



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/017

Judgment No.: UNDT/2021/024

Date: 19 March 2021

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PONCE-GONZALEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

George Irving

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Maureen Munyolo, AAS/ALD/OHR

Introduction

1. The Applicant is a staff member of the United Nations Interim Security Force for Abyei (“UNISFA”). He is contesting the failure by the Administration to afford him full and fair consideration for the temporary position of Chief, Operations and Resource Management Section (“ORM”) under the Temporary Job Opening (“TJO”) No. 109862 (“the contested decision”).

2. The Respondent argues that the application is not receivable *ratione materiae* because the Applicant did not request management evaluation within the 60-day statutory period of staff rule 11.2(c) and not receivable *ratione personae* because he withdrew from the selection process and therefore has no standing to contest the non-selection. Further, should the Dispute Tribunal find the application receivable, it has no merit. For reasons given below, the application is receivable but is dismissed on the merits.

Facts and Procedure

3. The Applicant is the Chief of the Budget and Finance Section of UNISFA at the P-4 step 15 level.

4. On 11 January 2019, TJO 109862 was issued with a closing date of 18 January 2019.¹ The Applicant applied for the position on the same date.²

5. The Hiring Manager then reviewed the 65 job applications received and shortlisted nine job applicants, including the Applicant, for assessment through a competency-based interview.³ Eight of the short-listed candidates participated in a competency-based interview (“CBI”). The Applicant did not attend the interview.

¹ Application, annex 10.

² Application, para. 1.

³ Reply, para. 18.

The interview panel documented its evaluation in the *Inspira* system as follows:⁴

The candidate was invited to take part in the interview on 28 March. In an effort to accommodate the candidate's schedule and preferences the interview was rescheduled for 30 March, 01 April, and 08 April. Although the candidate expressed his continued interest in the position he failed to confirm his participation for any of the proposed dates. Following the final notification for 08 April, the panel convened and waited until 45 minutes beyond the scheduled interview time but no response was received from the candidate. He was duly informed that no further accommodations could be made to his interview, and his non-response was documented as a withdrawal of interest in the position.

6. The interview panel recommended the selection of another candidate for TJO 109862 on 11 April 2019.⁵

7. On 5 September 2019, the UNISFA Chief of Mission Support ("CMS") broadcasted to all staff a circular on the arrival of the new Chief/ORM.⁶

8. The Applicant addressed an email to UNISFA's Chief Human Resources Officer ("CHRO") on 22 September 2019 requesting information on the selection decision.⁷

9. On 1 November 2019, the Applicant requested management evaluation of the failure to afford him impartial, full and fair consideration for the post of Chief/ORM which had initially been advertised under Recruit From Roster ('RFR') No. 104637 and subsequently re-advertised under TJO 109862.⁸

10. On 20 February 2020, the Applicant filed this application challenging the contested decision.

11. The Respondent filed a reply on 25 March 2020.

⁴ Ibid., para. 19 and reply, annex R/3.

⁵ Reply annex R/3.

⁶ Application, annex 6.

⁷ Application, annex 7.

⁸ Application, annex 8.

12. On 11 January 2021, the Applicant filed a rejoinder to the reply.

13. The Applicant filed an amended application on 16 February 2021 having been granted leave to do so. The Respondent filed a response to the amended application on 19 February 2021.

14. At the case management discussion held on 11 February 2021, the Applicant agreed to restrict this application to his non-selection under the TJO since his case challenging another selection process in RFR 104637 was pending before the United Nations Appeal Tribunal. Although the Applicant is challenging both decisions, he concedes that they were different in a sense that the RFR involved a regular post whereas the TJO involved a temporary position, and a separate recruitment action⁹. It is the TJO which is the subject of these proceedings.

15. The parties agreed to full disclosure of the record of the review undertaken for the post in question, including the reasons for the rejection of the Applicant's candidacy for the position on two occasions.

16. The parties filed their closing submissions on 12 March 2021.

Submissions on receivability

The Respondent

17. The Respondent submits that the application is not receivable because the Applicant did not request management evaluation within the 60-day statutory period of staff rule 11.2(c).

18. The 60-day period to request management evaluation started on 11 April 2019. On that day, the *Inspira* system changed the status of the TJO to "Recruitment completed" in the Applicant's account. The Applicant subsequently logged into the *Inspira* system on 16 April 2019. The change in the TJO status within the *Inspira*

⁹ Application, para. 9.

system provided the Applicant with notice that he had not been successful in his candidacy for the job-opening. Accordingly, the 60-day statutory deadline for requesting management evaluation expired on 10 June 2019. At the latest, the deadline for requesting management evaluation expired on 15 June 2019, that is, 60 days after the Applicant accessed the *Inspira* system. The Applicant submitted his request for management evaluation on 1 November 2019, more than six months beyond the statutory deadline.

19. The Applicant does not have legal standing to contest his non-selection because he did not attend the scheduled interview for the position.

20. On 25 March 2019, a UNISFA human resources officer invited the Applicant to participate in an interview for the TJO scheduled for 28 March 2019. On 27 March 2019, the Applicant indicated that he would not be available on 28 March 2019 and requested a postponement of the interview. On 3 April 2019, the human resources officer notified the Applicant that the interview was rescheduled for 10.00 a.m. on 8 April 2019 and requested the Applicant to confirm his availability.

21. On 7 April 2019, the human resources reminded the Applicant of the interview scheduled for the following day. On the same day, the Applicant responded indicating that he was willing to interview for the position but disagreed with the composition of the interview panel.

22. On 8 April 2019, the interview panel convened and waited 45 minutes from the scheduled start time for the Applicant to attend the interview. The Applicant, however, did not attend the interview. A voluntary decision not to participate in an interview deprives a job applicant of legal standing to contest the outcome of the selection process.

The Applicant

23. The Management Evaluation Unit (“MEU”) indicated that the selection decision was made on 16 April 2019 and therefore the Applicant’s request fell

outside the 60-day limit. However, MEU failed to produce a copy of, and the Applicant never received, any written notification from the Hiring Manager that his application had not been successful as required by the Staff Rules.

24. The Circular issued by the Hiring Manager on 5 September 2019 was the first time the Applicant became aware a selection decision had been made on filling the post. For this reason, he requested human resources for information on the selection decision on 22 September 2019 but received no response. As he submitted a management evaluation request within 60 days after first becoming aware of the selection decision and in the absence of evidence proving otherwise, it is clear that he complied with the applicable time limits.

25. Regarding the Respondent's argument that the application is not receivable *ratione personae*, the Applicant submits that he did not withdraw from the selection process but rather the Hiring Manager's presence in the selection process deprived him of the opportunity to be "interviewed impartially" and that he was willing to participate in the interview but only if he was accorded safeguards for full and fair consideration¹⁰. He also suggests that as a rostered candidate he was exempted from participating in a competitive assessment.

Considerations on receivability

26. The Respondent has argued that the Applicant logged into the *Inspira* system on 16 April 2019 and took notice of the change in the TJO status that the position had been filled. That accordingly, the 60-day statutory deadline for requesting management evaluation expired on 10 June 2019. At the latest, the deadline for requesting management evaluation expired on 15 June 2019, that is, 60 days after the Applicant accessed the *Inspira* system.

27. The Applicant on the other hand has argued that the Hiring Manager never served him with written notice that his application had not been successful as

¹⁰ Applicant's submissions pursuant to Order No. 003 (NBI/2021), paras. 9 and 10.

required by the staff rules. Therefore, time started running when he saw an internal circular issued by the Hiring Manager on 5 September 2019 that the position had been filled.

28. The Tribunal finds that section 10 of ST/AI/2010/3 (Staff Selection System), cited by the Applicant does not apply to temporary appointments. They are expressly excluded under section 3.2(b). The applicable administrative instruction is ST/AI/2010/4 Rev. 1 (Administration of temporary appointments) which does not compel the Hiring Manager to issue formal notification of a selection outcome to candidates. The Applicant has not cited any alternative regulatory framework that provides for formal communication of the selection result to any candidate other than the successful one.

29. The issue turns on the question of when the Applicant first became aware of the decision that he had not been selected for the position. The Applicant's argument is that he became aware of his non-selection on 5 September 2019, through an internal circular informing all staff of the arrival of the selected candidate and he requested management evaluation of the decision within 60 days on 1 November 2019. The Respondent on the other hand avers that the 60-day period started running on 11 April 2019 when the *Inspira* system changed the status of the TJO to "Recruitment completed" in the Applicant's account and that the Applicant first became aware of the decision on 16 April 2019 when he logged into the *Inspira* system. The change in the *Inspira* system was notice to the Applicant that he had not been successful in his candidacy for the job opening. Based on this, the latest date for requesting management evaluation was 15 June 2019. As it were, his application was six months beyond the statutory deadline as provided under staff rule 11 (2)(c).

30. The Applicant has counter argued that the status of the job opening in *Inspira* did not provide him with the requisite notice that his candidacy was unsuccessful. The Tribunal finds merit in this argument in the circumstances as described by the Applicant, for instance, that *Inspira* is a portal with many different applications, which this Tribunal believes to mean of a general as opposed to specific information

dissemination. It is also noted that although *Inspira* changed the job status on 11 April it was only in September that the recruited staff member was introduced to the Applicant and others through the internal circular.

31. Since there was no formal notification of the results of the selection process to the Applicant, the internal circular suffices as the notice for purposes of lodging the challenge against the process. Time started running on the date that the Applicant read the internal circular that the position had been filled, conversely that he had not been successful. The Tribunal notes that to be 100% certain, the Applicant made a formal enquiry on 22 September to the CHRO about the status of his application to which he never got a response. This is consistent with his submission that he first became aware of the decision on 5 September 2019.

32. The Tribunal finds that the Applicant complied with staff rule 11.2(c) by timely requesting management evaluation of his case. It is receivable.

33. On whether the Applicant has *locus standi* to challenge the contested decision after he ‘voluntarily’ failed to participate in the CBI the Respondent argues, based on *Loeber*,¹¹ that a voluntary decision not to participate in an interview deprives a job applicant of legal standing to contest the outcome of the selection process. In arriving at this decision, UNAT found at para 30 that:

Mr. Loeber chose not to participate in the interview due to his belief that the Panel was biased against him. However, he has failed to present sufficient evidence of such bias. Furthermore, in failing to participate in the necessary recruitment procedures, he is estopped from contesting this aspect and without standing to contest the selection outcome.

34. The Applicant has contended that he had an apprehension that the selection process was predetermined against him by the Hiring Manager who had flouted several procedural and regulatory provisions with a view of excluding him from the

¹¹ 2018-UNAT-836.

position. His decision not to participate in the interview was not a withdrawal but a protest against the irregular selection exercise.

35. The Tribunal finds that *Loeber*, is distinguishable from the case at bar, in that while UNAT agreed and found that; “Mr. Loeber chose voluntarily not to participate in the interview”. This Tribunal finds that the Applicant’s refusal to participate in the interview was not voluntary.

36. In *Kawamleh*¹² UNAT confirmed the UNRWA Dispute Tribunal finding that, “a selection process may only be challenged in the context of an appeal against the outcome of that process”¹³. This finding was in relation to the first test that had been cancelled therefore there was no administrative decision arising from that test for review.

37. Regarding the second test, UNAT agreed with UNRWA that Mr Kawamleh had decided and expressly stated that he would not participate in the second written test therefore he had no standing “to contest **the decision to conduct a second test** after he had elected not to participate in the process”¹⁴. This decision is distinguishable from the case at bar because unlike in *Kawamleh*, the Applicant is not appealing against a step in the selection process, that is: ‘a decision to conduct a test’ but rather a final decision not to select him for the position.

38. In *Ishak*, UNAT held that;

A selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process but cannot alone be the subject of an appeal to the UNDT¹⁵.

39. The empanelling of an interview team and setting other requirements for a selection exercise are in this Tribunal’s view, preparatory steps in the selection

¹² 2018-UNAT-818.

¹³ Paragraph 14.

¹⁴ Paragraph 15.

¹⁵ 2011-UNAT-152, para. 29.

exercise. They are not final decisions with adverse consequences for a staff member. It follows that they are not appealable until after the outcome of the process.

40. Consequently, it would not be in the interests of justice to deprive a staff member access to the internal justice system on the basis that he refused to participate in an interview not voluntarily but out of protest. The Applicant's grievances about the selection process were not resolved to his satisfaction. He is entitled to access justice which is a fundamental human right that this Tribunal is competent to grant within its statutory framework.

41. Article 2.1(a) of the UNDT Statute confers jurisdiction upon the UNDT to hear and pass judgment on an application to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance.

42. The Applicant is appealing the decision not to select him for the position advertised under the TJO. His non-selection has direct legal consequences on his terms of appointment or contract of appointment. The application is receivable.

Parties' submissions on the Merits

The Applicant

43. The second selection exercise, that is TJO 109862, was void *ab initio*. The disclosure of the evidence in the possession of the Respondent revealed that the Applicant was wilfully, deliberately and wrongfully disqualified by the Hiring Manager on the grounds that he did not meet the requirements of the job, which made the cancellation of the first selection exercise, RFR 104637, unlawful.

44. The Hiring Manager improperly interfered in the selection process by (a) improvising a spurious assessment of rostered candidates when no assessment was

required; (b) invoking evaluation criteria that had not been included in the TJO; (c) misrepresenting the Applicant's credentials to deliberately disqualify him; and (d) abusing his delegation of authority.

45. The disqualification of the Applicant under RFR 104637 was improperly motivated. The Applicant's credentials were deliberately not assessed fairly and impartially. The Hiring Manager's conclusion that the Applicant did not meet all the requirements for the job opening is verifiably unsustainable based upon his rostered status and the disclosure of all records including his PHP. The Hiring Manager's decision to cancel RFR 104637, on the grounds that there were no qualified candidates, was improper and only served as the basis for introducing TJO 109862 unlawfully with a view to selecting another candidate by opening the TJO to external recruitment while deliberately failing to afford the Applicant with impartial, full and fair consideration.

46. The Tribunal has noted the importance of not cancelling job openings where at least one candidate had been deemed suitable.

47. A TJO was wrongfully used to fill a regular post. According to section 1(y) of ST/AI/2010/3, temporarily vacant positions are blocked for a specific period of time for the return of a staff member on temporary assignment, mission assignment, special leave, secondment, or loan. This was not the case here. The General Assembly had recently approved this post and it was not encumbered. The Recruiter's Manual (2015) indicates in paragraph 18.3(c) that every effort must be made to limit temporary assignments to vacant positions to the shortest possible period, during which time the position must be filled under the procedures of that instruction.

48. According to the MEU's reply of 19 December 2019, TJO 109862 was used as part of a two-step process to fill a regular post. However, there is nothing in the staff selection system that calls for a two-step procedure involving a regular selection exercise followed by a TJO to fill a regular post. TJOs are not aimed at enlarging the

pool of candidates for a regular vacancy. TJO's are not intended to substitute for a legitimate regular selection exercise.

49. The original impropriety was in the decision on the part of the Hiring Manager to cancel the initial regular selection exercise when a suitable rostered candidate was in fact available. The TJO was issued on inappropriate procedural grounds following the Hiring Manager's unlawful disqualification of the Applicant for if he had been deemed fully compliant, the Hiring Manager could not have cancelled RFR 104637. The misuse of the two distinct recruitment actions with improper motives adverse to the Applicant's right to fair consideration is in strict violation of the staff rules and not in compliance with the lawful administration of temporary appointments as per ST/A1/2010/4 Rev. 1.

50. The same Hiring Manager that had disqualified the Applicant from RFR 104637 later deemed him suitable for the same post under TJO 109862 even though the minimum and desirable requirements and the assessment criteria for the post did not change and both job openings were published as a mirror image of each other.

51. The Respondent's claim that the change in assessment of the Applicant's suitability was due to the TJO having lower requirements, which allowed the Applicant to now qualify, is demonstrably false since the advertised requirements for the same post under RFR 104637 and TJO 109862 were identical.

52. The Applicant had met all the minimum and desirable requirements of both the RFR and the TJO and yet was assessed differently. This change in the assessment of the Applicant's suitability stands as compelling evidence that the assessment of the Applicant's credentials and his disqualification under RFR 104637 were unlawful and his inclusion for consideration under TJO 109862 was disingenuous and a mere façade for selecting another candidate who did not apply originally.

53. The fact that the TJO selection process was directed and decided by the Hiring Manager who had previously found the Applicant unsuitable for the position

in spite of his being a vetted qualified rostered candidate presented an obvious potential conflict of interest.

54. In January 2019, the recruitment authority was restored to UNISFA with the Head of Entity as the primary delegated official. Accordingly, since this recruitment involved a position reporting directly to the CMS (the Hiring Manager), the most appropriate official with the required level of delegation of authority was the Head of Entity who was not directly involved in this recruitment. This would have allowed the segregation of duties principle to be preserved and would have avoided a real or perceived conflict of interest since the CMS could not oversee and approve the process for which he was also the Hiring Manager. There is no evidence this took place.

55. The Hiring Manager, acting also as the Head of Entity, violated the segregation of duties principle in the following three instances: by cancelling RPR 104637 and issuing TJO 109862; by failing to remove himself from the selection process of TJO 109862 because of the pre-existing bias and conflict of interest as noted in the Tribunal's Order No. 046 (NBI/2019); and by finally approving the selection decision under TJO 109862.

56. The Assessment Section of TJO 109862 published on 13 January 2019 contained the following instruction: "Previously rostered candidates are not subject to any further assessment and as such, will not be invited for such an assessment." The Applicant fully satisfied this assessment criterion as he already was a pre-approved rostered candidate for the post of Chief Mission Support at the same P-5 level since 2018. Roster membership is based on job codes of similar functions. The job code title of Chief of Mission has 10 associated job code titles including the one for Chief Operations Resource Manager to which the Applicant was eligible.

57. Instead of either cancelling the process or respecting the established assessment criteria for rostered candidates who applied to TJO 109862, the Hiring Manager invoked and improvised an assessment criterion that had not been specified

in the TJO and invited the rostered Applicant to a CBI. In accordance with applicable rules, the assessment of candidates must strictly adhere to criteria established in the published job opening. The use of a CBI to further assess the Applicant was explicitly not in compliance with the evaluation criteria advertised in TJO 109862.

58. As stipulated in section 5.11.3 of the Hiring Manager Manual “Changes to a published job opening are not allowed.” This is fundamental to preserving the integrity of the exercise as denoted in section 5.4.5.1 of the same instructions which emphasize that in determining the assessment methodologies “the assessment methods chosen forms part of the evaluation criteria. Care must be taken that the assessment exercise is void of any bias. This was not the case.

59. Given that the Respondent introduced a criterion applicable to roster candidates, section 14.6.5 of the Hiring Manager Manual would apply. The Hiring Manager was not required to interview the rostered Applicant. One or preferably several roster applicants found suitable may be recommended for selection at this stage. The motive behind the Hiring Manager’s insistence on having the Applicant further subjectively assessed is suspect. By the same token, it would have been improper to disqualify the Applicant for not participating in the CBI given it was clearly enunciated that the Applicant was in fact not required to undergo further assessment. The Human Resources assessment of roster candidates states that if one applies to a position for which they are rostered, they will be advanced to the end of the process and exempt from assessment. Considering that he had been assessed as suitable and was already a vetted rostered candidate, his final disposition should have been “Recommended” if not necessarily selected. By marking his application as “Not Recommended” the Hiring Manager unlawfully disqualified the Applicant.

60. This notwithstanding, the Applicant never stopped to reiterate his interest in the post and willingness to be further assessed provided that an impartial and independent panel outside UNISFA would conduct the interviews. This was justified with supporting evidence that this would have: (a) increased the Applicant’s chances to be afforded full and fair consideration; (b) show some semblance that the concerns

raised by the Tribunal in Order No. 046 were being addressed; and (c) mitigate the decisive influence of the Hiring Manager that had previously disqualified him. However, the Hiring Manager refused to formally excuse himself and make any changes to the manner in which the TJO was being conducted and never afforded the Applicant a fair assessment. This was in violation of staff rule 1.2(q) on conflict of interest related to the integrity, independence and impartiality of the process. The Applicant's legitimate rights to be considered fairly and impartially under the new TJO 109862 were violated.

61. As a matter of principle, the Applicant declined to participate in an exercise lacking both impartiality and fairness since the process had been corrupted.

62. There is clear and convincing evidence that the Hiring Manager denied the Applicant the right to full and fair consideration of his candidacy under the RFR 104637. This same bias was carried over to the selection exercise under TJO 109862 since both job openings contained identical requirements and were to be assessed by the same Hiring Manager whose flawed assessment of the Applicant's credentials in RFR 104637 was demonstrated to have been unfair, lacking impartially and verifiably unsustainable.

63. Procedurally, rules were not followed but rather circumvented in order to unlawfully manipulate the selection process.

64. The selection process in both the RFR and the TJO was in contravention of art. 101.3 of the United Nations Charter since it violated basic core values of integrity, fairness and impartiality outlined in staff regulation 1.2.

65. The absence of procedural regularity implicitly confirms the presence of bias aimed at negating the Applicant's legitimate rights for full consideration. This was compounded by the prevailing conflict of interest of the Hiring Manager which compromised the integrity of the process and deprived the Applicant a fair chance of being afforded full and fair consideration.

66. The female candidate recommended by the Hiring Manager on 11 April 2019 was not the person appointed to the post. One of the alternates was. There is no written record of the decision on the Hiring Manager's recommendation. In spite of the delegation of authority, this appears to be contrary to the rules governing staff selection that recognize an important differentiation of roles.

67. The successful candidate was assessed to have met requirements despite the fact that he did not. He did not meet the experience requirements listed in the job opening. The selected candidate did not possess at least 10 years in one or more of the following areas: human resource management, finance and budget, performance management, technology, general administration.

68. The Hiring Manager acted in two capacities since he did not have the requisite delegated authority which amounts to a conflict of interest. The selection decision was implemented in his dual role as the Hiring Manager and the sub-delegated official. This conflict of interest had not been addressed in the manner in which this selection decision had been conducted.

The Respondent

69. The decision not to select the Applicant for TJO 109862 was lawful. The Applicant received full and fair consideration for the job opening.

70. The contested decision was in accordance with art. 101(3) of the United Nations Charter, staff regulations 4.1 and 4.2, and ST/AI/2010/4/Rev.1

71. As a result of the Applicant's decision not to participate in the interview, the interview panel decided not to recommend him for selection. The head of entity lawfully selected a candidate from among the three recommended candidates.

72. All job candidates, including the Applicant, were required to participate in an interview. The inclusion of the phrase, "Previously rostered candidates are not subject to any further assessment and as such will not be invited for such assessment" in the

TJO did not serve to exempt the Applicant from an interview. The inclusion of that phrase was an editorial error which did not serve to exempt the Applicant from an interview. The editorial error was of no consequence to the outcome of the selection process and did not result in an irregularity that would otherwise vitiate the selection process. The Applicant did not raise any issue with the inclusion of the phrase in the TJO when he objected to the interview. Rather, his concern was with the CMS being the Hiring Manager or decision maker for the TJO and with the possibility of the interview panel coming from outside UNISFA, which concerns were adequately addressed before the interview time.

73. The editorial error was of no consequence to the outcome of the selection process. At the time of the TJO, there was no roster for Chief/ORM, P-5. That roster was endorsed by the Field Central Review Board (“FCRB”) on 7 February 2020. Editorial errors in a job opening do not invalidate a selection process.

74. There were no grounds to exclude the Hiring Manager from the interview panel. The Applicant’s disagreement with the Hiring Manager’s previous decision to cancel the RFR for the position of Chief/ORM, P-5 was not a reasonable ground to exclude the Hiring Manager from the selection process for the TJO. The Applicant’s disagreement with the Hiring Manager’s evaluation of his qualifications following the cancellation of the RFR does not establish a conflict of interest or bias on the part of the Hiring Manager.

75. The Applicant’s contention that he should not have been subjected to an interview based on his roster membership is without merit. Roster membership does not necessarily mean that a staff member meets the requirements or possesses the qualifications for a specific job opening. The Administration is required to determine the suitability of a staff member for a position. The Applicant’s roster membership did not exempt him from technical evaluation and selection exercises to determine his suitability.

76. The Applicant’s contention that UNISFA should not have issued a temporary

job opening to fill the position is without merit. UNISFA published the TJO on 11 January 2019 for a period of seven days to temporarily fill the position in accordance with section 2.2(d) of ST/AI/2010/4/Rev.1. It is not for the Applicant or the Dispute Tribunal to determine the correctness of that choice made by the administration amongst the various courses of action open to it.

77. The Applicant alleged to have met all the minimum and desirable requirements for the position. However, his self-assessment has no bearing on the outcome of the selection process. He was not recommended for selection because he declined to participate in the interview to which he was invited. The Applicant knew, or should have known, that he could not be selected for a position for which he chose not to compete.

78. The Applicant's allegations that the contested decision was motivated by bias, personal animus and extraneous considerations are without merit. The Applicant has not met his burden to prove the allegations of bias, personal animus or extraneous considerations. Mere allegations are not proof. The Applicant has made several allegations regarding perceived non-impartiality and conflict of interest by the Hiring Manager. However, he has not produced any evidence to substantiate the allegations. The Applicant can only challenge the outcome of the selection process if it is adverse to him. The final selection decision was not adverse to the Applicant because he withdrew from the selection exercise.

79. In light of the foregoing, the Respondent submits that the Applicant is not entitled to the relief sought and requests the Tribunal to reject the application.

Considerations

80. The issue on the merits in this case is whether the Applicant's candidacy for TJO 109862 received full and fair consideration.

81. Article 101.1 of the United Nations Charter and staff regulations 1.2(c) and 4.1, endow the Secretary-General with broad discretion in matters of staff selection.

In the case of temporary appointments, the purpose, as stated in section 1.1 of ST/AI/2010/ 4 Rev. 1 is to enable the Organization to effectively and expeditiously manage its short-term staffing needs.

82. In a selection exercise to fill temporary job openings, the Administration is still required to adhere to the principle of fairness, reasonableness, legality, rationality, procedural regularity and proportionality. Acting fairly, shall mean that the decision is not tainted by improper motives which shall include bias and or discrimination. Further the Administration shall not act in a capricious or arbitrary manner. The Tribunal shall interfere with a decision which it finds to be absurd or perverse.¹⁶

83. The jurisprudence of the Appeals Tribunal further provides that, in reviewing the impugned decision, it is the role of the Tribunals to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration¹⁷.

84. The starting point during this review is to recall that,

Promotions and selections are presumed to be regular. However, the presumption is rebuttable. If management is able to show that an applicant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, 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 promotion. A candidate challenging the denial of promotion therefore must prove that proper grounds of review exist to rebut the presumption of regularity and set aside the decision. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been

¹⁶*Sanwidi* 2010-UNAT-084, confirmed in many subsequent cases including in *Kinyanjui* 2019-UNAT-932.

¹⁷ *Krioutchkov* 2020-UNAT- 1066. para. 17, *Lemonnier* 2017-UNAT-762, para. 31.

followed, and all relevant material has been taken into consideration, the selection or promotion should be upheld¹⁸.

85. In the case at bar the Respondent has outlined the procedure that was followed to fill the TJO, which is the subject of these proceedings. The Respondent has argued that a CBI was one of the eligibility criterion to fill the vacancy. All candidates without any exception had to undergo this interview despite the fact that the notice of interview indicated that previously rostered staff members would be exempted from the interview. This requirement was well known to all candidates well in advance of the interview, they had notice that they would take a CBI.

86. The Applicant in particular was on three separate occasions specifically invited and reminded to attend the interview. The Administration set the interview after three prior postponements to accommodate the Applicant. He did not show up for the interview. He was thus not assessed and failed to get any points from this exercise.

87. The Tribunal finds that the Respondent has satisfied the minimum burden of proof that he acted regularly. The burden now shifts to the Applicant to rebut this presumption through clear and convincing evidence that his candidacy was not given full and fair consideration.

88. In this regard, the Applicant claims that TJOs are not aimed at enlarging the pool of candidates for a regular vacancy. TJO's are not intended to substitute for a legitimate regular selection exercise. The original impropriety was in the decision on the part of the Hiring Manager to cancel the initial RFR exercise when a suitable rostered candidate was in fact available. The Respondent has argued that the purpose of the TJO was to fill the position temporarily pending finalisation of a regular selection process. This is an acceptable reason recognised by the relevant Administrative Instruction. The Applicant's arguments to the contrary are not proved

¹⁸ *Ngokeng* 2017-UNAT-747, para. 33. Confirmed in *Kinyanjui* 2019 quoting *Verma* 2018-UNAT-829, para.14.

by evidence or backed by law.

89. The fact that a “suitable rostered candidate was in fact available” as suggested by the Applicant was not a criterion to determine the best candidate under the selection procedure of the vacancy. There was a need for all candidates including those on the roster to attend an interview to determine a candidate based on technical competence. The Applicant was not entitled to and has not shown any legal basis either by citing a rule or regulation or policy or jurisprudence that exempted him from participating fully and completely in the selection process. His argument fails to take into consideration the one underlying principle of the Respondent’s discretion in staff selection, which is that even in TJOs, the Secretary-General shall not compromise on the United Nations core values and competences.

90. Similarly, the Applicant has not shown which particular applicable rule states that the assessment of candidates must strictly adhere to criteria established in the published job opening. Section 3.5 of ST/AI/2010/ 4 Rev. 1 states that assessment for a TJO may include a competency-based interview and/or other appropriate evaluation mechanisms, such as written tests, work sample tests and assessment centres. Further, UNAT jurisprudence provides that the Administration’s discretion on staff selection may extend to introducing a criteria in the interests of operational requirements or efficiency as long as such introduction is lawful, reasonable and fair.¹⁹

91. The Tribunal finds that this correction of an error appearing in the advertisement exempting rostered staff members from participating in the interview was not prejudicial to the Applicant’s right to fair and full consideration for the position. This is because it had no effect on the outcome of the selection process as the Applicant and all candidates were expressly on notice that despite the exemption, they were required to sit for a CBI. As rightly argued by the Respondent, editorial

¹⁹ *Smith* 2017-UNAT-785.

errors in a job opening do not invalidate a selection process and the Administration took steps to correct it.²⁰

92. This reasoning is fortified by UNAT established jurisprudence to the effect enunciated in *Kauf* that:

Pursuant to the principle of legality of the Administration, where the Administration commits an irregularity or error in the exercise of its competencies, then, as a rule, it falls to the Administration to take such necessary measures as are appropriate to correct the situation and align itself with the requirements of the law, including the revocation of the possibly illegal administrative act.”²¹

93. As already shown in this Judgment, ST/AI/2010/4 Rev. 1 provides the possibility of conducting a competency-based interview in a TJO. In terms of legal norms, it is more authoritative than the TJO advertisement and hence takes precedence over it.

94. The Applicant has argued that staff regulation 4.4 entitles his candidacy as an experienced person already in the service of the United Nations to be given the fullest regard on an equal footing with all other candidates under circumstances that ensured impartiality. The Tribunal has noted that 65 candidates were reviewed out of which nine including the Applicant were shortlisted for a CBI. The Applicant has not demonstrated the fullest regard he wished to have been given other than by being subjected to the same requirements as every other candidate. The Applicant wished to be treated differently from the other candidates without justification²². This Tribunal has held that proceeding in the manner suggested by the Applicant would breach the other shortlisted candidates’ rights to fair and full consideration²³.

95. The Applicant’s contention that the TJO was issued on “inappropriate procedural grounds following the Hiring Manager’s unlawful disqualification of the

²⁰ *Krioutchkov*, 2019-UNAT-920, para. 20.

²¹ 2019-UNAT-934, para. 21.

²² See generally *Loeber* 2018-UNAT-836.

²³ *Desouza* 2013/UNDT/054.

Applicant for if he had been deemed fully compliant, the Hiring Manager could not have cancelled RFR 104637”²⁴ is not supported by evidence. The Applicant was indeed found to have met some requirements for the TJO as evidenced by his being shortlisted from a pool of 65 reviewed candidates.²⁵ However he was found not qualified for the job because he did not take the CBI to test his technical competence. It was held in *Lemonnier* that

There may be a difference between a staff member on a roster being eligible for a position and the staff member on the roster being qualified for the position, as described in the job opening. Thus a staff member on a roster may be determined to be unqualified for a roster-related job opening due to his failure to meet particular requirements or competencies described in the job opening²⁶.

96. The Applicant further argues that the Administration ‘misused the two distinct recruitment actions with improper motives adverse to the Applicant’s right to fair consideration in strict violation of the staff rules and not in compliance with the lawful administration of temporary appointments as per ST/AI/2010/4 Rev. 1’. The Tribunal notes that the Applicant has not cited any specific section of the Administrative Instruction that was violated during this selection process. The Applicant cites the Hiring Manager’s manual to the effect that “One or preferably several roster applicants found suitable may be recommended for selection at this stage”²⁷. The Applicant cannot rely on this provision because the discretion is not absolute, the Hiring Manager may or may not recommend a candidate from a roster to fill a temporary vacancy. The Hiring Manager can therefore not be compelled to recommend a rostered candidate where the exigencies of the exercise require other qualities, such as a test on technical competence.

97. In relation to improper motives, it is the duty of the Applicant to provide clear evidence of improper motive. It is not enough to just allege without substance. The

²⁴ Amended application, para. 19.

²⁵ Respondent’s closing submission, para. 4 and para. 18 reply.

²⁶ Paragraph 29.

²⁷ Amended application, para. 29.

Applicant has not adduced any evidence to show that the decision was improperly motivated.

98. The Applicant's contention that the "same Hiring Manager that had disqualified him from RFR 104637 later deemed him suitable for the same post under TJO 109862"²⁸ cannot by itself prove improper motive. He has not substantiated the allegation of improper motive. law.

99. The Applicant proposes that he met all the minimum and desirable requirements of the TJO. This assertion is contradicted by the result of the selection process which shows that the Applicant did not attend the CBI therefore his technical competency could not be tested. It is therefore not true that he met all the desirable requirements for the job.

100. The argument that the Applicant's chances of being afforded full and fair consideration would have been achieved only if the CBI was conducted by "an impartial and independent panel outside UNISFA"²⁹ is without any factual or legal basis. It is an assumption not supported by evidence or law.

101. Similarly, the Applicant has not provided any evidence to show "decisive influence of the Hiring Manager"³⁰ in the selection process of the TJO. The Applicant's allegations are not substantiated by evidence.

102. The Applicant has not adduced any evidence to establish that the selection exercise was corrupted or manipulated or that there was conflict of interest, *animus* and bias on the part of the Hiring Manager. It is not enough to just allege without backing the allegation with clear and convincing evidence. The Applicant has not disputed the fact that he was not recommended for selection because he did not take the CBI.

²⁸ Amended application, para. 20.

²⁹ Amended application, para. 31.

³⁰ Applicant's closing submissions, para. 6.

Conclusion

103. Subjecting staff members equally to competitive selection process through a CBI is in full compliance with art. 101(3) of the United Nations Charter as it guarantees securing staff that meet the highest standards of efficiency, competence and integrity.

104. The Respondent has established a clear connection between the selection procedures and the Applicant's non-selection while the Applicant has not proved any improper procedure, bias, conflict, impartiality, unfairness or illegality to rebut the presumption of regularity.

Judgment

105. The application fails.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 19th day of March 2021

Entered in the Register on this 19th day of March 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi