hiring Manager, however, is not responsible for ensuring that lateral moves of her staff be recorded "once and for all" in Inspira.

33. The Applicant suggests in his last submission that, not only the Hiring Manager was ill-disposed vis-à-vis him, but she actually favoured the eventually successful candidate. In this connection, he alleges that the Director, Transport Division, knew the two individuals who were the successful candidate's supervisors in his previous job, who both shared the same national origins as the Hiring Manager. The Tribunal finds this allegation as unproven. Indeed, the Applicant has not provided any reliable evidence for this assertion, nor disclosed at least his sources. Moreover, even if the Hiring Manager knew and had the same nationality as the selected candidate's former supervisors, this is far from sufficient to establish that he benefited from favouritism on this account.

34. It remains that a degree of ill-disposition of the Hiring Manager towards the candidacy of the Applicant, as an "internal" candidate, is established, primarily on the basis of the convergent statements of three witnesses.

*Propriety of the selection procedure*

35. The Applicant holds that the written test was contrived to eliminate his candidacy; he notes that such a test had never been used before in the recruitment of P-5 staff of the Transport Division. The Tribunal emphasises, nonetheless, that

a written test is one of the assessment mechanisms expressly preconized in sec. 7.5 of ST/AI/2010/3 as one of the appropriate evaluation mechanisms to which a Hiring Manager may have resort. The holding of a written test in selection procedures has now become a wide-spread practice in the Organization, and the Hiring Manager pointed out that managers were encouraged by the human resources office to use it in their recruitments. The very inclusion of a written test in the procedure is lawful and legitimate.

36. The Applicant takes issue with the ratings he received at the test, in particular those the Hiring Manager gave him. He claims that she gave him a lower grade than his answers deserved and that, as a result, his final score was below the minimum required to pass the test, which brought about his elimination from the process.

37. It is established law that any act of the administration is presumed to have been regularly performed. However, this presumption may be rebutted. As the Appeals Tribunal ruled in *Rolland* 2011-UNAT-122:

If management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

38. In this case, where a bias by the Hiring Manager has come to light and was found to be established, the Applicant was eliminated prior to the interview phase, the question arises vividly as to whether the Respondent was able to minimally show that the procedure was conducted in such a manner to ensure that the Applicant stood "a fair chance of promotion".

39. On this point, the Administration puts forward that the test was administered in an anonymous manner, that is, it did not contain the candidates' names. An Administrative Assistant sent the tests to the candidates and received their answers. She assigned every test a numeric code and then sent the tests to the panel members for scoring. After reading and grading the tests, every panel member returned to the Administrative Assistant a grading sheet with the marks

attributed to each numerical code. Only upon receipt of all of the panel members' grades, the Administrative Assistant consolidated their ratings by calculating the average of the four assessors to each candidate. Lastly, she prepared a list showing the candidates' names and their respective final marks. The Respondent submits that, consequently, neither the Hiring Manager, nor any other panel member, knew the identities of the candidates while they were grading the tests.

40. While the Tribunal requested to be provided the communications whereby the different panel members sent their scores to the aforesaid Administrative Assistant, most of them could not be located. Therefore, the Respondent's factual account could not be corroborated by documentary evidence. However, the Administrative Assistant involved testified that the protocol described above was indeed followed, in the same way it is normally done in any selection exercise in the Division. She specifically confirmed that, to the best of her knowledge, none of the panel members could have learnt about the ratings given by the other assessors, before attributing his/her own.

41. The latter was relevant since the Hiring Manager's grading sheet contained observations that could have led to a conclusion that she took cognizance of the consolidated ratings of the candidates when she attributed her grades. Specifically, she wrote "for interview" next to exactly those candidates that were eventually invited for an interview. Having said that, the Hiring Manager said in evidence that the comment "for interview" reflected nothing else than her own opinion that the concerned candidates met the standard to progress to the next stage of the assessment. This appears as a plausible explanation.

42. Accordingly, the Tribunal finds that the procedure put in place to administer the written test was adequate to preserve the candidates' anonymity. Thereby, the Respondent has made a minimal showing that the Applicant's candidature was fairly considered in the recruitment process under review. As a consequence, the presumption that the administration of the test was regular prevails in principle, and the burden is on the Applicant to demonstrate the contrary.

*The Hiring Manager's ratings*

43. The Applicant feels strongly that, even if the numerical codes were used, the Hiring Manager could have recognised his test through his writing style, as they had been working together for a few years at that point and, as her manager, she had often read written work he produced. While the Hiring Manager retorted that she would be unable of remembering the style of each of her numerous supervisees, the Applicant stressed that barely ten candidates sat the test and he was the sole one already serving at the Transport Division; hence, the Hiring Manager only had to recognise him amongst ten.

44. It is appropriate to recall that the Secretary-General enjoys wide discretion in matters of selection and promotion. It is a well settled principle that the Tribunal's role is not to substitute its own judgment to that of the Administration (see e.g., *Abassi* 2011-UNAT-110); this includes the evaluation of candidates through a test or an interview (*Xu* 2010/UNDT/002). The Tribunal will not interfere lightly in the exercise of the assessors', the Hiring Manager's or the final decision-maker's discretion, its review being limited to verifying that such discretion was not abused.

45. The Applicant declared that, during a conversation with the Applicant and several colleagues in the summer of 2014, the Hiring Manager stated that staff members of the Transport Division had a considerable advantage over external candidates, which needed to be compensated in their assessment. In the Applicant's view, this revealed the Hiring Manager's intention to penalise candidates from the Transport Division like him in their assessment during the recruitment exercise, and, by implication, that she was able to recognise their tests. In this respect, the Hiring Manager admitted in evidence to having said that internal candidates enjoyed significant advantage as candidates for posts within the Transport Division, whilst insisting that she never planned to adjust their rating in the written test or the interview to compensate for such advantage. Further to these explanations, the Tribunal must note that the above-mentioned comment alone does not constitute proof that the Hiring Manager actually

adjusted her rating of the tests to the Applicant's detriment, nor that she did in fact recognize the Applicant's test as his.

46. The Applicant highlights that his average mark in the test was only slightly below the passing grade and notes that, the panel being composed of only four members, each of the assessors had a considerable influence on the final grade. In this regard, the Applicant observed that, out the four assessors, the Hiring Manager was the one who gave him lower marks. Notably, she attributed no points at all in one of the two questions of the test. Additionally, the Applicant asserts that those in the panel who possess a strong technical background as engineers rated him better, suggesting that the low grades given by other panel members may be due to an undervaluing of technical expertise.

47. The Tribunal has carefully taken into consideration these elements, however, they turn to be, at best, circumstantial and as such could only carry limited weight, if any.

48. As a matter of fact, it appears from a comparison of the various panel members' grading sheets, that the Hiring Manager gave lower grades to all candidates across the board, which suggests that she simply applied a more demanding standard. It is worth noting that, apart from the fact that some members were generally more or less lenient than their peers, their ratings of the different candidates were relatively coherent among them. Also, when specifically asked about the 0 points rating given in one of the Applicant's answers, the Hiring Manager said in evidence that she had given it thorough consideration before doing so, conscious of the toughness of such a grade. She explained her reasons for that, which are consistent with the comments made in her grading sheet with regard to the numerical code that corresponded to the Applicant's test. As it transpires from her expressed reasoning, it is well possible that she affords a lesser weight to technical expertise than other managers would. Be it as it may, this falls within the scope of her discretion, as long as her assessment does not result in a manifestly unreasonable outcome. This cannot be said to have occurred in the case at hand, the motives provided by the Hiring Manager were not implausible or absurd.

49. As to the fact that the one panel member having an engineering background granted higher marks to the Applicant, the Tribunal notes that different persons could apprehend the same answers differently. Even though the Applicant regrets that several of the panel members do not have stronger technical expertise, he did not contest that the panel members had the required knowledge to sit on it, as per the standards set in sec. 1(c) of ST/AI/2010/3 (see *Krioutchkov* UNDT/2016/066).

50. Having assessed the evidence before it, the Tribunal is unable to find established that the Hiring Manager recognized the Applicant's test and deliberately lowered the Applicant's marks to have him excluded at the stage of the written test. The Tribunal notes with some concern, however, the comments made by the Hiring Manager about her desire to have "fresh blood" in the Transport Division. What is decisive in the case at hand is, however, that any bias of the Hiring Manager did not crystallise so as to have an impact on the Applicant's candidature as it was effectively eliminated after the rating of an anonymous test by four panel members.

### **Conclusion**

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

The application is dismissed.

*(Signed)*

Judge Rowan Downing

Dated this 8<sup>th</sup> day of November 2016

Entered in the Register on this 8<sup>th</sup> day of November 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva