



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

RIECAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for the Applicant:**  
Self-represented

**Counsel for the Respondent:**  
Steven Dietrich, ALS/OHRM  
Alister Cumming, ALS/OHRM

## **Introduction**

1. The Applicant, at the time of filing this application on 27 July 2014, was the Director of the Statistics Division at the United Nations Economic and Social Commission (ESCWA) in Beirut, Lebanon at the D-1 level. The Respondent filed a reply to the application on 28 August 2014.

## **Facts**

2. On 8 July 2013, the United Nations Conference on Trade and Development (UNCTAD) advertised the position of Chief, Development Statistics and Information Branch on INSPIRA. The Applicant applied for the said position on 9 August 2013. He contests the decision not to recommend him for the position.

3. Eight other candidates and the Applicant were invited to participate in a written test. He sat for and passed the written test on 28 November 2013 and was later invited to participate in a competency-based interview.

4. The Applicant's interview for the position took place on 10 January 2014 by audio and video Skype conference.

5. In its report, the assessment/interview panel rated the Applicant as only partially meeting the requirements in the competencies of Professionalism and Leadership.

6. On 24 April 2014, he was informed by the hiring manager, Mr. Richard Kozul-Wright, that his application to the position would not be considered further. This meant that he was neither recommended nor selected for the position.

7. Two candidates were finally recommended for the position by the assessment/interview panel. One of them was selected for the position by the Head of office while the other was placed on the roster.

8. Thereafter, the Applicant submitted a request to the Management Evaluation Unit (MEU) on 24 April 2014. On 30 May 2014, the MEU responded

and upheld the administrative decision not to recommend him for the said position.

### **The Applicant's case**

9. The Applicant's case is that he was not given a full and fair assessment by the assessment/interview panel.

10. The finding of the assessment/interview panel that the Applicant did not fully meet the requirements of the competencies of professionalism and leadership are contrary to the Applicant's performance evaluation reports (e-PAS) for the five consecutive preceding reporting periods.

11. During the said preceding five consecutive reporting periods, the Applicant was assessed by three different First Reporting Officers (FROs) as fully competent for leadership. During the same five reporting cycles, he was assessed in three cycles as outstanding for professionalism and in the two remaining cycles as fully competent also for professionalism.

12. Moreover, the assessment/interview panel's report with regard to the competency of professionalism is not a truthful record of the Applicant's answers to questions asked by the said panel. The relevant and substantial parts of the answers given by the Applicant to the panel were not recorded in its report of his interview. For instance, two of the examples given by the Applicant during the interview with respect to dealing with incompatible data on prices and Millennium Development Goals (MDGs) were not recorded.

13. The suggestion of the assessment/interview panel's report that the Applicant's professionalism was limited to the statistics-related information technology (IT) did not emanate from the interview. Rather, that view was evidently brought in by the Economic Commission of Europe (ECE) representative on the panel who knew the Applicant's expertise in IT when he worked at the ECE.

14. The record of the Applicant's answer with regard to the competency of leadership is incomplete and biased. His examples are not recorded in the panel's report.

15. The assessment/interview panel did not follow the guidelines for competency-based interviews including the Instructional Manual for Hiring Managers and the Competency-based Interviewing Guide.

16. In particular, they failed to comply with section 9.4.1, paragraph 2 of the Instructional Manual for Hiring Managers. That section instructs that follow-up questions should be asked when the interview candidate gives examples of required behaviours. The answers should be further probed for better explanation and clarification.

17. The assessment/interview panel did not ask the Applicant any probing questions and this led him to believe that the said panel was satisfied by his answers during the interview.

18. The absence of an *ex-officio* member and note-taker during the interview meant that there was a lack of independent evidence and report of the said interview.

#### *Reliefs sought*

19. Rescission of the impugned decision.

20. That the Applicant be placed on a roster of candidates for D-1 positions or paid appropriate compensation.

#### **The Respondent's case**

21. The Applicant was given full and fair consideration because his candidacy was fairly assessed. Annex R1 of the reply is a reasoned and documented record of the evaluation of the candidates at the interview against the applicable evaluation criteria.

22. The said record showed that all the candidates were asked the same questions and assessed against the same competencies. All the candidates were assessed against the applicable evaluation criteria of professionalism, communication, teamwork, leadership and managing performance.

23. The Applicant was found to have fully met the competencies of communication, teamwork and managing performance. The panel concluded that he had only partially met the position's requirements on the competencies of professionalism and leadership.

24. The Applicant has failed to provide any actual evidence of irregularity on the part of the Respondent in the selection process. He has therefore failed to discharge the burden of showing that he was denied a fair chance of selection.

25. The Respondent followed the guidelines for competency-based interviews. The interview panel's report of the Applicant's interview showed that follow-up questions were asked and that there was no breach of the guidelines.

26. Even if the panel did not ask any follow-up questions, it cannot mean that the candidate in question met all the competencies for the position and should be recommended for selection.

27. The Applicant's previous performance evaluations did not entitle him to be selected for the position. Previous performance evaluations alone cannot give rise to a right to selection since it was the mandate of the interview panel to determine whether the Applicant met the competencies for the job opening for which he competed.

28. With regard to the Applicant's claim that there are problems within the Central Review Bodies (CRBs) generally, he has not made any specific allegations against the CRB in Geneva which reviewed the recommended candidates and confirmed that applicable procedures were followed in the selection exercise.

29. ST/AI/2010/3 (Staff selection system) which is the legislation governing staff selection does not provide that an *ex-officio* member must form part of the

interview panel or that a note-taker be present. This means that there is no legal requirement for the presence of an *ex-officio* panel member during the interviews. Therefore, the absence of an *ex-officio* panel member neither vitiated the selection exercise nor impacted on the full and fair consideration of the Applicant.

30. Similarly, although the Inspira Recruiters' Manual refers to *ex-officio* panel members and a note-taker, it does not state that such *ex-officio* members or a note-taker must be present at the interview.

31. The panel members evaluate the performance of candidates at the interviews and it is their responsibility to create the record of the evaluation which is a summary of the Applicant's answers and not a transcript of the interview.

32. The Applicant neither provided any documentary evidence to support his recollection of the interview nor did he provide evidence of bad faith on the part of any panel member during the selection process.

33. The evaluation record prepared contemporaneously by the three panel members should have greater weight than the Applicant's recollections of the interview some months later.

### **Considerations**

34. The crux of this application can be summarized in the singular issue of whether or not the Applicant was given fair and full consideration in the selection process for the position of Chief, Development Statistics and Information Branch at UNCTAD.

35. The Applicant's claim that he did not receive fair consideration in the said selection process is predicated on three grounds.

36. These three grounds are: (1) that the Applicant's performance evaluation for the previous five years and finding by another interview panel in 2008 contradicted the panel's finding that the Applicant did not meet the standard for the competencies of professionalism and leadership; (2) That the provisions of the Instructional Manual for the Hiring Manager and Competency-based Interviewing

Guide were not followed; and (3) there was no *ex-officio* member or note-taker at the interview.

37. The assessment/interview panel in its report had rated the Applicant as only partially meeting the requirements in the competencies of Professionalism and Leadership. The said report with regard to the Applicant's performance in the two competencies is hereunder reproduced:

#### Professionalism

The candidate is familiar with using statistics-related information technology in his work. However during the interview, he did not demonstrate sufficient substantive knowledge and competence in the production and application of economic statistics when responding to a question asked about the production of statistics in national and international institutions. Despite prompting from the panel, his response to dealing with problems of incompatible data, in prices series and MDG statistics, did not provide a clear methodology of how he would address this problem. He has produced a number of reports and papers on statistical issues, and is capable of reviewing and editing the work of other colleagues. He gave an example of the challenges he faced when he moved to a different duty station five years ago. He showed his persistence and commitments to his work by adapting to the new working culture and resolving staff conflict issues. He gave another example of some of his work in ECE where he observed deadlines to achieve results and showed that he was motivated by professional concerns.

#### Leadership:

The candidate defined a leader as having visions and missions and helping others to achieve their goals. However, it was not clear from his answer during the interview how he develops strategies or empowers others to translate his visions into results. He showed the courage to take unpopular stand by resolving a long-standing conflict between two staff members by splitting the work and reassigning them to different functions. When managing a team, he always took responsibility for incorporating gender perspectives and ensuring equal participation of women and men in his work.

38. The Applicant submitted and the Tribunal agrees that the interview panel is not bound by the performance appraisals of the Applicant. The said panel is also not bound by the evaluation of another panel which had interviewed the Applicant in 2008. However, the Tribunal is mindful of the fact that some of the said appraisals would ordinarily form part of the panel's briefing notes.

*What documents should be considered by the Assessment Panel with respect to candidates?*

39. Pursuant to Order No. 63 (NBI/2017), the Respondent, in addition to a comparative analysis report on the candidates produced by the assessment/interview panel which is already before the Tribunal, also filed the PHPs of all the candidates and the Applicant's e-PAS reports.

40. Also in response to the Order, the Respondent informed the Tribunal that the interview panel took into consideration the PHPs of all the candidates and the Applicant's e-PAS reports and that the Applicant was the only candidate who had provided e-PAS reports.

41. The Tribunal has perused all the documents filed by the Respondent pursuant to Order No. 63 (NBI/2017) which it is claimed the assessment/interview panel considered in arriving at its report. It has also examined the contents of the final transmittal memorandum submitted to the CRB on 31 March 2014 by the hiring manager, who was also a member of the interview panel. In the said memorandum, he explained the different stages of the selection process.

42. It is not recorded in the assessment/interview panel's comparative analysis report in which it rated all the Applicants who were assessed during the recruitment process that the panel took any documents into consideration apart from its oral interviews of the candidates. The record shows that the ratings awarded to each candidate for the competencies considered were based on the oral interviews only.

43. In his memorandum to the CRB, the hiring manager stated that those who passed a written examination were invited to a competency-based interview in which the candidates' competencies in five areas were assessed. The memorandum did not mention any consideration by the panel of the e-PAS submitted to it by the Applicant for five performance cycles.

44. The Tribunal is not in any doubt that although the Applicant's e-PAS for a five-year period were before the panel, the said panel did not give them any



consideration at all. It has already been submitted that the assessment/interview panel is not bound by any candidate's e-PAS reports.

45. Nevertheless, the question must be asked whether an assessment/interview panel is obligated to put the e-PAS of an internal candidate submitted in the process of a job selection into any kind of consideration in its assessment. In order to answer this question, it is imperative to briefly and quickly examine the purpose of the performance appraisal system of staff members of the United Nations Organization.

46. One of the purposes of the Performance Appraisal System within the United Nations is to recognize successful performance and to address underperformance in a fair and equitable manner. Performance ratings that show successful performance on the part of the staff member in question justify the award of salary increment.

47. Successful performance ratings shall be considered during the selection process for a staff member for a post at the same level or at a higher level, without prejudice to the Secretary-General's discretionary authority to appoint staff members.

48. In *Simmons* 2012-UNAT-222, the Appeals Tribunal held that e-PAS reports are important for the staff member because they inform him/her of how well or how poorly he/she has performed and how his/her performance has been adjudged by reporting officers and gives opportunity for performance improvement.

49. The Appeals Tribunal went further and held that not only is the e-PAS report helpful in the staff member's professional development and for other uses, it is also helpful to interview panels when the staff member is being considered for promotion or selection to a higher post or a fresh post.

50. In other words, both ST/AI/2010/3 and the pronouncements of UNAT affirm that where the e-PAS reports of a staff member are available to an assessment panel in the course of a selection process, the panel has a duty to

consider the e-PAS reports and reflect that consideration in its own assessment report.

51. This duty becomes even more critical in a situation like that of the Applicant where his e-PAS reports show that for three out of the past five reporting cycles, he was rated as outstanding for professionalism by different reporting officers whereas the interview panel rated him as only partially meeting the requirements.

52. The failure to consider the Applicant's e-PAS reports (which he had made available to the assessment/interview panel) and to address them especially in the context of the disparity between its ratings and those of the Applicant's reporting officers on the same competencies and within the same organization is a serious flaw in the selection process which cannot be overlooked.

*The allegation that the provisions of the Recruiter's Manual were not followed*

53. It was part of the Applicant's case that the provisions of the Instructional Manual for the Hiring Manager were not followed in the selection process.

54. In particular, the Applicant submitted that whereas in paragraph 2 of section 9.4.1 of the applicable Instructional Manual for Hiring Managers and in the competency-based Interviewing Guide, the assessment/interview panel had a duty to 'probe' with follow-up questions in order to elicit specific instances from a candidate but that the panel did not do so.

55. He submitted that when the panel claims in its comparative analysis report with regard to questions asked on the competency of professionalism that the Applicant was 'prompted', it did not satisfy the requirement to 'probe' on the part of the panel. He also submitted that there was no 'probing' when he answered questions relating to the competency of leadership.

56. The Tribunal has reviewed these submissions. In considering the argument that even if the panel did 'prompt' the Applicant while he answered its questions, this did not satisfy the requirement for it to ask 'probing' questions, the Tribunal disagrees.

57. This is because a distinction as to whether the words ‘prompting’ and ‘probing’ as used in this context mean one and the same thing is unnecessary, insubstantial and flimsy. In other words, the Tribunal does not see the need for engaging in unnecessary semantics here but is satisfied that the panel asked probing questions as was required of it and as reflected in its report even if it described what it did as ‘prompting’ rather than ‘probing’.

*The absence of an ex-officio member on the panel*

58. The Applicant raised the issue of the absence of an *ex-officio* member who could have acted as a note-taker on the assessment/interview panel. He submitted that the absence of an *ex-officio* member had robbed him of an opportunity for an independent source for notes or record of the interview.

59. On his part, the Respondent contended that the absence of an *ex-officio* member did not vitiate the selection process. He submitted that even the Inspira Recruiter’s Manual is only a guide and that although it refers to an *ex-officio* member; it does not state that such a member must be present during the interview.

60. The Tribunal agrees with the Respondent’s submissions that the absence of an *ex-officio* member on the assessment/interview panel by itself could not vitiate the selection exercise.

**Conclusion**

61. In *Aliko* 2015-UNAT-540, it was held that 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. In the present case there was a material failure by the interview panel to consider relevant material, that is, the Applicant’s e-PAS reports, especially in the context of the disparity between its ratings and those of the Applicant’s reporting officers on the same competencies and within the same organization. The Tribunal finds

and holds that the Applicant's candidacy for the position of Chief, Development Statistics and Information Branch was not given full and fair consideration.

**Judgment**

62. In view of the foregoing, the Tribunal awards the Applicant three months' net base pay at the salary the Applicant was drawing on 24 April 2014 with interest on the award of compensation at the US Prime Rate from the date of this Judgment to the date the payment is actually made to the Applicant.

63. All other pleas are refused.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 26<sup>th</sup> day of April 2017

Entered in the Register on this 26<sup>th</sup> day of April 2017

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi