



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

MIANDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Victor Rodriguez

Counsel for Respondent:

Bettina Gerber, HRLU/UNOG

Introduction

1. By application filed on 12 April 2016, the Applicant, a staff member of the Office of the High Commissioner for Human Rights (“OHCHR”), contests her non-selection for the position of Programme Management Officer (P-4), OHCHR, advertised under job opening 14-PGM-OHCHR-37020-R-Geneva (X) (“Job opening”).

2. The application was served on the Respondent, who filed his reply on 17 May 2016.

Procedural background

3. By Order No. 107 (GVA/2016) of 26 May 2016, the Tribunal shared with the Applicant, on an under seal basis, some supporting documents to the Respondent’s reply that had been filed *ex parte*.

4. After examining the file, the Tribunal considered that it was not necessary to hold a hearing to make a determination of the issues arising in this case, since they are purely of a legal nature. Therefore, by Order No. 182 (GVA/2017) of 20 September 2017, the Tribunal directed the parties to file comments, if any, to the matter being determined without holding a hearing.

5. On 29 September 2017, both parties filed submissions agreeing to having the matter determined based on the pleadings on file. On the same date, the Applicant requested an extension of time to file additional submissions, which was granted by Order No. 188 (GVA/2017) of 3 October 2017. The Applicant filed her additional submission on 20 October 2017 and on 2 November 2017, the Respondent filed a response thereto.

Facts

6. The Job opening for the position of Programme Officer, OHCHR, was advertised from 21 October to 20 December 2014. The Applicant applied for the position, and on 30 January 2015, she was invited to take a competency-based interview scheduled for 4 February 2015.

7. The assessment panel comprised three members, namely the Director, Human Rights Treaties Division (“HRTD”) (“the hiring manager”), the Special Assistant to the Director, Human Rights Council and Special Procedures Division, and the Chief, Civil, Political, Economic, Social and Cultural Rights Section (“CPESCR”), HRTD. The panel interviewed six out of the nine shortlisted candidates.

8. Due to the unavailability of the Chief, CPESCR, HRTD, another staff member, namely the Chief, Groups in Focus Section, HRTD, was taken as a replacement and sat in the remaining three interviews by a *second* assessment panel.

9. By “Final Transmittal Memo to the Central Review Body” dated 23 March 2015, the hiring manager transmitted to the Central Review Committee (“CRC”), among other documents, a report of the interview panel and recommended four candidates. In that memorandum, the hiring manager *inter alia* indicated that “the panel assessed the competency of professionalism through a review of the [Personal History Profile] PHP as well as those aspects of answers to other competencies that related to professionalism”.

10. It transpired that when the final assessment report was completed and a list of recommended candidates created, one of the panel members had neither seen the final panel report, nor had she been consulted as to the list of recommended candidates. Consequently, on 30 March 2015, the panel member in question wrote a note for the file indicating that she was not consulted on the final panel report and list of recommended candidates before its submission to the CRC.

11. At its meeting on 16 April 2015, the CRC issued comments to the panel assessment report, which it sent to the hiring manager. The CRC considered that it was not in a position to endorse the list of recommended candidates because of the way the assessment of the candidates on the competency of professionalism had been done.

12. The hiring manager responded to the CRC's comments about how the professionalism competency had been assessed and reissued his memorandum on 22 April 2015, which was considered by the CRC at its 7 May 2015 meeting. However, the CRC was not satisfied with the explanations and its position remained the same, i.e. that it could not endorse the process. The CRC noted that each competency needed to be assessed independently through explicit questions based on the evaluation criteria, and also recommended to the hiring manager to consider assessing the competency of professionalism in a follow-up interview.

13. Therefore, the candidates, including the Applicant, were called to take a written test on 19 May 2015.

14. On 22 May 2015, the hiring manager submitted a further revised transmittal memorandum to the CRC reflecting the outcome of the written test and recommending, this time, only three of the four candidates put forward in his 23 March 2015 memorandum.

15. On 5 June 2015, the CRC considered the 22 May 2015 recommendation and concluded, once again, that it was not in a position to endorse the selection process as the hiring manager had not complied with its recommendation to conduct a follow-up interview.

16. On 15 June 2015, a complementary competency-based interview for the professionalism competency was held. That interview was conducted by a *third* assessment panel, because one of the panel members—who had written the above-mentioned note for the file—was replaced by another staff member.

17. On 18 June 2015, the hiring manager transmitted his memorandum to the CRC for its review, recommending no longer three but four candidates, namely those in his 23 March 2015 memorandum. On 8 July 2015, the CRC endorsed the recruitment process and gave the hiring manager the “go ahead” to proceed with the final selection of the candidate.

18. The Applicant was informed of her non-selection on 21 July 2015. On 16 September 2015, she requested management evaluation of the decision on her non-selection and on 12 April 2016 filed her application.

19. In his reply, the Respondent concedes that there was an irregularity in the selection exercise to the extent that the final assessment panel report was not shared with all of the panel members and that there was a factual dispute on whether the panel members reached a consensus regarding the recommended candidates.

Parties' submissions

20. The Applicant's principal contentions are:

- a. She was not accorded full and fair consideration during the recruitment process for the job opening in light, for example, of the failure of the assessment panel to secure the endorsement of all its members;
- b. The recruitment process was marred by bias and discrimination, proper procedures were not followed and all relevant material was not taken into account;
- c. The composition of the assessment panel was irregular since candidates were not interviewed by the same panel members, contrary to the requirements of the manual for the hiring managers and in violation of the principle of equal treatment;

d. The *Manual for the Hiring Manager on Staff Selection System (Inspira), version 3.0, October 2012* (the Manual) provides for at least five working days' notice to be provided when inviting candidates to take part in any assessment; yet, she was given less than five working days' notice while other candidates were allegedly given longer periods; and

e. The selection decision should be rescinded and the Respondent ordered to restart the selection exercise; she had suffered a loss of opportunity, harm to her professional reputation and moral damages in view of the problems caused to her by the irregular selection process; she requests the Tribunal to order the payment of six months' salary and other relief it deems appropriate.

21. The Respondent's principal contentions are:

a. There was an irregularity in the selection exercise to the extent that the final assessment panel report was not shared with all of the panel members as such the judgment in this case should be limited to the award of damages;

b. The alleged procedural flaws raised by the Applicant are based on provisions of the hiring managers' manual which is not of mandatory application;

c. None of the candidates received five working days' notice prior to each of the assessments; therefore, there was equal treatment of candidates during the scheduling of interviews and, accordingly, the Applicant was not prejudiced;

d. Though it is ideal that all candidates be assessed by the same panel, this requirement is not mandatory; the changes in the composition of the assessment panel did not impact the Applicant because she had not succeeded in two competencies during the first interview;

e. The Applicant's allegations of bias and discrimination are unsubstantiated; and

f. Not every violation leads to an award of compensation, such award should be granted only if the staff member actually suffered damages; the Organization should only be ordered to pay compensation to a staff member if he or she has suffered direct and certain injury; the Applicant is not entitled to moral damages since she did not present any specific evidence.

Issues

22. Considering that the Respondent concedes that there was an irregularity during the selection exercise, in that the assessment panel report that was sent to the CRC had not been shared with all the panel members, and that there is a dispute as to whether there was consensus regarding the recommended candidates, the Tribunal finds that the issues to be determined are:

- a. Whether the Applicant's candidature was given full and fair consideration during the recruitment process; and
- b. What remedy is the Applicant entitled to, if any.

Consideration

Was the Applicant's candidature given full and fair consideration?

23. The burden of proof in matters of non-selection rests on the Applicant who has to show through clear and convincing evidence that she was denied a fair chance for promotion. The Respondent is presumed to have regularly performed official acts. Therefore, if the Respondent can minimally show that the Applicant was given full and fair consideration during the selection exercise, then the presumption of regularity is satisfied (*Rolland* 2011-UNAT-122).

24. The Applicant avers that the selection process was marred by bias, discrimination, and violation of recruitment procedures.

25. Section 2.6 of ST/AI/2010/3 (Staff selection system), which was applicable at the time of the recruitment for the job opening, provided that:

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

Notice to undertake assessment

26. In relying on provisions 9.3.4, 9.4.1 and 9.6.1 of the Manual, the Applicant submits that she was given less than five working days' notice in advance of the written test. The Respondent admits that the candidates were not given the five working days' notice. He stresses, however, that all the candidates were given the same notice prior to the undertaking of the assessments.

27. The Tribunal notes that if all candidates are treated in the same manner, there is no discrimination. The principle of equality means equal treatment of equals; it also means unequal treatment of unequals (*Tabari* 2011-UNAT-177, para. 26). The candidates for the job opening were treated equally with regard to the notice given to scheduling of interviews and taking of the written assessment. This may not have been ideal and represents poor managerial practice, but without evidence in support of any ulterior motive or how the failure to give the five working days' notice prejudiced the Applicant, the Tribunal does not find that this failure amounted to discrimination *per se* (see *Lennard* UNDT/2014/044, at paras. 34 to 37).

28. The Tribunal is, however, left to ask whether the provisions of the Manual providing for five days' notice are not there for the purpose of fairness? Indeed, secs. 9.3.4, 9.4.1 and 9.6.1 of the Manual explicitly refer to at least five working days' notice of the anticipated date of the assessment exercise. These multiple

references would appear to be a consideration of fairness to allow people to prepare for the assessment. To say that equal, or unequal treatment, of all is not discriminatory may well be so; however, it may be that it is in fact unfair to all. This is not excusable and is a divergence from an actually specified provision of procedural fairness, rather than inferred procedural fairness as is usually the case. It may also defeat any legitimate expectation of the candidates as to the minimum time that they may have to prepare for the assessment process, or in this case, part thereof.

The assessment panels and conduct of the assessments

29. The assessment of the candidates for the position in this matter was undertaken pursuant to ST/AI/2010/3, in conjunction with the implementing *Manual for the Hiring Manager on Staff Selection System (Inspira) 2012*. The Applicant challenges the fact that candidates were not interviewed by the same panel.

30. A first panel interviewed six candidates; then, one panellist was no longer available due to his work schedule and was replaced by another panellist. This replacement thus materially changed the composition of the initial panel and resulted in the constitution of a second panel to complete the interviews. After the assessment report was rejected by the CRC, the hiring manager was directed to interview the candidates once again on the competency of professionalism. By memo of 30 March 2015, a member of the first and second panel withdrew from further involvement, stating that panel members should meet to discuss the final results of the selection exercise and draft the report concerning the final recommendations. She stated that she had not received a copy of the final interview report and had not been consulted with regard to the list of recommended candidates. The Tribunal finds that this panel member raised serious matters and it was entirely proper and justified for this panel member to withdraw from the process. It is unfortunate that the hiring manager did not address these matters, abort the interview process and recommence the interviews afresh. Instead of taking

appropriate corrective measures, the hiring manager merely replaced the panel member in question, thus establishing a third panel.

31. The Respondent submitted that though it is ideal to have all the candidates assessed by the same panel, this is not a mandatory requirement and that regard should be given to whether there is an objective and reasonable justification for the change of the panel composition (*Diatta* UNDT/20155/054). The justification provided for the replacements of panel members in the case at hand is that one of the panel members was busy and could not attend the interviews, and that another panel member recused herself.

32. Additionally, the Respondent argued that the change in the composition of the panel, which was constituted solely to conduct the assessment of the professionalism competency, did not impact the Applicant, since she had already been unsuccessful in two other competencies in the previous interview.

33. The Tribunal does not agree with the base assertion of the Respondent in this regard as it is unable to find any justification or authorisation for the replacement of panel members of the first panel. Further, the reference to the case of *Diatta* (supra) is misleading. That case does not provide the justification for the reconstitution of an assessment panel considering, rather, that para. 84 of that Judgment noted the following:

Further, the Tribunal considers that all member(s) of an assessment panel have a legal obligation and the correlative right to withdraw, on their own initiative, from an assessment panel if they made a prior assessment regarding one or more candidates and/or if the panel member's impartiality could be open to question on reasonable grounds.

34. The case of *Diatta* (supra) actually involved the establishment of a number of assessment panels for different job openings, although they were for the same post, in circumstances where there appeared to be constructive cancellations of the job openings. It did not involve the reconstitution of a panel during the process of assessing candidates in respect of one job opening, as appears to be asserted by the Respondent.

35. The definition of an “assessment panel” was set out in sec. 1 of ST/AI/2010/3 as follows:

(c) *Assessment panel*: 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. For D-2 level job openings, the panel should normally be comprised of at least three members, with two being from outside the department or office, and at least one female[.]

36. This definition requires careful examination. Firstly, it provides for, in effect, the establishment of a panel. Literally, that can only be interpreted as being one single panel. It is “normally comprised of at least three members”. Secondly, it then provides for the role of the constituted panel, “who will undertake the assessment of applicants for a job opening”. The reference to “who will undertake the assessment” is one to “the panel” as it has been constituted for the assessment of (all) applicants for a job opening. The administrative instruction makes no reference whatsoever to a possible reconstitution of a panel or to reserve members of the panel, as there could be. There is thus no apparent right to substitute panel members, should they become unavailable.

37. The structure of ST/AI/2010/3 is unsatisfactory, as the only direction as to the composition and role of the assessment panel is contained in the section on definitions. It is the Tribunal’s view that a direction or authorisation to conduct an activity should be contained in the actual corpus of the provisions of an Administrative Instruction, rather than solely in its definitions. It appears that the definition clause must be read in conjunction with sec. 7.5, which provides in respect of positions below the D2 level, as follows:

7.5 Shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written tests, work sample tests or assessment centres.

38. Interestingly, the Manual contains the following provision:

9.3.3. In the event that changes occur during the evaluation process in either the members participating in evaluating the assessment exercise or the members conducting the competency-based interview, reasoned and relevant information should be provided in the transmission to the relevant Central Review body.

39. Section 2.6 of ST/AI/2010/3 sets out the hierarchy between the administrative instruction and administrative issuances, such as the Manual, concerning the staff selection processes:

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

40. The Manual provided for matters that were not contemplated in ST/AI/2010/3. It is not legally possible to use an administrative issuance, such as the Manual, to create a process which is not provided for or authorised by the Administrative Instruction. The Manual was created to provide for the implementation of the Administrative Instruction, it could not vary or expand its provisions. The apparent authorisation in the Manual to change panel members, once the processes of the assessment panel has commenced, is *ultra vires*, as there is no such right given in ST/AI/2010/3 to change the composition of an assessment panel once it has been constituted. Actions taken by such a reconstituted Panel are thus illegal.

41. The continuity of panel members making assessments is essential to ensure fairness and equality of treatment throughout the process, since assessments made by each member are subjective. Indeed, assessments are made by looking at how

each candidate meets the competencies required for a job opening. To some extent, such assessments are also subjectively comparative between the candidates, as the panel seeks to identify the best candidate. Thus, the assessment necessarily contains a comparative element. As stated above, continuity of membership of an assessment panel is thus essential.

42. Moreover, the rights of a candidate to challenge the selection into a panel of a person who has a conflict of interest cannot be exercised properly in circumstances where panel members are changed without apparent notification to the candidates, as appears to have been the situation in this case. When selecting members of a panel, the Administration must guarantee that they are available for the duration of the whole process and are not liable to be unable to continue due to work commitments. If a panel member cannot continue, in exceptional circumstances—e.g. in case of death or if a Panel member ceases to work for the Organization—the whole process must recommence from the beginning, by a newly constituted panel. That means that candidates who have already been interviewed have to be interviewed anew by the newly constituted Panel. If management wishes to provide otherwise, to authorise substitution or to provide for a reserve panel member, then it should do so in the Administrative Instruction. It is noted that sec. 7 of ST/AI/2016/1, which replaced ST/AI/2010/3, does not provide for the substitution of panel members either, and that the Manual remains unchanged in sec. 9.3.3. in respect of purporting to allow a change in assessors.

43. It is noted that sec. 9.3.3. of the Manual specifically provides for a condition for the recommencement of interviews where members of the panel are not authorised to be on such. It is most unfortunate that the authorisation to be on an assessment panel is to be found in a manual and not the Administrative Instruction, which is silent on the matter. It is also unfortunate that whilst both the former ST/AI/2010/3 and the current ST/AI/2016/1 in respect of staff selection make reference to staff members being on the assessment panels, one only finds the effective definition of “staff member” for this purpose in sec. 9.3.1. of the Manual. This is clearly offensive of the mere implementing role of the Manuals. Manuals should not contain substantive provisions.

44. It is further noted that the role of assessment panels is fundamental and crucial in a selection process, which is established to ensure the continuing operations of the United Nations at the highest standards possible in conformity with art. 101 of its Charter. In *Diatta (supra)* the Tribunal correctly stated:

The Tribunal is of the view that the members of the assessment panel, even if they do not themselves make the selection decision, have a crucial role in conducting an independent and impartial process, assessing and evaluating the candidates, and submitting a list of recommended candidates to the Department Head, based on which he or she makes the selection decision.

45. The Tribunal is mindful of the essential principles of equal treatment, fairness and transparency for staff members during recruitment exercises. It notes that the replacement of panellists in the assessment panel should not have occurred. The assessment improperly moved forward with only one member of the original panel. However, the irregularities in the entire process speak to the lack of training and inexperience of the hiring manager in conducting recruitment exercises.

46. In the memo of 23 March 2015 to the CRC, the hiring manager *inter alia* indicated that (emphasis added):

The panel assessed the competency of professionalism through a review of the PHP as well as those aspects of answers to other competencies that related to professionalism.

...

The panel posed a series of questions to assess the extent to which each candidate met the indicators for each individual competency as set out in the job vacancy announcement. **In accordance with competency-based interviewing techniques, the panel did not seek to ask exactly the same questions to each candidate**, but rather asked a series of questions to ascertain whether the candidates met the indicators set out for each competency.

47. The CRC noted that in the evaluation of the competency of professionalism in the comparative analysis report, the hiring manager had included information pertaining to the preliminary evaluation of all candidates. The CRC asked for that kind of assessment to be removed, and also noted that the examples given by the

candidates were missing from the analysis report, making it impossible for it to understand on which grounds the candidates met the professionalism competency.

48. Additionally, the CRC observed that they “were more confused when they read in the transmittal memo that the same questions were not asked to candidates”. The CRC referred to sec. 9.5.1.6 of the Manual and requested the hiring manager to provide further details.

49. Upon receiving the comments from the CRC, the hiring manager wrote his responses to the CRC’s concerns, indicating that the assessment of the competency of professionalism was done on the basis of information contained in the candidates’ PHPs. He further noted that the written evaluations had been redrafted to clarify the panel’s assessment.

50. The hiring manager, without explanation, then transmitted a revised memo to the CRC, dated 22 April 2015. Therein, the hiring manager had reworded the above quoted paragraph to indicate as follows (emphasis added):

The panel posed a series of questions to assess the extent to which each candidate met the indicators for each individual competency as set out in the job vacancy announcement. **In accordance with competency-based interviewing techniques, the panel asked the same initial lead question for each competency** and asked a series of further questions as appropriate to ascertain whether the candidates met the indicators set out for each competency.

51. On 7 May 2015, the CRC held another meeting to consider the recruitment process in this matter and it was still not in a position to endorse the list of recommend candidates, due to the manner in which the assessment of the competency of professionalism had been conducted. The CRC “noted with concern the method chosen by the [hiring manager], as explained in the transmittal memo”. It further noted that:

While the CRC understands that these responses may have provided elements related to Professionalism, in accordance with established procedures, each competency, including Professionalism, should have been assessed independently, through explicit questions based on the evaluation criteria. The information provided by the

candidates in the PHP should have been corroborated in the interview and/or written assessment, by relevant questions related to the competency Professionalism. The CRC also noted that no written assessment was used to evaluate the substantive knowledge/abilities of the candidates, although the CRC understands that the written assessment is optional.

In addition, the write—up for the competency Professionalism is not convincing as the examples provided by the candidates for the other competencies are not elaborated to show what aspects of the candidates' responses were taken into account for the competency Professionalism.

Therefore, the CRC is not in a position to endorse the recommendation at this stage and would like to recommend to the HM to consider assessing the competency Professionalism by asking explicit questions to the candidates in a follow up interview.

52. Consequently, the hiring manager called all the candidates to undertake a written test and a competency based interview on the professionalism competency only. By memorandum dated 22 May 2015, the hiring manager wrote to the CRC, including the report of the analysis of the written assessment of the competency of professionalism that took place on 19 May 2015. That memorandum shows that one of the candidates who was on the recommended list in the 23 March and 22 April 2015 memoranda, was found unsuccessful after the 19 May 2015 written assessment. The hiring manager concluded by stating, “[t]hose candidates who were found to meet all competencies were recommended”. In the memorandum the hiring manager indicated as follows:

4. As a result of the rigorous assessment process the Assessment Panel determined that 6 applicant(s) did not fully meet the competencies required for this position with the following reasons and therefore are not recommended:

6 Were unsuccessful in their interview.

5. The Assessment Panel additionally determined that the following 3 candidate(s) have met all of the evaluation criteria for the subject job opening and are placed on the recommended list: [names omitted].

53. In an email of 5 June 2015, a Human Resources Officer, UNOG, informed the hiring manager, through a Human Resources Assistant at OHCHR, that the CRC was not in a position to endorse the recruitment process because:

[T]hey believe that the process was not properly followed and their request to re-interview the candidates regarding the competency Professionalism has not been complied with. Therefore, they are in the process of preparing a draft communication to the [Assistant Secretary-General, Office of Human Resources Management] requesting a review of the case.

54. On 8 June 2015, a Human Resources Officer, OHCHR, replied to the Human Resources Officer, UNOG, explaining the recruitment process, pleading for the consideration of the recruitment by the CRC, and stressing that sending the matter to ASG/OHRM would in effect stall the process. The Tribunal notes that these comments represent a somewhat unfortunate and damning observation on the processes of the ASG/OHRM. Additionally, the Human Resources Officer, OHCHR, stated in her communication to UNOG:

While we understand the CRC feels that professionalism should have been assessed through an additional interview, we would like to ask for the members' understanding given the current situation of the Department and the fact that corrective action was taken—even if not in the way specified by the CRC. Indeed, the High Commissioner has decided to undertake a full restructuring of the Department which also means that there will be a freeze on recruitments (including ongoing recruitments). The hiring manager was worried that the recruitment of this critical position would be frozen and this is the main reason why he did proceed with the assessment in the absence of a response from the CRC. When the CRC responded to his query, the tests had already been administered and the response to the CRC drafted. It was indeed submitted the same day as the response from the CRC was received.

55. The Tribunal observes that at this point it appears as though achieving an end of having the matter proceed—due to a possible freeze on the position being put in place if the proper processes had to be followed with the interviews being repeated in full with a newly appointed panel—had overtaken the consideration of the application of the proper processes within Human Resources, OHCHR.

Those ultimately overseeing this recruitment exercise should have stopped it at this point, as the irregularities were too great for it to be continued.

56. On 11 June 2015, all the candidates were called to take a “complementary competency based interview” only on the professionalism competency. In a memorandum dated 18 June 2015, from the hiring manager to the CRC, the number of recommended candidates increased to four from the three listed in the 22 May 2015 memorandum. In his 18 June 2015 memorandum the hiring manager indicated that:

4. As a result of the rigorous assessment process the Assessment Panel determined that 5 applicant(s) did not fully meet the competencies required for this position with the following reasons and therefore are not recommended:

5 Were unsuccessful in their interview.

5. The Assessment Panel additionally determined that the following 4 candidate(s) have met all of the evaluation criteria for the subject job opening and are placed on the recommended list: [names omitted]

...

8. Upon request by the CRC, candidates were further assessed on the competency of professionalism through first a written test, which was not eliminatory, and then a follow-up competency-based interview focused on professionalism.

57. The hiring manger stating in the 18 June 2015 memorandum that the written test was not eliminatory, yet eliminating, after it, a candidate that he had recommended in two previous memoranda, shows lack of truthfulness in the reporting to the CRC. If after the written test one candidate did not pass and was thus eliminated, it should have been indicated in the memorandum communicating the outcome, rather than “amending” it to include a statement that does not appear truthful.

Lack of hiring manager's training

58. According to sec. 9.3.3.d. of the Manual, before serving on an interview panel, staff members should undergo a training on competency-based selection and interviewing skills.

59. The Respondent admits that the hiring manger had not received the required training before conducting the recruitment exercise in this matter. However, he argues that the lack of training is not enough to vitiate the selection exercise. The Respondent relies on *Charles* UNDT/2012/024 where the Tribunal found that there was no requirement to have expert panel members undergo training in competency based interviewing.

60. The credibility of the entire recruitment process falls at the feet of the hiring manager, who ought to have known the processes expected of him and professionally should not have undertaken the role unless he was competent to do so. The act of deleting and “amending” sections of his memoranda because they were questioned by the CRC calls in question the ethical conduct of the hiring manager.

61. The hiring manager was more concerned about filling the post irrespective of the procedural requirements he ought to have met. His actions were improperly motivated. It is quite apparent that he was wishing to avoid the hiring freeze to be implemented in OHCHR. The Tribunal is mindful of the need to fill vacant posts as quickly as is feasible, but this is never to be at the expense of rules and processes that are to be adhered to while filling vacant posts. Certainty, compliance with the rules and regulations, and transparency of process are all important pillars of the rule of law within the Organization. They can never be subverted by expediency and illegality of action to achieve a desired end.

62. It appears that the decision by the CRC to send the matter to the ASG/OHRM to have it dealt with because the hiring manager had failed to comply with its instructions, made him redo part of the process so as to appear to comply with what the CRC had required of him.

63. It seems clear that had the hiring manager received the required training and had appraised himself of the recruitment processes, the credibility and conduct of the selection exercise for the job opening would have been according to the required process. It is unfortunate that the hiring manager, in his senior capacity as a Director did not have the appreciation of the Organization's proper recruitment processes. The handling of the recruitment process was fundamentally unprofessional.

64. The Tribunal notes that the Manual, though an inferior norm in the hierarchy of United Nations norms, serves a purpose, which is to provide guidance in executing some of the responsibilities set out in Secretary-General Bulletins and Administrative Instructions. This is because without the manuals, guidelines and information circulars, managers will not be in a position to remember the steps and processes to undertake. This is without prejudice to the Tribunal's conclusions above as to the illegality to include provisions in the Manual that go beyond the scope of the Administrative Instruction.

65. The Respondent cannot choose when to comply with the provisions of the Manual that he set up to be followed by his staff while at the same time arguing that they are not mandatory and can be dispensed with. If that is the case, why have them in the first place? The CRC asked the hiring manager to re-evaluate the candidates due to his non-compliance with the provisions of the same Manual that the Respondent now asserts is not mandatory.

66. The lack of training and knowledge of recruitment processes by the hiring manager who is at a Director level, clearly shows why the training on recruitment and the various related processes is paramount before conducting a recruitment. It is noteworthy that though the requirement of training on competency based interview was not in the then applicable ST/AI/2010/3 on staff selection, which was applicable at the time of the recruitment, ST/AI/2016/1 that replaced it makes the completion of such training mandatory for members of an assessment before conducting competency based interviews (sec. 7.4).

67. The Respondent's reliance on the case of *Charles* UNDT/2012/024 where one of the expert panel member had not received training before conducting the interview is inapt. The case of *Charles* concerned recruitment in a peacekeeping mission, the lack of training was not attributed to the hiring manager and furthermore the then Standard Operating Procedures of the United Nations Peacekeeping operations provided *inter alia* that it was preferable that at least one panel member had received interview training. Finally, the selection process in *Charles* was not tainted by any irregularity unlike the case at hand.

68. The Tribunal finds for the reasons expressed above that the flaws in the recruitment process were so fundamental as to render it illegal. Consequently, the selection decision must be rescinded.

Bias and discrimination

69. The Tribunal will not address the Applicant's claims on discrimination, favouritism and bias, because no substantial proof of it was presented. If the Applicant seeks to pursue this, the Organization has issued ST/SGB/2008/5 to address discrimination at the place of work, which is the proper avenue to raise these matters.

Remedies

70. 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. It provides 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.

Rescission of the contested decision

71. Having found the selection decision to be unlawful, and that the Applicant had a chance to be selected (see below), the Tribunal rescinds it. Since the selection decision concerns a promotion/appointment, the Tribunal is mandated by art. 10.5(a) of its Statute to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision.

72. In determining the amount for compensation under art. 10.5(a) of its Statute in appointment or promotion cases, the Dispute Tribunal must take into account the nature of the irregularities on which the rescission of the contested decision was based, and the chances that the staff member would have had to be selected had those irregularities not been committed. However, the determination of the "compensation in lieu" must be done on a case-by-case basis (see *Valentine* UNDT/2017/004) and ultimately carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265).

73. In respect of decisions denying promotions, the Appeals Tribunal held that "there is no set way for a trial court to set damages for loss of chance of promotion, and that each case must turn on its facts" (*Sprauten* 2012-UNAT-219, para. 22; see also *Niedermayr* 2015-UNAT-603). The Appeals Tribunal also held that in calculating such compensation, the Tribunal has to assess the probability for an Applicant to be appointed to a post but for the procedural breach.

74. In his admission of irregularity in the selection process, the Respondent avers that the Applicant was one of nine short-listed candidates in the selection exercise, all of whom had considerable experience working for OHCHR. Therefore, in the Respondent's view, the Applicant did not have a greater chance of promotion than the other candidates and only had one in nine chances of selection. Accordingly, the Respondent concluded that her damages should be one-ninth of the difference

in salary between the P-4 and her grade at the time of the contested decision over a period of two years which approximately equates to USD1,612.53.

75. Though the Respondent admitted to only one irregularity, despite the glaring other anomalies in this selection exercise, the Administration did not deem it fit to consider cancelling and redoing the process, especially when they had the chance/opportunity, and perhaps the obligation to do so in this case, since the flaws were obvious and numerous.

76. In *Niedermayr* 2015-UNAT-603, the Appeals Tribunal, stated that:

In *Sprauten* [2012-UNAT-219], we stated that “[t]he Appeals Tribunal affirmed in *Lutta* that there is no set way for a trial court to set damages for loss of chance of promotion and that each case must turn on its facts” [reference to footnote omitted]. In *Marsh* [2012-UNAT-205], we opined that “the lost chance of being selected, even if slight, and the loss of a better chance of being recommended or included in the roster had ... material and financial consequences”.

77. The Tribunal finds that, since the loss of chance is not an exact science, it should assess the matter in a way to arrive at a fair and equitable remedy having regard to the nature of the irregularities in the recruitment for the job opening. The numerous irregularities in this case were examined in detail above. The Tribunal finds that in light of them, it is impossible to determine the probability for the Applicant to be selected for the contested post but for the procedural breaches.

78. In light of all of the foregoing, the Tribunal finds it appropriate to direct the Respondent to pay the Applicant the sum of USD4,000 as compensation in lieu of rescission.

Compensation for harm

79. Under art. 10.5(b) of its Statute, the Dispute Tribunal may award compensation for the Administration’s breaches of an Applicant’s rights under her/his employment contract. The objective of such compensation is to place the

staff member in the position he or she would have been in had the breach not occurred (see *Mmata* 2010-UNAT-092).

80. It is established jurisprudence that the Dispute Tribunal has authority to order compensation to a staff member for violation of the staff member's legal rights under art. 10.5(b) of the Statute. Compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress, and moral injury (see *Nyakossi* 2012-UNAT-254).

81. In the case at hand, the Tribunal is of the view that the Applicant's claim for compensation for loss of opportunity to be selected for the relevant post and to be rostered at the higher level is fully compensated by its decision above under art. 10.5(a) of its Statute. With respect to the Applicant's claim for moral damages, the Tribunal finds that they are vague and unsupported by any evidence; they do not meet the standard of proof required by the Appeals Tribunal (cf. *Kallon* 2017-UNAT-742). In view of the foregoing, the Tribunal will not grant damages under art. 10.5(b) of its Statute.

Conclusion

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

- a. To declare the recruitment process illegal and, consequently, to rescind the non-selection decision;
- b. That should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant an amount of USD4,000;
- c. That the above compensation shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment;

- d. That parts of the file referring to mediation of settlement between the parties in this matter shall be expunged from the case file before the Tribunal; and
- e. That all other claims are rejected.

(Signed)

Judge Rowan Downing

Dated this 25th day of May 2018

Entered in the Register on this 25th day of May 2018

(Signed)

René M. Vargas M., Registrar, Geneva