UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2016/022
Judgment No.: UNDT/2018/033
Date: 6 March 2018
Original: English

Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

FERNANDEZ AROCENA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 23 February 2015 with the Nairobi Registry, the Applicant contests the result of an online test (2014 Field Service ("FS") Campaign), arranged by the Department of Field Support/Field Personnel Division and carried out by a private company, for Generic Job Opening ("GJO") 426110-FS-5 of Telecommunications Assistant.

2. The Respondent filed his reply on 26 March 2015.

3. Pursuant to Orders Nos. 99 (NBI/2016) and 183 (NBI/2016) of 15 March and 5 April 2016, respectively, and since the parties did not object to it, the case was transferred to the Geneva Registry of the Tribunal. It was then registered under Case No. UNDT/GVA/2016/022.

Facts

4. The Applicant joined the United Nations in 1990 as an FS-3, and since then has served the Organization in Lebanon, Iraq, Afghanistan and Western Sahara. He was promoted to FS-4 in 1999 and is rostered as a FS-4 Telecommunications Assistant.

5. He holds a permanent appointment and is serving since 9 October 2005 as Radio Operator with the United Nations Mission for the Referendum in Western Sahara (MINURSO), at the FS-4 level.

6. On 31 January 2014, a Generic Job Opening ("GJO") No. 14-IST-PMSS-426110-R-Multiple D/S Telecommunications Assistant (FS-5) was published, with a closing date of 17 February 2014. It stated that "[a]ll applicants will be notified in writing as to the status of their application (successful or unsuccessful) at the end of the recruitment/rostering/selection exercise. … The process for rostering based on [GJO] usually takes from 4 to 6 months from the date the vacancy is posted".

7. The Applicant applied to it and, on 17 March 2014, he participated in an online written test. The test consisted of two parts: a general and a technical assessment. The general assessment consisted of 30 multiple-choice questions on UN competencies and key values. The technical assessment consisted of 21 multiple-choice questions to assess the candidates' technical knowledge. The test was taken by 480 staff members in various duty stations.

8. By email of 24 November 2014, the Applicant was informed that his application for the above-referenced position was not successful, in the following terms:

> Title: GJO-426110, FS-5, Telecommunication Assistant
>
> Dear Applicant, Please refer to your application to vacancy announcement GJO-426110 for the position of Telecommunications Assistant, FS-5, with Field Missions Administered by DPKO. We regret to inform you that your application for the above-mentioned position was not successful.

9. The Applicant requested management evaluation on 5 December 2014, contesting the fact that he had been notified that he had not been successful to obtain FCRB cleared status at the FS-4 and FS-5 levels in the recent FS Campaign. In his request for management evaluation, he identified "the post which [he had] applied to: Telecommunications Assistant, FS-5 (Vacancy announcement number: 14-IST-[PMSS]-426110-R-MULTIPLE D/S)", and gave details about the generic job opening and the test he had undertaken.

10. The Management Evaluation Unit ("MEU") informed him on 8 December 2014 that it had found that his request was not receivable, since he did not contest the lawfulness of an administrative decision relating to his individual application to a vacancy and his contract of employment. Rather, MEU found that he was contesting the general design of the test and noted that the Administration disposes of broad discretion in this matter. It also stressed that the Applicant had requested further information, which he was not entitled to receive.

11. The Applicant contacted the President of the Field Staff Union to get his support to obtain a copy of the questionnaire, to no avail.

Procedure before the Tribunal

12. After the case was transferred to the Geneva Registry of the Tribunal, the latter requested the Respondent, by Order No. 207 (GVA/2017) of 9 November 2017, to file a copy of the general assessment and the technical assessment part of the online written test administered for the GJO, as well as the Applicant's responses provided to both parts of the test, and the evaluation of the same.

13. The Respondent informed the Tribunal on 17 November 2017 that he did not have copies of the general and the technical parts of the online written test, which had been contracted out to a United Kingdom based (external) company.

14. In that regard, the Respondent provided an explanatory email addressed by the Department of Field Support to Counsel for the Respondent, which states the following:

> As far as we can see, the testing and assessment for GJO 426110, Telecommunications Assistant (FS-5) was contracted out to a UK based (external) company ("The test factory"). For the GJO 426110, the relevant occupational group manager worked with the proponent office and senior technical staff in the field to design between 20 to 25 technical questions relating to telecommunications. These questions were then provided to OHRM for proofing and consistency and then uploaded to the platform of "The test factory". The company then administered the test through its web-service.
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> Once the testing was done by the company and results were available (pass mark required was 90 per cent correct responses), only the list of names of candidates who passed the test was provided to FPD. Applicants were only given a pass/fail based on the overall score (above or below 90 per cent) and no actual mark. FPD then continued to arrange for interviews and finalized the process for the successful candidates. [The Applicant] was not one of them.
>
> Unfortunately due to the UN ceasing to work with "The test factory" no records of general and technical assessment questions and responses have been retrieved by FPD so far and we will provide once they become available. We are continuing to review FPD's records in this respect and will provide as they become available.

15. By Order No. 219 (GVA/2017) of 23 November 2017, the parties were convoked to a case management discussion ("CMD"), which took place on 30 November 2017. At that time, the Applicant was still self-represented. However, in light of the Respondent's inability to provide the requested evidence, the undersigned Judge suggested to the Applicant to again approach the Office of Staff Legal Assistance ("OSLA").

16. Another CMD was held on 19 December 2017, at which the Applicant was represented by OSLA Counsel. During the CMD, the Respondent indicated that his client, the Department for Field Support, was able to locate only the technical part of the test. Upon the Judge's explicit inquiry, Counsel for the Respondent confirmed that the questions were in their final form, after approval by OHRM. Counsel for the Respondent further informed the Tribunal that his client was still trying to retrieve the questions for the general assessment part of the test conducted for the GJO. He stressed, however, that the Applicant seemed to question only the technical part of the test.

17. During the CMD, the Applicant's Counsel stressed that new facts had come up since the filing of the application, both with respect to the documents the Respondent was able to retrieve and the fact that the test had been outsourced, and that this might be relevant, for instance, with respect to what was actually submitted for review to the Central Review Bodies. He therefore asked to be given leave to amend the application to better identify the decision as contested and also to properly address this change in factual circumstances.

18. The Tribunal granted the Applicant leave to amend the application, stressing that an amended application might also need to better identify the remedies sought by the formerly unrepresented Applicant. The Tribunal also asked the Respondent whether there was more information available, such as guidelines on how to assess the test and who actually designed it, and asked him to file such, if available. Finally, the Tribunal also noted at the CMD that it might be possible to decide on the matter without a hearing and urged the parties—particularly the Applicant—to inform it if, nevertheless, a hearing was deemed necessary.

19. On 19 December 2017, the Respondent filed a copy of the technical part of the written assessment for the vacancy. According to orders made at the CMD, the Applicant filed an amended application on 12 January 2018. The Respondent filed a response to the Applicant's amended application on 5 February 2018. The Tribunal subsequently informed the parties that in light of their latest submissions, it would decide upon the matter on the basis of the written submissions.

Parties' submissions

20. The Applicant's principal contentions are:

a. In his request for management evaluation, he identified the specific recruitment process and the fact that he had been found unsuccessful as the contested decision; he also identified the date of the email informing him that he had not been successful as the date he was informed of the contested decision;

b. In his application to the Tribunal, he again identified the contested decision as being the outcome of the generic recruitment exercise for FS-5, Telecommunications Assistants, and provided a copy of the contested decision, namely an email advising of his non-selection in relation to a specific recruitment exercise;

c. If any doubt subsisted, and consistent with *Planas* UNDT/2009/086 and *Applicant* UNDT/2012/149, the Applicant may be and was offered the opportunity to provide clarification of the contested decision, which is the decision to exclude him from recruitment against Generic Job Opening No. 426110; the application is therefore receivable;

d. The outsourcing of the evaluation was procedurally irregular, since it did not comply with the applicable rules under ST/AI/2010/3, which provide for an assessment by an assessment or expert panel;

e. The Administration failed to comply with general disclosure and documentation requirements under administrative law, and the requirement for proper documentation under secs. 1(e) and 7.6 of ST/AI/2010/3; for the Central Review Bodies and the Tribunal to meaningfully review the procedure followed; the Administration must be in a position to properly document the process;

f. While questions used in the technical test have now been provided, the general assessment questions and responses have not: also, the questions and answers lately supplied by the Administration contain various typographical errors and the Applicant seeks clarifications as to where the Respondent recovered these questions and answers from—from "The test factory" or some other entity?; can the Respondent state with certainty that these were the questions uploaded by "The test factory", or are they an early draft?;

g. Inference can be drawn from the failure by the Administration to provide the relevant documentation and the procedurally incorrect outsourcing cannot represent a legitimate reason for the failure to maintain a proper record;

h. Should the questions provided by the Respondent correspond to the test sat, they demonstrate that the process was arbitrary; for example, only two of the questions submitted by the Respondent were relevant to communications centre support (questions 9 and 15); the requirement that all candidates have detailed knowledge of all roles, aggravated by the advantage provided to candidates from roles about which a higher number of questions were asked, renders the technical test arbitrary;

i. The poor quality of the questions asked equally renders the technical test arbitrary; responses to some of the multiple-choice questions were subjective or debatable rather than objectively correct; hence, those questions were inappropriate; also, some questions asked did not relate to the functions of the various roles being recruited for, e.g. question 2 and 11 which refer to management competencies and questions 3, 4 and 14 relating to procurement; question 5 is objectively incorrect; questions 6 and 21 are too vague for a

multiple-choice question, questions 8, 13 and 16 are irrelevant, because none of the roles for Telecommunications Assistants include project management functions; the impact of these defective questions was magnified by the fact that a passing mark of 90% was required, meaning that staff could only get two questions wrong; it follows that even a finding that only one of 21 questions was defective would be sufficient to conclude that the recruitment process was vitiated; and

j. The Applicant seeks rescission of the decision and the opportunity to be fairly considered for rostering; alternatively, he seeks compensation for the loss of opportunity to be given full and fair consideration; DPKO currently recruits almost exclusively from the roster, placement on which did thus represent the only opportunity for available career progression for the Applicant; he thus claims compensation for the material damage for the lost opportunity to be put on the roster.

21. The Respondent's principal contentions are:

a. There is no provision in the Tribunal's Statute or Rules of Procedure that allows amendments to an application; the directions made by the Judge at the CMD were made in accordance with art. 19 of the Tribunal's Rules of Procedure; however, the amended application filed by the Applicant's Counsel falls outside the scope for which the Tribunal allowed the original application to be amended during the CMD; it is a new application filed many years after the expiry of the filing deadline; the Judge did not give permission to the Applicant to file a new application challenging a different decision, which would be in direct contravention of statutory time limits;

b. The application is not receivable, since the Applicant has not identified any individual administrative decision having direct legal consequences to his terms of appointment; his assessment that the design of the technical part of the test did not suit his personal experience is not an administrative decision within the meaning of art. 2.1(a) of the Tribunal's Statute; the same test was administered to all candidates and the Applicant admits that it did address relevant specialities;

c. He failed to show that the distribution of the questions in the written assessment was an administrative decision directed toward him individually or that the Administration was required to tailor the test to his strengths and skills set (cf. *Charles* UNDT/2013/142; 2014-UNAT-477);

d. On the merits, the Respondent recalls the broad discretion of the Secretary-General in matters of staff selection; tests are designed to assess whether candidates meet the competencies and technical requirements of a job opening, and may include questions that assess any of the job requirements;

e. The Applicant admitted that the technical portion of the test contained questions that tested the relevant specialities of the job opening in question; his only objection is that there were not more questions assessing his lengthy experience in the Communications Centre speciality;

f. All candidates were given the same test, and the Applicant had no right to be given an assessment that was ideally suited to his individual experience; he failed both the general and the technical part of the written test; therefore, notwithstanding his challenges to the technical portion of the assessment, he would have still failed the test, because he was required to pass both to be considered further;

g. The Applicant provided no evidence that he has suffered any compensable harm as required by art. 10.5(b) as amended; and

h. Both applications should be dismissed.

Consideration

Receivability

22. The Respondent argues that the application is not receivable, *ratione materiae*, since the Applicant failed to identify and contest an administrative decision in his initial application.

23. In that respect, the Tribunal recalls that the Appeals Tribunal ruled the following in *Massabni,* 2012-UNAT-238:

> 25. The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.
>
> 26. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

24. The Tribunal notes that in his request for management evaluation, the Applicant identified the specific recruitment exercise for which he was informed he had been unsuccessful, and the date of the email notifying him thereof. The Management Evaluation Unit characterized the request for management evaluation as concerning "the results of [the Applicant's] application for the generic job opening for Telecommunications Assistant, FS-5".

25. As correctly pointed out by Counsel for the Applicant, in his application, the latter also identified the contested decision as being the outcome of the generic recruitment exercise for FS-5 Telecommunications Assistants, and clearly indicated that the decision had been notified to him by email of 24 November 2014. The Tribunal notes that at the time, the Applicant was self-represented after OSLA had turned him down because he had not been able to produce a copy of the questionnaire and, hence, it was not able to represent him.

The amendment of the application

26. Pursuant to directions given by the Tribunal at the second CMD, Counsel for the Applicant filed an amended application. The Respondent objected to the Tribunal allowing the amendment of the application arguing that art. 19 of the Tribunal's Rules of Procedure did not permit it.

27. It is noted that art. 19 of the Tribunal's Rules of Procedure provides that:

> The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

28. Of particular import is the phrase "give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties". In circumstances where an applicant is not provided with the whole of the documentation involved in a matter sought to be brought before the Tribunal, it is essential that as material is provided to an applicant there be a right to amend an application. To not allow the amendment of the application would not "do justice to the parties" or "lead to the fair disposal of the case".

29. It ill behoves the Respondent to object to the amendment of an application when he is ordered by the Tribunal to produce documents that relate to the matter before it, in circumstances where he has not previously provided them and where such production, or the lack of such being available to be produced, may support the complaint in the application, or disclose a further fundamental complaint based upon illegality, the evidence of which was not previously disclosed to the Applicant. The Respondent has no good basis to object when it is he who has not disclosed the entirety of the relevant documents. He cannot turn his own failures into an advantage at the expense of justice being done between the parties.

30. Further, in *El-Komy* UNAT-2013-324, at para. 21, the Appeals Tribunal referred to "the inherent jurisdiction of any Tribunal adjudicating cases in a system of administration of justice consistent with the principles of rule of law and due process". Clearly, not permitting an amendment when the true state of affairs is revealed for the first time by the Respondent would offend the inherent obligations of the Tribunal consistent with the principles of the rule of law and due process.

31. To do justice between the parties, amendments must be permitted as an applicant cannot know matters that are in the exclusive domain and knowledge of the Respondent at the time of the filing of an application. On many occasions, the real, but not disclosed, reasons for decisions or serious procedural errors, are disclosed after the application has been issued. Not to allow amendment in such circumstances would be a denial of justice.

32. Further, and with the foregoing in mind, the Tribunal is satisfied that the Applicant's Counsel, in accordance with the directions given during the second CMD, merely clarified the decision as contested, which had, however, already been sufficiently identified by the Applicant in his request for management evaluation and his application.

33. Therefore, the Tribunal is of the view that in the amended application, the Applicant did not contest another decision as argued by the Respondent. Rather, the amended application confirmed that what the Applicant is contesting is the decision to exclude him from recruitment against GJO-426110 for FS-5 Telecommunications Assistant. That is an administrative decision, and the application is therefore receivable *ratione materiae*.

Merits

34. The Tribunal will now turn to the merits of the present application.

35. It is recalled that according to the established jurisprudence of the Appeals Tribunal, the Secretary-General has broad discretion in matters of appointment and promotions. Accordingly, the scope of the Tribunal's judicial review in these matters is limited as follows (*Abbassi* 2011-UNAT-110):

> 23. In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

> 24. The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

36. It further notes that the Appeals Tribunal held in *Rolland* 2011-UNAT-122 that:

> 26. There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the 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.

37. The Tribunal notes that the ST/AI/2010/3 (Staff Selection System) does not provide for the possibility for the Organization to outsource the design and administration of a test for the purpose of a recruitment or roster exercise to an external contractor. Rather, the definitions provided by the administrative instruction with respect to "assessment" (sec. 1 (b)) and of an "expert panel" (sec. 1(g)) leave no doubt that under the current legal regime within the United Nations, recruitment tests have to be conducted by an assessment panel, or, in the case at hand, an expert panel. Consequently, the mere fact for the Organization to have used the services of "The test factory" for the design and administration of the test, by way of outsourcing, makes the whole process procedurally flawed and must lead to the illegality of the contested decision.

38. The Tribunal is further extremely concerned that because of the outsourcing and shortcomings in the respective procurement exercise, the Respondent was unable to produce the documentation relating to the test as managed by "The test factory". Upon the Tribunal's insistence, the Respondent was finally able to retrieve the questions for the technical part of the assessment test. In response to a query from the Tribunal, the Respondent confirmed that the questions he provided were

the final version, as approved by OHRM and then entered by "The test factory" in the online test. The Respondent also said that, unfortunately, he was not in a position to provide the Tribunal with the Applicant's answers to these questions and their assessment.

39. Despite the Tribunal calling on the Respondent's Counsel to provide it with further details about the expertise of "The test factory" and guidelines on the assessment of the test results, it was not possible for the Respondent to provide them. Also, the Respondent did not provide any communication or document showing that OHRM had indeed reviewed and approved the test questions.

40. Having examined the questions for the technical part of the test as provided by the Respondent, supposedly in their final form as approved by OHRM and as such used for the online test as administered by "The test factory", the Tribunal is concerned that these questions contain at least one repetition (question 10, "Missions"). Also, the objectivity and correctness of some of the answers to a total of 21 multiple-choice questions, as well as their relevance in light of the terms of the GJO is debatable. This is even more critical in light of the passing mark of 90%.

41. The foregoing notwithstanding, the Tribunal will refrain from any detailed analysis of the questions of the technical part of the test, as entertained by the Applicant. It finds, however, that the above, combined with the lack of information on the expertise of "The test factory", the failure to disclose any assessment guidelines, and the input by OHRM, if any, causes the Tribunal to have serious doubts about the reasonableness of the questions asked and, thus, on the legality of the exercise of discretion by the Administration in respect of the conduct of the test. Having determined to conduct a test pursuant to section 7.5 of ST/AI/2010/3 , the Administration must then follow through on the exercise of that discretion and comply with the other legal requirements provided for in ST/AI/2010/3 and act reasonably and properly in doing so. Indeed, without actually making a finding of unreasonableness, the Tribunal finds that the questions submitted by the Respondent appear to not have been developed with the necessary and proper care.

42. The Tribunal notes that there is no evidence of an actual OHRM review and approval of the questions prepared by "The test factory", and finds that the Respondent did not make a minimal showing that OHRM, or anyone else within the Organization, actually complied with all the legal obligations set forth in sec. 7 of ST/AI/2010/3, as further specifically discussed below.

43. The Tribunal observes that the Respondent was not able to provide the questions to the generic part of the test, either. While the Applicant's case is about the arbitrariness of the technical, rather than the general part of the test, the Tribunal expresses its concern that the questions for the general part of the test were not available at all.

44. The Tribunal reiterates that for the reasons outlined above, the outsourcing of the concept and administration of the test for the GJO was in itself illegal. This notwithstanding, it is most unfortunate that it appears that the Administration did not make sure that the procurement contract ensured that all records of the outsourced entity were available to the Organization, and, as such, to the Field Central Review Panels and ultimately to the Tribunal for its judicial review. This is in clear contradiction with principles of disclosure under administrative law, and the specific provisions under secs. 1(e) and 7.6 of ST/AI/2010/3, as pointed out by Counsel for the Applicant. The failure to provide the documented record clearly resulted in a serious procedural flaw, which leads to a further finding of illegality of the contested decision.

45. Under the terms of ST/AI/2010/3, shortlisted candidates are "assessed to determine whether they meet the technical requirements and competencies of the job opening" (sec. 7.5) by an assessment panel (sec. 1(c)), an expert panel in the case at hand. Following the panel's assessment, the hiring manager "shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body [("CRB")]" (sec. 7.6).

46. Also, under sec. 8.1 of ST/AI/2010/3, it is the role of the CRB to "review proposals for … placing candidates on the roster following a generic job opening … to ensure that applicants were evaluated on the basis of the corresponding evaluation criteria and that the applicable procedures were followed in accordance with sections 5.2 and 5.6 of ST/SGB/2002/6 [(currently ST/SGB/2011/7)]". Section 4.5 of ST/SGB/2011/7 provides as follows:

> 4.5 The central review bodies shall review the recommendation for … placing candidates on the roster following a generic job opening, made by the department/office concerned, to ensure that the integrity of the process was upheld, that the applications and profiles of applicants were reviewed on the basis of the pre-approved evaluation criteria and that the applicable procedures were followed.

47. Additionally, according to sec. 4.6(c) of the above-mentioned bulletin, that review includes the consideration by the CRB of whether "[t]he record contains a fully justified analysis of each of the competencies listed in the job opening, which must be evaluated during the competency-based interview and/or other assessment methodologies for all short-listed candidates". It goes without saying that the CRB cannot exercise that control when it is not provided with the relevant record, as in the present case. Thus, the first safeguard in the procedure to ensure its regularity could not be exercised in any meaningful manner, or at all.

48. It is not possible for the Tribunal to exercise its judicial control or review if the Respondent is not in a position to provide it with the relevant documentation as a result of an inappropriate outsourcing exercise. The Tribunal thus draws negative inferences as to the procedural regularity of the selection exercise.

Remedies

49. Art. 10.5 of the Tribunal's Statute, as amended by General Assembly resolution 69/203 adopted on 18 December 2014, delineates the Tribunal's powers regarding the award of remedies, providing that:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision.

50. The decision to exclude the Applicant from recruitment against GJO No. 426110 was found to be illegal and has to be rescinded. As a consequence, the Applicant has to be placed in the same position he would have been in if the illegality had not occurred, that is, he has to be granted an opportunity to be fairly considered for rostering.

51. The Tribunal recalls what the Appeals Tribunal held in *Nwuke* 2010-UNAT-099, namely that:

> 37. The judicial review of the administrative decision may result in the affirmation of the contested decision or its rescission, and in the latter case, Article 10 of the UNDT Statute allows to order both the rescission and the performance needed to bring the administrative situation in compliance with the law.

52. While the Tribunal cannot order the Respondent to place the Applicant on the roster, and it would not be appropriate to do so, it falls within its competence to order the Administration to allow the Applicant to sit on a new test, without delay, and thus to give him the opportunity to be fairly considered for rostering (cf. *Farr* 2013-UNAT-350, para. 28).

Conclusion

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

a. The contested decision is rescinded;

b. The Administration has to set a new written assessment to be taken by the Applicant, without undue delay.

(*Signed*)

Judge Rowan Downing

Dated this 6th day of March 2018

Entered in the Register on this 6th day of March 2018

(*Signed*)

René M. Vargas M., Registrar, Geneva