



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

TARR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. On 4 August 2016, the Applicant, an Investigator at the P-4 level with the Office of Internal Oversight Services (“OIOS”) located in the United Nations Mission in Liberia (“UNMIL”), filed an application challenging the decision not to select her for the position of P-4 level Investigator (Job Opening No. 50231) with the OIOS Regional Office in Vienna, Austria.

2. The Applicant submits, *inter alia*, that she should have been selected in compliance with ST/AI/1999/9 (Special measures for the achievement of gender equality), and based on the requirements of ST/AI/2010/3 (Staff selection system) mandating special geographical considerations on recruitment. She also claims that the selection process was improper, irregular and flawed. As a remedy, the Applicant requests that the Administration be ordered to transfer her to a P-4 level regular budget investigator post at duty station Vienna, and pay moral damages.

3. The Respondent filed his reply on 14 September 2016, requesting that the application be rejected on the merits. The Respondent submits, *inter alia*, that the Applicant had no right of preference over a more suitable candidate simply because of her gender and nationality, that the Applicant was given full and fair consideration for selection for the position, that the correct selection procedures were followed, and that the hiring manager lawfully selected the most suitable candidate for the position in accordance with ST/AI/2010/3. The Respondent submits that the Applicant has adduced no evidence to support a rescission of the selection decision, nor has she demonstrated any harm suffered as a result of the contested decision.

Brief procedural background

4. This application was initially registered as Case No. UNDT/NBI/2016/058 with the Dispute Tribunal in Nairobi on 4 August 2016. On 18 November 2016, by Order No. 486 (NBI/2016), the Tribunal ordered that the case be transferred to the Tribunal's Registry in New York. Upon receipt in New York, the case was registered under Case No. UNDT/NY/2016/061.

5. Pursuant to Order No. 255 (NY/2017) dated 15 November 2017, on 14 December 2017, the Applicant filed her response to the Respondent's reply contending, *inter alia*, that the Administration has failed to demonstrate that she was given full and fair consideration there being no evidence to demonstrate that the recruitment complied with the requirements of ST/AI/1999/9. The Applicant also contended that the Respondent failed to rebut the evidence presented by her in support of her contention that no consideration was given to her status as a female as an equally qualified candidate. The Applicant also submitted that she was unable to effectively challenge the presumption of regularity as she had been denied access to what actually occurred, despite her request for such information, which information is in the hands of the Administration.

6. On 3 July 2018, the Applicant filed a submission entitled, "Applicant's Supplemental Filing Concerning New Facts", setting out new facts that only recently became known to her, and which indicated that her non-selection "was retaliatory in nature following a protected activity concerning [her] report of sexual harassment" against an investigator in the Vienna OIOS office. The Applicant requested that these new facts be taken into account in the consideration of the matter.

7. On 20 July 2018, pursuant to Order No. 140 (NY/2018), the Respondent filed a response to the Applicant's supplemental filing denying that the Applicant's

non-selection was retaliatory in nature following a complaint of prohibited conduct, and maintaining that the Applicant was not selected for the contested position as she did not meet the requirements of Job Opening No. 50231.

8. On 7 September 2018, pursuant to Order No. 151 (NY/2018), the parties filed a joint submission listing agreed facts, agreed legal issues and legal issues in dispute. The parties did not dispute any facts and did not request additional information or documents. The parties also agreed that the case could be decided on the papers.

9. On 15 January 2019, by Order No. 12 (NY/2019), to clarify the scope of the case, the Tribunal ordered the Applicant to confirm whether she had abandoned her claim that the contested decision was a retaliation as a result of her protected activity, and whether she requested any further information or documents. The Tribunal also ordered the parties to file closing statements.

10. On 5 February 2019, pursuant to Order No. 12 (NY/2019), only the Respondent filed a closing statement. The Applicant did not file any further submissions and made no requests for discovery or disclosure of documentation.

Facts

11. In a joint submission dated 7 September 2018, the parties submitted the following agreed facts:

... On 3 January 2013, the Applicant was rostered as a P-4 Investigator.

... On 5 March 2013, the Applicant was rostered as a P-3 Investigator.

... On 6 July 2013, the Applicant was appointed a P-3, step 2 Investigator with OIOS.

... On 12 January 2015, the Applicant was selected for a position as a P-4 Investigator with OIOS.

... On 5 January 2016, the contested Job Opening [No. 50231] for a P-4 Investigator (with the OIOS regional office in Vienna, Austria) was advertised on Inspira.

... On 7 January 2016, the Applicant applied for the [Job Opening].

... On 19 January 2016, the hiring manager, the Officer-in-Charge [(“OIC”)], Investigations Division OIOS [(“ID/OIOS”)], formed a panel of P-5 investigators to assess rostered candidates for the contested position. The Applicant was among the roster candidates.

... On 31 March 2016, the panel completed its review of the applications of the roster candidates. The panel provided the OIC with a comparative evaluation of all rostered candidates, the panel’s recommendations and the Personal History Profiles [(“PHP”)] of four recommended candidates, including the Applicant. The panel unanimously recommended one candidate as the most suitable.

... The panel found the Applicant suitable and documented the candidate’s qualifications. However, the Applicant was ranked third overall by two members of the panel, and second by the third member of the panel.

... One of the panel members, [Mr. JU, name redacted], participated in both the 2012 recruitment exercises resulting in the roster memberships of the Applicant, and her appointment in 2013.

... On 7 April 2016, the OIC forwarded the job opening, PHPs, and comparative review matrix to [the Assistant Secretary-General for Internal Oversight Services (“ASG/OIOS”)] and noted the panel’s recommended candidate. The [ASG/OIOS] forwarded the recommendation to [the Under-Secretary-General for Internal Oversight Services (“USG/OIOS”)] for review.

... On 15 April 2016, the [USG/OIOS] selected the recommended candidate.

... On 27 April 2016, the Applicant was informed that she had not been appointed to contested position and rather a P-3 male investigator had been appointed to the post.

Consideration

Legal framework

12. Selection exercises are governed by ST/AI/2010/3 (Staff selection system), which generally applies to the selection and appointment of all staff members after a regular selection process and includes detailed provisions on, *inter alia*, job openings, applications, pre-screening and assessment, and selection decisions throughout the Secretariat. ST/AI/1999/9 (Special measures for the achievement of gender equality) was promulgated to achieve a 50/50 gender distribution in all posts in the Professional category and above and is applicable to selection and appointment.

13. It is settled jurisprudence that the Dispute Tribunal's judicial review of a selection decision is limited. As reiterated in *Lemonnier* 2017-UNAT-762 (references to footnotes omitted) in paras. 30-32 and 38:

30. Initially, the Secretary-General has "broad discretion" in staff selection decisions under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1. However, the Secretary-General's "discretion is not unfettered and is subject to judicial review".

31. Judicial review of a staff selection decision is not for the purpose of substituting the Dispute Tribunal's selection decision for that of the Administration. Rather, [...] the Dispute Tribunal's role in reviewing an administrative decision regarding an appointment is to examine: "(1) whether the procedure laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration". The role of the [Dispute Tribunal] is "to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner".

32. As the Appeals Tribunal has explained, the starting point for judicial review is a presumption that official acts have been regularly performed:

... But this presumption is a rebuttable one. If the management is able to even minimally show that the [staff member's] candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the [staff member] who must show through clear and convincing evidence that []he was denied a fair chance of promotion.

...

38. Whether a non-selected candidate can meet his burden to show that he did not receive full and fair consideration for a job opening depends for the most part on the evidence the Administration reviewed in making the non-selection decision; not evidence outside the administrative record of which the Administration was not aware. And certainly not evidence outside the record relating to the qualifications of the selected candidate. Of course, this does not mean that a staff member cannot present evidence outside the administrative record to show bias or ill motive against him or her or in favour of the selected candidate. That is a different matter.

14. In *Finniss* UNDT/2012/200 (affirmed by 2014-UNAT-397), in a non-selection decision, the Tribunal explained what a minimal showing is:

107. Administrative decisions must be capable of being demonstrated to be legal, rational, procedurally correct [citing *Sanwidi* 2010-UNAT-084] and based on well-founded facts. The Respondent will have made a minimal showing of regularity and will have met his evidentiary burden if he provides the Applicant and the Tribunal with information about the decision being challenged.

108. This information should include the findings of fact material to the decision; the evidence on which the findings of fact were based; the reasons for the decision and all of the documentation in the possession and control of the decision maker which is relevant to the review of the decision.

15. As stated in *Ngokeng* 2017-UNAT-747, at para. 33, if management is able to minimally show that an applicant's candidature was given full and fair consideration, the evidentiary burden of proof shifts to the applicant who must show through clear and convincing evidence that he or she was denied a fair chance of selection. For

example, an applicant may allege and must prove through clear and convincing evidence that procedures were violated, that the members of the panel exhibited bias, or that irrelevant material was considered and/or relevant material ignored. There could be other grounds as well, depending on the facts of each individual case (*Rolland* 2011-UNAT-122, para. 21).

The merits

16. In the present case, the Applicant submits that there is clear and convincing evidence that the selection process was not carried out in a regular manner. In particular, the Applicant submits that the selection decision did not comply with ST/AI/1999/9 and ST/AI/2010/3, that the formation of a panel, appointment of panel members, and their actions were improper, irregular and flawed. Further, the Applicant submits that the selection decision was a retaliation as a result of her filing of a sexual harassment complaint.

17. The Respondent submits that the correct procedures were followed in the selection exercise, that the Applicant received full and fair consideration, and that the selected candidate's qualifications and experience were superior to the Applicant's. The Respondent further submits that the Applicant had no right of preference based on her gender or nationality, and there is no evidence that the selection decision was tainted by the consideration of her harassment complaint.

18. As stated above, the Respondent is therefore required to minimally demonstrate that the Applicant's candidature received full and fair consideration, and it is for the Applicant to then show through clear and convincing evidence that she was denied a fair chance of selection.

Has the Respondent minimally demonstrated that the Applicant's candidature was given full and fair consideration?

19. ST/AI/2010/3 (Staff selection system) provides detailed procedures of the selection exercise: The job opening for a position shall reflect the functions and the location of the position and include the qualifications, skills and competencies required (sec. 4.5); Applicants are pre-screened based on information provided in their application to determine whether they meet the minimum requirements of the job opening (sec. 7.1), and a hiring manager further evaluates all pre-screened applicants and prepares a shortlist of those who appear most qualified for the job opening based on a review of their documentation (sec. 7.4); Shortlisted candidates are assessed to determine whether they meet the technical requirements and competencies of the job opening (sec. 7.5); A hiring manager then prepares a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria (sec. 7.6), which is reviewed by central review bodies (sec. 8); The selection decision is made by the head of department/office on the basis of proposals made by a hiring manager when the central review body finds that the candidates have been evaluated on the basis of approved evaluation criteria and the applicable procedures have been followed (sec. 9.2); Candidates included in the roster may be selected by the head of department/office, without reference to a central review body (sec. 9.4).

20. With respect to the evaluation of applicants, sec. 1(f) of ST/AI/2010/3 states that evaluation criteria used for the evaluation of applicants for a position "must be objective and related to the functions of the generic job profile or the individually classified job description and must reflect the key competencies that will be assessed". Under sec. 1(b), assessment is defined as "the substantive process of evaluating applicants to determine whether they meet all, most, some or none of the requirements of the position under recruitment".

21. In this case, the Tribunal notes that Job Opening No. 50231 listed the following mandatory requirements in education, work experience and languages:

- a. Advanced university degree in law, international law, criminal investigation, police studies or related fields. A first-level university degree with two additional years of qualifying experience or formal qualifications/certifications in investigations with four additional years of qualifying work experience may be accepted.
- b. A minimum of seven years of progressively responsible experience in investigatory work including criminal and administration investigations is required.
- c. Experience in investigation management and administration together with supervisory functions is required.
- d. Fluency in English is required.

22. Job Opening No. 50231 then listed the following desirable/advantageous qualifications:

- a. Experience with international investigation activities is desirable.
- b. Experience with an international or multilateral public institution is desirable.
- c. Knowledge of French is desirable.
- d. Knowledge of another official United Nations language is an advantage.

23. However, the Tribunal observes that the evaluation criteria in the comparative review matrix on record, against which the suitability of job candidates was appraised, do not correspond to the mandatory and desirable/advantageous qualifications of Job Opening No. 50231. In particular, the comparative review matrix included criterion simply labeled as “Managerial Experience”, while the equivalent managerial requirement in the Job Opening is described as “[e]xperience in investigation management and administration together with supervisory functions”. Since the selection panel only wrote, “Yes”, “No evidence” and “Limited evidence”, it is unclear whether the selection panel correctly reviewed the required experience or incorrectly considered the job candidate’s general managerial experience, which is not a criterion of the Job Opening, which instead specifies that the required “supervisory function” must be in the area of “investigation management and administration”. Further, despite the fact that this is a mandatory requirement, a candidate who had limited evidence of managerial experience was included as one of the four recommended candidates, without further explanation.

24. Also, the Tribunal finds it notable that while, according to Job Opening No. 50231, fluency in English is required, this criterion is not included in the matrix at all. This information appears in the table called “Panel Endorsed Candidates”, which lists the qualifications of four recommended candidates. However, this does not show that fluency in English was considered at the evaluation stage, as the table only includes the language skills of the four panel endorsed candidates.

25. In addition, “[e]xperience with international investigation activities” and “[e]xperience with an international or multilateral public institution” are listed as desirable qualifications, but the matrix lists “Yrs of International Experience” and “UN experience” in the criteria. These criteria in the matrix do not correspond to the above desirable qualifications listed in the Job Opening.

26. With respect to desirable language skill, French is listed in the matrix but knowledge of another official United Nations language, which is an advantageous qualification under Job Opening No. 50231, is not used as a criterion in the matrix. Other language skills of the recommended candidates are indicated in the “Panel Endorsed Candidates” table, but as explained above, this does not show that knowledge of another official United Nations language was considered at the evaluation stage.

27. In light of these anomalies alone, which are in violation of ST/AI/2010/3, the Tribunal finds that the Respondent failed to minimally demonstrate that the Applicant received full and fair consideration.

28. The Tribunal will also review the further claims raised by the Applicant.

ST/AI/1999/9 (Special measures for the achievement of gender equality)

29. Section 1.8 (a) and (d) of ST/AI/1999/9 provide:

Selection/appointment

1.8 (a) Vacancies in the Professional category and above shall be filled, when there are one or more women candidates, by one of those candidates provided that:

- (i) Her qualifications meet the requirements for the vacant post;
- (ii) Her qualifications are substantially equal or superior to those of competing male candidates;

...

(d) When the qualifications of one or more women candidates match the requirements for the vacant post and the department or office recommends a male candidate, the department or office shall submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation, indicating how the qualifications and experience of the recommended candidate, when

compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended.

30. The Applicant argues that as a P-4 level investigator with ID/OIOS in a different duty station, her qualifications met the requirements for the contested post and her qualifications were substantially equal if not superior to the selected male candidate, who was a P-3 investigator for the entirety of his employment with OIOS. The Applicant also notes that while serving as a P-4 investigations team leader, she received a rating of “exceeds expectations” in her last performance evaluation. Thus, the Applicant argues that the Administration violated sec. 1.8(a) by selecting a P-3 level male investigator instead of the Applicant.

31. The Applicant further argues that given her qualifications, the Administration would have been unable to meet the requirements of sec. 1.8(d) which enjoins the Administration to provide a written analysis “indicating how the qualifications and experience of the recommended candidate, when compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended”.

32. In response, the Respondent argues that the USG/OIOS was not required to select the Applicant over a more suitable candidate based on her gender as the Appeals Tribunal held in *Tiwathia* 2016-UNAT-616, at paras. 28-29, that ST/AI/1999/9 does not apply where the female candidate’s qualifications are not substantially equal to or superior to the selected male candidate’s. The Respondent argues that the selected candidate possessed superior qualifications and experience than the Applicant in all the assessed categories. In particular, the Respondent submits that while the Applicant has a master’s and a bachelor’s degree in law, the selected candidate has two master’s degrees in investigations and administration as well as a bachelor’s degree in law. The selected candidate is also a certified fraud examiner. Further, Job Opening No. 50231 required seven years of progressively

responsible experience in investigatory work, and the Applicant had only three years and eight months experience in investigations, while the selected candidate had twenty years of investigatory experience of which more than eight years were obtained in the ID/OIOS. Finally, knowledge of French was a desirable qualification, which the selected candidate satisfied, and the Applicant did not. Further, the Respondent submits that as a response to the Applicant's request for management evaluation shows, the Applicant actually did not meet the experience requirements of Job Opening No. 50231, even though she was recommended for the contested position, because she only had three years and eight months investigatory experience.

33. The Applicant submits that the Respondent's argument regarding her alleged lack of requisite years of experience directly contradicts the selection panel's finding and has no basis in reality. The Applicant had 13 years of relevant investigatory experience including that of prosecution and other legal work related to investigations. The Applicant submits that given that both her and the selected candidate had experience far in excess of the seven-year requirement, both applicants would be deemed equally qualified for the position when examined against the job description, which is the basis for review under ST/AI/1999/9.

34. Regarding the academic qualifications, the Applicant submits that the selection panel failed to list all academic degrees held by the Applicant since she also has a bachelor's degree and two post graduate degrees (Master of Laws and Juris Doctorate) as indicated in her PHP. While the Respondent highlights that the selected candidate is a certified fraud examiner, he fails to highlight that she is a member of the Massachusetts Bar.

35. The Applicant further submits that the matrix prepared by the selection panel and the PHPs do not constitute written justification or supporting documentation as

required by ST/AI/1999/9, and that there is no indication that even the matrix had been forwarded to the USG/OIOS.

36. Regarding the selected candidate's French language skill, the Applicant submits that French was not a requirement for the post but merely desirable, and under ST/AI/1999/9, the instruction states that the candidates will be assessed against the requirements for the post, not the desirable attributes.

37. The Tribunal observes that, under sec. 1.8(a) of ST/AI/1999/9, to receive priority consideration as a female candidate, a female candidate's qualifications should first meet the requirements for the vacant post. The Tribunal finds it peculiar that the Administration argued in the management evaluation and in the reply to the Applicant's current application that she only had three years and eight months investigatory experience and thus did not meet the requirements for the post, whilst to the contrary, the selection panel found that the Applicant met the requirements for the vacant post and thus recommended her for the contested position.

38. In any event, the Tribunal notes that this rationalization is *ex post facto* and finds it is unsupported by evidence. The matrix listed the Applicant's investigatory experience and prosecutorial/legal experience under relevant experience. Also, as set out in the agreed facts of the parties' joint submission, the Applicant was rostered as a P-4 level investigator in 2013 and selected as a P-4 level investigator in 2015. The Applicant was further recommended for the contested post in 2016. The Tribunal also notes that the job opening from which the Applicant was selected as a P-4 investigator is almost identical to Job Opening No. 50231. Considering the foregoing, the Tribunal accepts that, consistent with the selection panel's assessment at the time of the contested selection, the Applicant's qualifications met the requirements for the contested post.

39. The next question then is whether the Applicant's qualifications were substantially equal or superior to those of the selected male candidate. To support the argument that the selected male candidate was superior to the Applicant, the Respondent offers lengthy justifications concerning education, work experience and language qualifications, which were not reflected in the comparative review matrix itself, except for the French language skill of the selected candidate. Since the matrix fails to explain how the decision to recommend some of the rostered candidates was arrived at and how they were ranked among the recommended candidates, it is impossible for the Tribunal to review whether the Administration has shown that the selected candidate was superior to the Applicant.

40. Furthermore, the Tribunal recalls that under sec. 1.8(d) of ST/AI/1999/9, when the qualifications of one or more female candidates match the requirements for the vacant post and the department or office recommends a male candidate, a written analysis with appropriate supporting documentation, indicating how the qualifications and experience of the recommended candidate are clearly superior to those of the female candidates, shall be submitted to the appointment body. The Appeals Tribunal analyzed this requirement in *Zhao, Zhuang and Xie* 2015-UNAT-536, stating that the provision of a written analysis as set out in sec. 1.8(d) is mandatory and "to do anything to the contrary renders a selection process flawed". Further, the Appeals Tribunal held that "a compilation of the panel's individual evaluations of the staff members who were interviewed" does not fulfill the requirement of sec. 1.8(d) "insofar as there is no specific analysis as to how the qualifications and experience of the recommended candidate were clearly superior vis-à-vis Ms. Xie's own qualifications and experience" (see paras. 53 and 57). In line therewith, the lack of the requisite written analysis alone would therefore render the selection process flawed in this case.

41. The Tribunal notes that the management evaluation stated that the comparative evaluation matrix met the written analysis mandated under sec. 1.8(d). However, the Respondent did not address this particular point in the pleadings before the Tribunal. In any event, the Tribunal finds that a compilation of the evaluations does not fulfil the mandatory requirement so long as there is no specific analysis between the recommended male candidate and female candidates in line with the *ratio* in *Zhao, Zhuang and Xie*. Considering that the documents on record do not include any specific analysis with supporting documentation as to how the selected male candidate's qualifications were clearly superior vis-à-vis the Applicant, the Tribunal finds that the Applicant has proved through clear and convincing evidence that the selection decision violated ST/AI/1999/9 and rendered the selection process flawed.

Special considerations of geographical representation and a status as a staff member from a downsizing mission

42. The Applicant submits that ST/AI/2010/3 mandates that geographical representation must be given special consideration during the recruitment process and that offices must put forth a human resources action plan to fulfil this obligation. The Applicant submits that it is unclear whether the selection panel considered the percentage of staff appointed from underrepresented geographical locations during the selection process. Further that it is also unclear whether the USG/OIOS was provided with relevant information, especially considering that neither of the two underrepresented candidates was appointed to the post, and the selected candidate was listed as geographically overrepresented.

43. The Respondent on the other hand submits that the USG/OIOS was not required to select the Applicant based on her nationality. Staff regulation 4.2 provides that "due regard shall be paid to the importance of recruiting the staff on as wide a

geographical basis as possible”. The hiring manager’s recommendation to the USG/OIOS indicated that the Applicant was from an underrepresented country and the selected candidate was from an overrepresented country, and the USG/OIOS gave due regard to geographical representation in her decision to select the candidate she considered the most suitable.

44. In response, the Applicant submits that no evidence has been provided by the Administration indicating that due regard was given to nationality and geographical distribution, and given the lack of evidence, there is clear and convincing evidence that the USG/OIOS was not provided with this information during the appointment of the selected candidate.

45. Article 101(3) of the United Nations Charter provides that “[t]he paramount consideration in the employment of the staff ... shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible”. This provision is reiterated in staff regulation 4.2.

46. The Tribunal accepts the Respondent’s explanation that the hiring manager’s recommendation to the USG/OIOS indicated that the Applicant was from an underrepresented country and the selected candidate was from an overrepresented country, and the USG/OIOS, being so aware, gave due regard to geographical representation in her selection decision, noting that the “Panel Endorsed Candidates” table indicates the geographical representation of each recommended candidate.

47. The Applicant further submits that ST/AI/2010/3 also mandates that staff members serving with downsizing entities must be given special consideration, yet it is not clear whether such information was provided to the USG/OIOS, given that the assessment matrix did not include the current duty stations of any of the four

recommended candidates. The Applicant submits that there was a 20 percent reduction of staff in the UNMIL, ID/OIOS Office in light of the downsizing of the mission.

48. In response, the Respondent submits that the USG/OIOS was not required to select the Applicant because she served in a downsizing mission. In accordance with art. 101 of the Charter and ST/AI/2010/3, a candidate's suitability for a position is the determining factor in a selection decision.

49. The Applicant's submission that ID/OIOS office in UNMIL downsized by 20 percent in light of the downsizing of the Mission has not been rebutted. Instead, the Respondent insists that it was not required to select the Applicant because she served in a downsizing mission.

50. The Tribunal notes that sec. 1(x) of ST/AI/2010/3 provides (emphasis added) as follows:

(x) *Selection decision*: decision by a head of department/office to select a preferred candidate for a particular position up to and including the D-1 level from a list of qualified candidates who have been reviewed by a central review body taking into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender, and *giving the fullest regard to candidates already in the service of the Organization as well as those encumbering posts that are slated for abolition or are serving in secretariat entities undergoing downsizing and/or liquidation*. Selection decisions for positions at the D-2 level are made by the Secretary-General following review by the Senior Review Group

51. While ““priority consideration” cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for” (*Onana* 2015-UNAT-533, para. 46, citing *Megerditchian* 2010-UNAT-088, para. 28), ST/AI/2010/3 is clear that a selection decision should take into account various

factors, especially giving the fullest regard to candidates serving in Secretariat entities undergoing downsizing.

52. As the Applicant was one of the recommended candidates for the contested post and under ST/AI/2010/3, the fullest regard should have been given to her status as a qualified candidate serving in a secretariat entity undergoing downsizing. Considering that there is no evidence on record that this factor was considered for the contested decision either at the assessment stage or at the selection stage and that the Respondent did not claim otherwise, the Tribunal finds that the Applicant has proved through clear and convincing evidence that the Administration failed to consider her status as a staff member from a downsizing entity, as required by ST/AI/2010/3.

Other matters

53. The Applicant notes that the selection panel consisted of three P-5 level investigators, all from headquarters or offices away from headquarters and none from field offices, and that this composition necessarily favoured candidates serving in non-field positions. The Applicant further notes that one of the panel members was a P-5 level investigator from Vienna who was serving as the second reporting officer of the selected candidate at the time of recruitment, which created an unfair bias in favour of the selected candidate. The Applicant further argues that it was irregular to have on the selection panel, a member who had been previously involved in the 2012 recruitment exercises at the P-3 and P-4 levels that resulted in the rostering and recruitment of the Applicant at each level.

54. Section 1(c) of ST/AI/2010/3 defines an assessment panel 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 ...

55. The Applicant submits that all three panel members are at the P-5 level, which is a higher level of Job Opening No. 50231. The Tribunal finds that there being no requirement that panel compositions should be balanced between headquarters and field locations, this aspect of the claim fails.

56. As the Dispute Tribunal found in *Chawla* UNDT/2012/108, the burden of establishing bias or the perception of bias in a recruitment process lies on the applicant through clear and convincing evidence. It is unclear on what basis the Applicant objects to the presence of a panel member who was involved in previous recruitment exercises that resulted in the Applicant's successful rostering and recruitment. The Applicant failed to make any precise averment of bias or prejudice against her or any other candidate, or to allege that there could be a perception of bias and presented no evidence in support, if indeed this was her contention. If anything, the relevant panel member would appear to have had a positive view of the Applicant if she succeeded in being previously rostered and recruited. Similarly, while the Applicant also objects to the presence of a panel member from Vienna, the mere fact that one of the panel members was a second reporting officer of the selected candidate at the time of recruitment, without further specific allegations supported by evidence, is insufficient as it does not meet the clear and convincing evidence standard. Thus, in the absence of any specific allegation or averment which could be tested on the facts before the Tribunal, this aspect of her claim fails.

57. The Applicant also argues that dividing the Applicant's relevant experience into sub categories, one labeled as investigatory and another as prosecutorial and legal, is improper, irregular and flawed and defeats the purpose of the roster system resulting from a competitive recruitment process. Given the lack of any specific rules

and regulations that support her claim and the Secretary-General's broad discretion in selection matters, this claim also fails.

Retaliation

58. The Applicant claimed that the non-selection decision was retaliatory following her complaint of prohibited conduct. The Tribunal notes that the Applicant did not list any relevant facts relating to this claim in the agreed or disputed facts in the joint submission dated 7 September 2018, this allegation being made pursuant to her supplemental filing of 3 July 2018, as information she allegedly received after the fact on 14 March 2018. This allegation was denied by the Respondent in a response dated 20 July 2018. The Tribunal notes that the Applicant claimed in her management evaluation request that OIC of ID/OIOS made comments about her complaint of prohibited conduct during the conversation about the Applicant's non-selection, which led her to believe that her filing of the complaint was unduly considered in the selection decision. On 15 January 2019, the Tribunal therefore directed the Applicant to clarify whether she had abandoned this aspect of her claim. Due to the lack of the Applicant's response in this regard, the Tribunal will address this claim as presented in her earlier submissions.

59. In her submission of 3 July 2018, the Applicant states that she met with the USG/OIOS on 14 March 2018 where they discussed gender discrimination within ID/OIOS, and widespread sexual harassment in the field environment. During the meeting, she alleges that she clarified the USG/OIOS's understanding that the reason for the Applicant's non-selection for the contested post was that the Applicant had filed a sexual harassment complaint against an investigator in the Vienna office and that she did not want to be in the same office as the implicated person. The Applicant submits that the non-selection was therefore retaliatory in nature following a protected activity.

60. The Respondent acknowledges that the Applicant met with the USG/OIOS on 14 March 2018 to discuss her own situation and the condition of female staff members in the field but denies that the USG/OIOS informed the Applicant that she was not selected because of a complaint of prohibited conduct. The Respondent submits that at no point during the meeting did the USG/OIOS provide any rationale for her selection decision with respect to the contested post.

61. The Tribunal recalls that it is the candidate challenging the selection decision who must prove through clear and convincing evidence that procedure was violated, that the members of the panel exhibited bias, that irrelevant material was considered or relevant material ignored (see *Rolland, supra*). As no sworn testimony was called, there is no evidence supporting this claim other than the Applicant's submission which appears to have been abandoned, and which is disputed by the Respondent. There being a substantial dispute of fact which has not been reconciled, the Tribunal finds that the Applicant failed to prove through clear and convincing evidence that her protected activity was considered in the contested selection decision.

Conclusion

62. In light of the foregoing and the various reasons stated herein, the Tribunal finds that the selection process for Job Opening No. 50231 was flawed and that the Applicant therefore did not receive a full and fair consideration.

Relief

63. Article 10.5 of the Dispute Tribunal's Statute provides:

- (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 for harm, supported by evidence, and shall provide the reasons for that decision.

64. As a remedy, the Applicant requests that the Administration be ordered to transfer her to a P-4 level regular budget investigator post at duty station Vienna, as well as to pay moral damages. The Applicant submits that she suffered harm, including reassignment to a field duty station due to UNMIL's closure and severe psychological harm as a result of the contested decision.

65. The Respondent submits on remedies that the Applicant failed to show that she suffered any harm as a result of the contested decision as she applied for a lateral transfer in the same unit of the same department at the same grade and level and thus it did not affect her benefits or entitlements.

66. Under art. 10.5(a) of the Statute, the Tribunal has the statutory discretion to rescind the contested decision or order specific performance, but as the Appeals Tribunal stated, the rescission can be ordered only when a staff member would have had a significant or strong chance for selection (see *Dualeh* 2011-UNAT-175, para. 19; see also *Zhao Zhuang Xie* UNDT/2014/036 (affirmed by 2015-UNAT-536)). In this case, various irregularities rendered the selection process flawed and deprived the Applicant of full and fair consideration; that is, the Tribunal found that the evaluation criteria were flawed, that provisions of ST/AI/1999/9 were violated, and that her status as a staff member from a downsizing entity was not considered. However, it is undisputed that the Applicant did not have French language skills, which was a desirable qualification for the contested post. Thus, the Tribunal finds that the

Applicant did not have a significant or strong chance for selection. The Tribunal notes that in some instances specific performance may be inappropriate or not feasible, for example where third party rights are affected. The Tribunal finds that specific performance in this instance would be unfeasible as the contested position has long been filled and declines the Applicant's request for transfer to a P-4 level regular budget investigator post in Vienna. Further, even if the Applicant had a significant or strong chance for selection, since the contested decision concerns "appointment, promotion or termination", under art. 10.5(a) of the Statute, in ordering specific performance, the Tribunal must set an amount of compensation *in lieu* of rescission or specific performance, which needs to be supported by evidence. As stated by the Appeals Tribunal, *in lieu* compensation shall be the economic equivalent for the loss of a favourable administrative decision (see *Mihai* 2017-UNAT-724, para. 19). Considering that the Applicant applied for the contested post at the same level and has not provided any evidence that she suffered any economic loss otherwise, no amount of *in lieu* compensation can be ordered.

67. Regarding moral damages, while the Applicant claims psychological and other harm she suffered, she has failed to provide any evidence. Under art. 10.5(b) of the Dispute Tribunal's Statute, compensation for harm should be supported by evidence, and as the Appeals Tribunal held, "the testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise)" (*Langue* 2018-UNAT-858, para. 18, citing *Kallon* 2017-UNAT-742). In this regard, the Tribunal notes that the Applicant was allowed to further support her claim of damages either in a joint submission or a closing submission, which she failed to do.

Conclusion

68. In view of the foregoing, the Tribunal decides:
- a. The Applicant did not receive full and fair consideration in the contested selection decision for the P-4 Vienna Investigator position;
 - b. The Applicant's claim for remedies fails as lacking in evidence.

(Signed)

Judge Ebrahim-Carstens

Dated this 29th day of April 2019

Entered in the Register on this 29th day of April 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York