



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/113/R-1

Judgment No.: UNDT/2021/161

Date: 23 December 2021

Original: English

Before: Judge Margaret Tibulya

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, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

Introduction and procedural background

1. On 5 August 2019, the Applicant, Chief, Budget and Finance Officer with the United Nations Interim Security Force for Abyei (“UNISFA”), filed a revised application contesting the failure to afford full and fair consideration to his candidacy for the post of P-5 Chief, Operations and Resource Management, advertised under Recruit from Roster (“RFR”) exercise number 104637 and abuse of authority in cancelling the RFR in violation of the applicable rules following his unlawful disqualification.
2. The Respondent filed a reply on 6 September 2019 in which it was argued that the application was not receivable.
3. On 28 May 2020, the Tribunal issued Judgment No. UNDT/2020/079 in which it found that the application was not receivable.
4. The Applicant appealed the said Judgment and, on 19 March 2021, the United Nations Appeals Tribunal issued Judgment No. 2021-UNAT-1099 which vacated the UNDT Judgment and remanded it to the UNDT for additional fact-finding and judgment on the merits.
5. The Tribunal held a case management discussion on 7 October 2021.
6. On 8 October 2021, the Tribunal issued Order No. 215 (NBI/2021) which granted the Applicant’s request to submit a rejoinder to the reply, to submit additional documentation and set the deadline for the filing of closing submissions.
7. The parties duly filed the said documents on 29 October, 2 November and on 12 November 2021.

Summary of the relevant facts

8. On 9 October 2018, the Administration issued an RFR exercise for the post of Chief, Operations and Resource Management, UNISFA, at the P-5 level under the

reference 18-Administration-UNISFA-104637-J-Abyei with a closing date of 23 October 2018.¹

9. The Applicant submitted his candidacy for RFR 104637 on 22 October 2018.

10. On 28 January 2019, he was notified that the RFR 104637 recruitment exercise had been cancelled and that it may be advertised at a later stage.²

11. On 18 March 2019, the Applicant requested management evaluation of the decision to cancel the RFR 104637 recruitment exercise. On 10 April 2019, he submitted to the Management Evaluation Unit (“MEU”) an addendum to his request of 18 March.³

12. On 7 May 2019, the MEU upheld the contested decision.

Parties’ submissions

Applicant

13. The Applicant makes the following arguments:

a. His exclusion from the RFR selection process was arbitrary, irregular and unlawful.

i. The hiring manager violated the Staff Regulations and Rules and ST/AI/2010/3 (Staff selection system) by failing to formally notify him that he had been eliminated from RFR 104637. He was from the outset deprived of the right under the Staff Rules to challenge his disqualification and request a suspension of action of the decision to later cancel the RFR had he been duly informed.

ii. It is not appropriate to cancel a regular job opening (“JO”) where

¹ Application, annex 2.

² Application, annex 4.

³ Application, annex 9.

at least one candidate would have been deemed suitable. If he had been fully and fairly considered, the facts substantiate that he would have been found suitable on the basis of the published job requirements.

iii. JO cancellation should occur at the earlier stages of the recruitment exercise before the candidates are identified and shortlisted. The JO cancellation was improper since it did not occur before the assessment exercise but after the hiring manager assessed his candidacy on a personal and non-transparent basis.

iv. On 11 January 2019, the hiring manager launched temporary job opening (“TJO”) No. 109862 with a closing date of 18 January 2019 while RFR 104637 was still ongoing. For 10 days running, there were two ongoing recruitment exercises for the same post until the hiring manager finally cancelled RFR 104637 on 28 January 2019. Contrary to ST/AI 2010/3 and ST/AI 2010/4 (Administration of temporary appointments), the hiring manager issued a temporary TJO No. 109862 to fill a regular post.

v. The hiring manager excluded the Applicant from fair consideration through an arbitrary and irregular process in which he misused the mission’s newly delegated recruitment authority to act as hiring manager and Head of Mission (“HOM”) simultaneously. While the extent and level of the sub-delegated authority granted to him by the HOM remains inconclusive, the hiring manager retained absolute control and authority over the entire selection process. This breakdown in internal controls allowed the hiring manager to misuse and abuse his discretionary authority without adhering to oversight procedures as required in sections 7 and 9 of ST/AI/2010/3 to unlawfully disqualify him, which in turn allowed for the cancellation of the RFR and the issuance of the TJO.

b. *There is clear and convincing evidence that the hiring manager did not assess his credentials fairly and impartially.*

i. The Administration manipulated the exercise and JO posting and failed to apply the relevant regulations and rules in a fair and transparent manner, thereby preventing the Applicant from receiving full and fair consideration.

ii. He was disqualified on unreasonable grounds and the hiring manager did not follow section 7.1 of ST/A1/2013 and afford him a fair chance at adequate and impartial consideration. Evidence indicates the Administration's actions constituted substantive material and procedural irregularity and the relevant rules, procedures and guidelines were not followed.

iii. In the rejoinder to the reply, he has referred to evidence he had submitted proving that he met the minimum and desirable requirements which the hiring manager ignored when assessing him. The evidence he adduced also proves that the hiring manager deliberately omitted 13 years of qualifying experience from consideration.

iv. His improper disqualification was implemented by first introducing a comparative assessment that is not regular practice in an RFR exercise. Whereas the JO published assessment criteria that rostered candidates were not the subject of further assessment, this was not followed. The verifiable irrational result of the assessment appeared to be a *mala fide* instrument devised to disqualify him in an arbitrary and unreasonable way.

v. The comparative analysis report ("CAR") was seriously flawed. His suitability was not determined by strictly comparing his Personal History Profile ("PHP") and relevant material against the criteria set out

in the JO. What was improper was the hiring manager's intrusions of unpublished criteria as the basis for excluding the Applicant. The extent to which the CAR was seriously flawed included the rating "partially meets requirements" for an interview that never took place. There was capricious and contradicting comparative assessment for him for the exact same requirements between the RFR and the TJO.

vi. The evidence adduced suggests this recruitment exercise was handled entirely by the hiring manager, as there is no record that the HOM reviewed or endorsed the non-selection decision. The Respondent alleges without documentary evidence that the HOM delegated to the hiring manager his full authority, which would essentially render the role and function of HOM redundant.

vii. According to paragraph 2.3 of ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules), a core principle of delegation of authority is the delegation of centrally held decision-making closer to the point of service delivery. The hiring manager misinterpreted this as a license to make and execute decisions in a manner that headquarters would not have endorsed before 1 January 2019. Using a TJO instead of an RFR for a regular post is a case in point. After he disqualified the Applicant on 2 December 2018, the hiring manager failed to notify him within the prescribed 14 days and then delayed the cancellation of the RFR until 27 January 2019 and in between issued a TJO on 11 January 2019.

viii. Whether the hiring manager had in fact the sub-delegated authority to make appointments up to the D-1 level could not be corroborated due to the lack of documentary evidence provided by the Respondent. The cover letter that the Respondent provided is not authenticated nor registered with an official stamp from the HOM

office. It is however recorded as officially received at the UNISFA, Chief of Mission Support (“CMS”) office on 7 February 2019. The letter is conspicuously backdated to 11 January 2019, the date on which the hiring manager issued the TJO. Therefore, the only facts that can be ascertained from the cover letter are that the hiring manager disqualified the Applicant, issued the TJO and cancelled RFR 104637 without having at the time any sub-delegation of authority, which allegedly arrived at the hiring manager’s/CMS office only on 7 February 2019.

ix. A sub-delegated authority can only enter into force upon the receipt and acceptance of those duties in a corresponding binding document to that effect. As established by jurisprudence, irrespective of the Administration’s scope of discretionary authority, the Tribunal is entitled to draw appropriate conclusions from the failure on the part of the Administration to provide relevant documentary evidence.

Remedies

14. The Applicant submits that the impropriety resulted in a manifestly unreasonable non-selection outcome for him which removed a unique opportunity for promotion and caused irreversible and irreparable harm and damage to his professional standing. He further submits that he had a 100% chance for selection and promotion after a lifetime career dedicated to the service of the Organization had he been given fair consideration since no other roster candidates met the requirements, and that, given the likelihood that he would have remained in this post until his retirement, this signifies a potential loss of some five years of differential in pay and irreparable harm to his career and professional reputation.

15. In view of this he requests the Tribunal to award him the following reliefs:

a. Rescission of the contested decision and damages in the amount of two years’ net base pay for loss of opportunity and moral damages for violation of

rights and loss of *dignitas*. Given that any rescission of the contested decision could no longer repair the permanent and irreparable harm this has caused to his professional standing and career, he requests that the Tribunal compensates him accordingly for both procedural and substantive irregularity.

- b. Costs for the abuse of process that this case has presented.
- c. Promotion to P-5 or alternatively the difference in pay between P-4 and P-5 until retirement, including the difference in pension contributions.
- d. Accountability for the responsible officials.

Respondent

16. The Respondent's case is summarized as follows:

- a. *The contested decision was lawful.*
 - i. The contested decision was in accordance with art. 101 of the United Nations Charter, staff regulations 4.1 and 4.2 and ST/AI/2010/3.
 - ii. UNISFA advertised the Position for a period of 14 days between 9 October 2018 and 23 October 2018 and received six job applications, including the Applicant's. In accordance with section 7 of ST/AI/2010/3, UNISFA reviewed all the job applicants to ensure that they met the JO criteria. The hiring manager evaluated the job candidates against both the required and desirable JO criteria and determined that none of the job candidates met all of the required and desirable criteria of the JO. Pursuant to section 7.6 of ST/AI/2010/3, the hiring manager documented his consideration in a CAR. With respect to the Applicant, the hiring manager determined that he partially met the work experience criteria of the JO.
 - iii. The Applicant's own assessment of his experience has no

bearing on the outcome of the recruitment process. That is the role of the hiring manager. The hiring manager determined that the Applicant lacked sufficient experience in organizational performance management and measurement, service delivery, and managing/measuring resources and resource efficiencies.

iii. The Applicant's contention that he should not have been subjected to an assessment based on his roster membership is without merit. The Position was advertised as an RFR and all job candidates were roster candidates. Additionally, roster membership does not necessarily mean that a staff member meets the requirements or possesses the specific qualifications for a 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 further assessment to determine his suitability.

iv. There is no requirement to assess job applicants through interviews. The hiring manager may choose from various forms of assessments. The Applicant has not produced any evidence to rebut the presumption of regularity, or to show that the contested decision was arbitrary or tainted by improper motive. He 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.

v. It is immaterial that the hiring manager shortlisted the Applicant for a completely different job opening, TJO No. 109862. The issues to be determined by the Dispute Tribunal in the present case are whether UNISFA properly exercised its discretion to cancel the JO and whether the Applicant received full and fair consideration for the position. The issues relating to the Applicant's suitability for the TJO are the subject of separate proceedings currently pending before the Appeals Tribunal.

vi. UNISFA's decision to interview the Applicant for the TJO does not establish an error by the hiring manager with respect to his review of the Applicant's job application for the RFR JO. As the TJO was intended to be only for the short-term, the hiring manager decided to broaden the candidate pool and to use only the required work experience to shortlist job applicants. The Applicant was invited to interview for the TJO because he met the required work experience, though he did not meet the desirable criteria considered for the RFR JO. TJOs have a lower bar for qualifications as opposed to regular job openings given their short-term nature and low risk. As such, the considerations that goes into reviewing TJOs are more expansive due to the need to widen the candidate pool.

b. The cancellation of the RFR JO was lawful and was done under the proper delegation of authority.

i. UNISFA has the discretion whether to recruit from the roster and whether to cancel a job opening.

ii. Contrary to the Applicant's allegations, the Respondent's response to Order No. 215 (NBI/2021) attaches both the delegation of authority from the Secretary-General to the UNISFA Head of Entity ("HOE") and the sub-delegation of authority from the UNISFA HoE to the UNISFA/CMS. The 11 January 2019 letter attaches the sub-delegation instrument from the UNISFA acting HOE at the time, to the UNISFA CMS while the sub-delegation instrument of 28 April 2021 is from the current acting HOE to the UNISFA CMS.

iii. The JO was cancelled on 27 January 2019. The applicable sub-delegation instrument at the time of the cancellation of the JO was the one attached to the letter of 11 January 2019. It confirms that the CMS had authority to make selections at the D-1 level and below and that

UNISFA had authority to cancel the RFR. The 28 April 2021 sub-delegation instrument does not apply retrospectively.

c. The Applicant is not entitled to the relief sought.

i. The Applicant has not demonstrated any procedural or substantive breach of his rights nor has he adduced any evidence of harm.

ii. Compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has in fact occurred. There must be a substantial factual basis and corroboration of independent evidence to support a claim of both procedural breaches and breaches of a fundamental nature.

d. The Applicant's request for accountability should be denied.

i. The Applicant has failed to prove any serious flaws, bias, retaliation or abuse of authority by UNISFA officials.

ii. The Appeals Tribunal has held that the exercise of the power of referral for accountability must be exercised sparingly and only where the breach or conduct in question exhibits serious flaws.

17. In view of the foregoing, the Respondent requests that the Tribunal deny the application.

Considerations

18. In reviewing impugned selection decisions, the Tribunal's role is to assess;

a. whether the applicable regulations and rules have been applied,

b. whether they were applied in a fair, transparent and non-discriminatory manner, and

c. whether the Applicant's candidacy received full and fair consideration.

19. The Tribunal is alive to the following guiding principles. Its role is not to substitute its decision for that of the Administration.⁴ Official acts are presumed to have been regularly performed, but that presumption is rebuttable.⁵ If management is able to show that an applicant's candidature was given 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/she was denied a fair chance of promotion. A candidate challenging denial of promotion must therefore prove that proper grounds of review exist to rebut the presumption of regularity. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the selection or promotion should be upheld.⁶

20. 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.

21. The gist of the Applicant's case is that his candidacy for RFR 104637 did not receive full and fair consideration and that the selection process for that JO was improperly cancelled. He seeks to prove that a number of procedural irregularities occurred to support that claim.

22. The Applicant's complaint is that while he met the minimum requirements under the JO for RFR 104637, an improper evaluation exercise conducted by the hiring manager formed the basis for the unlawful rejection of his candidacy and subsequent cancellation of the selection exercise. He asserts that the hiring manager ignored critical information and assessed him against un-published criteria.

⁴ *Krioutchkov* 2020-UNAT-1066, para. 17; *Lemonnier* 2017-UNAT-762, para. 31.

⁵ *Rolland* UNAT 2011-122.

⁶ *Ngokeng* 2017-UNAT-747, para. 33. Confirmed in *Kinyanjui* 2019-UNAT-932 quoting *Verma* 2018-UNAT-829, para.14.

23. He seeks to rely on the information he submitted in his PHP which he claims evidences the fact that he complied with the eligibility, minimum and desired requirements which were outlined in the JO. Based on this fact, he maintains that a full and fair consideration would have deemed him suitable under the RFR rules.

24. The Respondent asserts that the Applicant received full and fair consideration and that the hiring manager evaluated him based on the work experience he described in his job application and against the published selection criteria. Further, that while the hiring manager considered that the Applicant met the required work experience for the position, he concluded that he did not demonstrate the desirable work experience. It is contended that the hiring manager considered that the Applicant did not demonstrate the desirable work experience of "...planning and administering complex organizational resources in a volatile environment." Citing section 9.5 of ST/AI/2010/3, the Respondent argues that the hiring manager lawfully exercised his discretion not to recommend the Applicant or any other rostered candidate for selection from the roster. None of them met the required and desirable work experience requirements.

25. The Tribunal will resolve the underlying issues presented by the parties' arguments before pronouncing itself on the core issues. The underlying issues are:

- a. whether the hiring manager evoked published or unpublished selection criteria in evaluating the Applicant's candidacy;
- b. whether the Applicant met and exceeded the published selection criteria; and
- c. whether the Administration properly cancelled the selection process.

Whether the H/M evoked published or unpublished selection criteria in evaluating the Applicant's candidacy.

26. The Applicant argues that the hiring manager invoked multiple evaluation criteria which were not stipulated in RFR 104637. He also maintains that the assessment improperly focused on performance management as the sole exclusionary requirement. Further that the hiring manager invoked Organizational performance management and measurement which were improvised during the assessment to disqualify the Applicant and cancel the RFR process.

27. The issues raised by the Applicant are questions of fact, and in line with established jurisprudence,⁷ they will be determined based on the information contained in documents such as the JO and the CAR.

28. According to the JO, the desirable requirements (the only ones in issue) were; “Experience planning and administering complex organizational resources in a volatile environment... Experience implementing UN common system administrative and/or financial policies and practices...” Information in the CAR however indicates that the hiring manager determined that “Outside of RBB, candidate [Applicant] lacks notable experience in organizational performance management and measurement, service delivery, and managing/ measuring resources and resource efficiencies.”

29. The above assessment has no relationship at all with the published criteria. This galvanizes the complaint that the Respondent invoked multiple evaluation criteria which were not stipulated in JO 104637. The Respondent's assertion (at para. 13 of the reply) that the hiring manager evaluated the Applicant based on the work experience he described in his job application and the published criteria of the job opening is factually incorrect. In agreement with the Applicant, the Tribunal finds that the published criteria were not invoked and that unpublished criteria were instead evoked during the Applicant's evaluation.

⁷ *Ross* 2020-UNAT-1054, para. 29.

Whether the Applicant met and exceeded the requirements for the JO.

30. The Applicant's assertion that he met and exceeded the requirements for the JO is premised on his interpretation of the import of the JO. The requirements of the JO were:

At least (10) years of progressively responsible professional experience in **one or more** of the following areas is required: human resource management, finance and budget, performance management, technology, general administration, or related area(s). Experience managing a diverse team is required. Experience planning and administering complex organizational resources in a volatile environment is desirable. Experience implementing UN common system administrative and / or financial policies and practices is desirable. (Emphasis added).

The above excerpt clearly shows that experience was required in one or more of the stipulated areas and not in all of the five areas as the Respondent claims. Based on this, the Tribunal agrees with the Applicant that the Respondent's expressed intention is that candidates only needed to have experience in one of five stipulated areas (human resource management, finance and budget, performance management, technology, general administration), as the minimum requirement.

31. It is worthy to note that the Respondent concedes (at para. 10 of the reply) that the Applicant has relevant experience in more than one area (i.e. in "technology (ICT project management, telecommunications engineering; network security and encryption for the Bank of Canada; ICT consulting projects with UNDP); general administration (as Admin Officer with IOT UNAMID for 2 years); and budget and finance (with UNISFA, Feb 2012 – present)").

32. In the Tribunal's view, however, "experience managing a diverse team" is a standalone. It is not among the five areas covered by the generic requirement. This means that in addition to one or more areas of experience, one had to demonstrate "experience managing a diverse team". The hiring manager, however, did not find the Applicant wanting in this regard (and the Tribunal does not), based on information in

the Applicant's PHP relating to his duties as Chief Finance and Budget officer and as Administrative officer, which expose the requisite experience.

33. Closely linked with the above issues is the complaint that the Respondent ignored available material which could have helped the Applicant to secure a positive assessment. In this regard, the Applicant specifically points to information relating to his work experience as Chief Budget Officer between 21 February 2012 and 13 September 2014 (page 6 of Annex 3) and asserts that it exposes the required experience relating to the unpublished desirable criteria for which he was negatively assessed.

34. The Tribunal agrees with the Applicant in this regard. The description of the Applicant's duties during the above period as presented in his PHP, which included,

...ensure effective and efficient management, monitoring, and control of the budgetary allotments and effecting redeployment of funds as and when required...monitor obligations/expenditure...finalize performance reports...supervise and train junior staff members and evaluate their work...liaise with section chiefs and counterparts at UN Headquarters to ensure effective and efficient management of resources in accordance with the approved mandate...,

leaves no doubt that the information exposes experience which satisfies the requisite criteria of "...performance management and measurement, service delivery, and managing/measuring resources and resource efficiencies."

35. The Tribunal agrees with the Applicant that his experience in Finance and Budget combined with that in managing a diverse team sufficed to secure him a positive assessment. The Tribunal also agrees with the Applicant that since he demonstrated experience in all the five areas, he exceeded the published job requirements.

36. Based on the above findings, the Tribunal is positive that the Applicant met and exceeded the requirements for the JO.

Whether the Respondent properly cancelled the selection process.

37. The stated reason for the cancellation of the selection process is that “none of the rostered candidates met all of the required and desirable criteria of the job opening.” (para. 10 of the reply) As it turns out, at least one of the rostered candidates (the Applicant) met and exceeded all criteria. The Tribunal finds that the Respondent improperly cancelled the selection process.

38. The Applicant further complains that his evaluation was irregular in that while in line with the Recruiters Manual (page 18 of 269, Section 11 item (c)) the JO had stipulated that previously rostered candidates were not subject to any further assessment, the hiring manager nonetheless improvised a CAR and went ahead to assess him.

39. The Applicant’s contention that he should not have been subjected to that kind of assessment based on his roster membership is without merit. Section 7.1 of ST/AI/2010/3 stipulates that “Applicants applying to job-openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job-opening.” It is common cause that all the candidates were roster candidates. They had to be subjected to assessment to determine their suitability for the job. It is also true that roster membership does not necessarily mean that a staff member meets the requirements or possesses the specific qualifications for a JO.⁸

40. Indeed, as the language of the JO indicates, the exclusion of assessment is not all encompassing as the Applicant suggests. The statement that “...and as such, [previously rostered candidates] will not be invited for such an assessment” supports this view. Clearly, the Respondent only had in mind assessment methods which would not require candidates’ attendance, and the CAR is one such method. Its use was therefore not excluded. The Tribunal agrees with the Respondent that the hiring

⁸ *Lemonnier* 2017-UNAT-762, para. 29; *Krioutchkou* 2016-UNAT-807, para. 29; *Charles* 2014-UNAT-416, para.28; ST/AI/2010/3, section 7.

manager lawfully exercised his discretion under section 7 of ST/AI/2010/3 to review job applicants to ensure that they met the criteria of the job opening.

41. The Applicant also contends that the Respondent fabricated data and an erroneous work history profile which they attributed to him. In this regard the Applicant cited information which was extracted from the reply to his suspension of action application (para. 16 of Annex 7 to the application) to the effect that;

candidate has 20 years of experience in the Secretariat in the field of finance and budget (Associate Finance Officer, Chief of payroll, and Budget Officer in UNMIBH 1997-1999), human resources management (Admin Officer & OIC Personnel, UNSCO, 2001 -2005; CCPO in UNDOF, 2005 -2008; OIC HR in MONUC, 2008 -2009; HRO in UNDP, 2009 – 2014; Regional Administrative Office, MINUSCA, 2015 -2018). Candidate does not have experience in Performance management or business Intelligence / analysis.

The Applicant rightly asserts that this information does not reflect his PHP. The Respondent confirms this assertion (at para. 15 of the reply), but explains that the information in issue relates to another candidate and had no bearing on the Applicant's assessment. The Tribunal accepts this explanation. This means that all the complaints based on that information are wrongly premised and are moot.

42. The Applicant points to the alleged procedural irregularities which plagued the RFR process. In this regard he highlights the fact that a separate TJO 109862 was issued on 11 January 2019 with a closing date of 18 January 2019 for the same post while the RFR 104637 process was still officially ongoing. He adds that for 10 days running, there were two ongoing exercises for the same post until 28 January 2019 when the RFR process was cancelled. His other complaint is that the TJO closed 10 days before he was notified that the RFR 104637 process had been cancelled.

43. The Respondent does not deny the above facts, but contends that since the hiring manager's review was entered into the *Inspira* system in December 2018, and since *Inspira* displays the status "recruitment completed" for all job applicants when all job applicants are either rejected or not recommended, in December 2018 all job

applicants for the job opening, including the Applicant would have been able to see the change in status of the job opening.

44. This submission is an admission that the Respondent irregularly maintained two recruitment exercises for the same post running at the same time, and that the RFR recruitment exercise was cancelled on 27 January 2019 and the following day the Applicant was notified that the RFR 104637 recruitment exercise had been cancelled. It is also an admission that the Respondent did not notify the Applicant that he had been eliminated as required by section 10 of ST/AI/2010/3 (“...other candidates convoked for assessment but not selected or placed on a roster shall be so informed by the hiring manager or the Occupational Group Manager within 14 days after the selection decision is made in writing. Applicants eliminated prior to the assessment exercise shall be informed...”). Based on those admissions, the Tribunal finds that those complaints have been proven.

45. The Applicant raises complaints relating to the hiring manager’s role in the RFR selection process. The first complaint is that the hiring manager acted without authority. The Respondent however maintains that on 1 January 2019, UNISFA was granted delegation of authority with respect to the selection of staff up to and including the D-1 level. In this regard, they seek to rely on the delegation instrument from the Secretary-General (attached to their response to Order No 215 (NBI/2021) to prove that the hiring manager acted under delegated authority at all times material to this application.

46. The Applicant however makes valid observations that the documents which the Respondent seeks to rely on only contain the delegation instrument from the Secretary-General to UNISFA acting HOM, which includes the HOM’s authority to make appointments up to the D-1 level in accordance with ST/SGB/2019/2. The documents do not bear the details and extent of the authority that the acting HOM sub-delegated to the CMS as indicated in the second point of the cover letter; i.e., that “the attached documents contain the areas and conditions under which you have delegated authority”.

47. Based on the above, the Tribunal agrees with Applicant's observations that the Respondent's cover letter does not have corresponding attachments and applicable areas and conditions of the sub-delegated authority in each of the four areas including Human Resources. The Tribunal agrees with the Applicant that there is no evidence of the date on which the sub-delegation became effective. There is also no evidence relating to the extent of the authority that may have been sub-delegated to the CMS and retained by the HOM. It is also true that the only properly promulgated documentary evidence is the one effective 28 April 2021 which clearly indicates the areas where the Chief of Mission has been sub-delegated the authority to make appointments restricted to the P-3/FS-6 level and below. It is the Head of Mission who retained the authority to make appointments for the P-4/FS-7 level up to the D-1 level. The sub-delegation of 28 April 2021 is supported by a letter that is officially registered and number-referenced and bears the official stamp originating from the HOM's all of which are lacking in the letter of 19 January 2012 submitted by the Respondent.

48. Since the Respondent either failed or refused to provide the delegation information which was the subject of Order No 215 (NBI/2021), the Tribunal accepts the Applicant's assertions that the hiring manager acted without authority.⁹

49. The Respondent did not respond to assertions that in the selection process leading up to the cancellation of the RFR, the hiring manager was conflicted since he acted as the Head of Entity who had to make the decision and as the hiring manager who was to execute it, which violated the segregation of duties under section 2.3 of ST/SGB/2019/2 ("...the exercise of a delegated authority is the taking of a decision within the authority delegated and is separate from the execution of that decision, which may require a specific administrative capacity...") It also contravened staff rule 1.2(q) (A staff member shall disclose any possible conflict of interest to the Head of office and, except as otherwise authorized by the Secretary General, formally excuse himself or herself from participating with regard to any involvement in that matter

⁹ *Bertucci* 2011-UNAT-121, para. 51; *Abbassi* 2011-UNAT-110, para. 20.

which might give rise to a conflict of interest situation). The Tribunal accepts the Applicant's assertions as unchallenged.

50. Turning to the primary issues presented by this application, that is,
- a. whether the applicable regulations and rules have been applied;
 - b. whether they were applied in a fair, transparent and non-discriminatory manner; and
 - c. whether the Applicant's candidacy received full and fair consideration,

based on the evidence and Tribunal findings that the desirable requirements were not invoked during the Applicant's disqualification, further that the Applicant was improperly evaluated against unpublished criteria and that the requirements of section 7.1 of ST/AI/2013 (Applicants applying to job-openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job opening) were not complied with, the Tribunal finds that the applicable Regulations and Rules were not complied with in the selection process.

51. On the basis of the Tribunal's findings that the Applicant was wrongly evaluated against unpublished criteria, discretionary authority to cancel the JO was misused and abused and the Applicant was not afforded a fair chance at adequate and impartial consideration, the Tribunal finds that the applicable Regulations and Rules were not applied in a fair, transparent and non-discriminatory manner.

52. Based on all the above findings and on the finding that the Applicant met and exceeded the requirements for the JO but that the RFR was improperly cancelled, the Tribunal finds that the presumption of regularity of the hiring manager's actions has been rebutted and that the Applicant's candidacy did not receive full and fair consideration.

Remedies

53. The Applicant prays for the following reliefs:

- a. Rescission of the contested decision;
- b. Damages in the amount of two years' net base pay for loss of opportunity;
- c. Moral damages for violation of rights and loss of *dignitas*;
- d. Promotion to P-5 or the difference in pay between P-4 and P-5 until retirement, including the difference in pension contributions; and
- e. Accountability for the responsible officials.

54. It is the law (art. 10.5 of the Statute of the Dispute Tribunal) that the Tribunal may only order one or both of the following.

- a. Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of art. 10.5.
- 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.

Rescission of the contested decision

55. The Applicant maintains that an order to rescind the contested decision could no longer repair the permanent and irreparable harm to his professional standing and career. The Tribunal however considers that such an order is warranted considering that the contested decision was illegal, irrational, procedurally irregular and arbitrary. An order of rescission of the contested decision is accordingly issued. But in keeping with the applicable law, the Tribunal must set an amount of in-lieu compensation that the Secretary-General may elect to pay instead.

56. Compensation in lieu of rescission shall be an economic equivalent for the loss of a favourable administrative decision.¹⁰ The Tribunal determines that the Respondent may pay the sum equivalent to the difference in the Applicant's pay between P-4 and P-5 from the date of the selected candidate was appointed to TJO No. 109862 to the date of the Applicant's retirement, including the difference in pension contributions.

Damages for loss of opportunity.

57. The Tribunal agrees with the Applicant that since none of the other roster candidates fully met the job requirements, there was a 100% probability that he would have been recommended for the post had he been given fair consideration. The Applicant's argument that the impropriety resulted in a manifestly unreasonable non-selection outcome for him which removed a unique opportunity for promotion at the end of his career is valid. He rightly asserts that the impugned decision caused irreparable harm to his legitimate career expectations and future pension benefits. He is also right to say that owing to an irregular non-selection he is entitled to compensation given the likelihood that he would have remained in this post until his retirement, which signifies a potential loss of some five years of differential in pay. Tribunal jurisprudence¹¹ establishes the principle that an Applicant who has unlawfully

¹⁰ *Mihai* 2017-UNAT-724, para. 19.

¹¹ *Ross* 2019-UNAT-926, paras. 47-48.

lost an opportunity for promotion by reason of an irregular non-selection is entitled to compensation.

58. To quantify the financial value of such loss of opportunity the Tribunal turns to UNDT and the Appeals Tribunal jurisprudence. In *Zhao, Zhuang and Xie*¹² a compensation of USD4,000 was confirmed for a candidate who had been found to have had fair chances to be selected for a P-5 post and the same was awarded by way of moral damages. In *Asariotis*¹³ USD8,000 of compensation was confirmed for a candidate who had 1/7 chance for being selected to a D-1 post and the same amount by way of moral damages. In *Ross*,¹⁴ the applicant in that case was found to have a 1/5 chance of promotion and was awarded USD5,000. Bearing the above arguments and established principles in mind, the Tribunal believes that the sum of USD40,500, which represents the average amount of the compensation awarded in the latter-two cited cases if the applicants had a 100% chance of selection, is appropriate in this case.¹⁵

Moral damages for violation of rights and loss of dignitas.

59. There is no basis for awarding moral damages. Established jurisprudence¹⁶ requires that the applicant's evidence should be corroborated by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred, but there is no such evidence in this case. The request for moral damages for violation of rights and loss of *dignitas* is rejected.

Promotion to P-5 or the difference in pay between P-4 and P-5 until retirement, including the difference in pension contributions.

60. This remedy is not among those which the Tribunal may grant. (art. 10.5 of the Statute of the Dispute Tribunal). This request is therefore rejected.

¹² 2015-UNAT-536.

¹³ 2015 UNAT 496.

¹⁴ UNDT/2018/108.

¹⁵ Calculated as follows: average of (8000 x 7) + (5000 x 5).

¹⁶ 2017-UNAT-742.

Accountability for the responsible officials.

61. Consistent jurisprudence¹⁷ has guided that the exercise of the power of referral for accountability in terms of art. 10.8 of the UNDT Statute must be exercised sparingly and only where the breach or conduct in question exhibits serious flaws. The wrongdoing in this case was primarily that the hiring manager committed various errors in the recruitment process which resulted in the Applicant's loss of an opportunity of promotion at a critical stage of his career. Agreed, the Applicant has suffered serious prejudice, but the Tribunal is not convinced that the circumstances of the case take it in the ambit of one which should call for a referral to the Secretary-General. A referral for accountability is not appropriate.

Decision

62. The application succeeds. The Tribunal awards the Applicant compensation as follows:

- a. The contested decision is hereby rescinded.
- b. As an alternative to rescission, the Respondent may elect to pay the Applicant the difference in the Applicant's pay between P-4 and P-5 from the date of the selected candidate was appointed to TJO No. 109862 to the date of the Applicant's retirement, including the difference in pension contributions.
- c. The Tribunal awards the Applicant USD40,500 as damages for loss of opportunity.
- d. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional 5% shall be

¹⁷ *Appellant* 2021-UNAT-1137, para. 66 citing to *Cohen* 2017-UNAT-716, para. 46; *Igbinedion* 2014-UNAT-410, para. 37; *Finniss* 2014-UNAT-397, paras. 37-38).

applied to the United States of America prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Margaret Tibulya

Dated this 23rd day of December 2021

Entered in the Register on this 23rd day of December 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi