



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NEGASA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Shuba Suresh Naik, OSLA

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Maureen Munyolo, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Security Officer at the United Nations Mission in South Sudan (“UNMISS”) holding a continuing appointment at the FS-5 level, challenges the Administration’s evaluation of his candidature for the Security Affairs Exam.

Factual and procedural background

2. On 10 June 2020, the Applicant sat for the Security Affairs Exam as part of the Young Professionals Programme (“YPP”) process. The exam comprised six parts: five of which had multiple choice questions – United Nations Core Values; Summary & Conclusion; Security Technical Knowledge; Situational Judgment Part; Security Reasoning Part; and the sixth part which required drafting - Security Report Drafting Part.

3. On 11 February 2021, the Applicant received notification that he had not attained the passing score in the written test that would enable him to proceed to the next phase of the selection process.

4. On 12 February 2021, the Applicant sought clarification on the breakdown of his results, the YPP Team explained that some of the questions had been deleted after marking the exams and as such that his remaining answers and scores did not reach the pass mark. No specific breakdown of the Applicant’s scores was given.

5. On 17 February 2021, the YPP Team provided the Applicant with the following explanation:

We are happy to offer you some further explanation of the process though, as we do understand the confusion as to why your score on the Summary & Conclusion exam part is not a whole number score. The reason for this is that every question included in the test may not necessarily be included in the final scoring. We mention in the results letter that the “questions and results are carefully analyzed and reviewed” before being finalized, in an effort to “ensure accuracy and fairness of the exam”. After thorough analysis, a question may be removed from the final scoring if we find that it statistically advantages or disadvantages certain groups of applicants (i.e., causes a disparate impact based on gender, internal

v. external status, etc.). This is a standard practice that we take prior to finalizing the results for all tests we administer, and do so in an anonymous manner (i.e., before we match names to test scores). So, depending on the total number of final questions included in scoring, one's result is not always a number that divides neatly into the 100 points allocated for each MCQ exam part; this then translates into a score with decimal points.

More specifically, for Summary & Conclusion, four questions were eliminated, meaning the final exam part consisted of 16 questions for scoring. Each question was worth 6.25 points, and as you answered 6 of the 16 questions correctly, you received a score of 37.5 points out of 100. We would like to also point out that while a bare minimum threshold of 40 points was set for each of the MCQ exam parts, there was a total MCQ passing point set: 337.5 out of 500 (67.5%). Your total score on the MCQ exam parts was 285.36 out of 500 (57%). We mention this simply to point out that while the 37.5 points seems so close to the 40 points needed to meet the threshold, your total points still are not close to the total MCQ passing point.

6. On 4 March 2021, the Office of Staff Legal Assistance (“OSLA”) sought a breakdown and further clarification of the Applicant’s scores and the basis of the YPP Team decision.
7. On 16 March 2021, the YPP team responded to OSLA’s query but did not provide a breakdown or justification for the basis of the cancellation of questions or the breakdown of the Applicant’s scores.
8. Since the Applicant was disqualified by the YPP Team from proceeding to the next step of the selection process for the YPP programme, his candidature in the YPP process has ended and will no longer be considered going forward save for an intervention of the rescission of the decision.
9. On 12 April 2021, the Applicant therefore filed a request for management evaluation challenging the decision.
10. On 29 May 2021, the management evaluation letter was issued upholding the impugned decision.
11. On 25 August 2021, he filed an application with the United Nations Dispute Tribunal sitting in Nairobi to impugn the Respondent’s “failure to give the

Applicant's YPP candidature full and fair consideration for the Security Affairs Exam.”

12. The Respondent filed his reply on 27 September 2021. The Respondent's principal contention is that the impugned decision is lawful. The Applicant received full and fair consideration in accordance with ST/AI/2012/2/Rev.1 (the Young Professionals Programme)

13. On 3 August 2022, the Tribunal issued Order No. 104 (NBI/2022) to inform the parties of its decision to adjudicate this matter on the basis of their written submissions. To that end, the parties were invited to file their closing submissions simultaneously on 16 August 2022.

14. The Applicant and Respondent filed their respective closing submissions as directed.

Parties' submissions

15. The Applicant alleges that his candidature was not given full and fair consideration. ST/AI/2012/2/Rev.1 is clear. Only changes relating to the format can be made to the exam, and even then, only prior to the exam being administered. It does not envision deletion of any questions, let alone once the candidates have sat for the exam and after the papers are marked. The YPP Team/Human Resources engaged in practices that are not envisioned or permitted within ST/AI/2012/2/Rev.1.

16. Section 5.4 of the ST/AI stipulates that the Specialised Board of Examiners can only modify the *format* of the written and oral exam, so as to test certain areas. Such changes shall be communicated to *all* examinees *prior* to the actual exam. The Board does not have the authority to delete any questions, let alone *after* the exam has been done and the papers marked.

17. The Applicant submits that the Respondent's "standard practice" (as described to the Applicant on 17 February 2021) is problematic on several levels. It is also potentially discriminatory and will result in the outcome of the

examinations being tampered/interfered with. A review of the Respondent's explanation shows that the practice is not taken in any anonymous manner as the factors they consider inevitably will require them to consider identifying particulars of a group of people. As the exam would already have taken place and been marked, any action to allegedly prevent disparate impact on one group, will mean that candidates of the other group, if they had scored correctly, will automatically be prejudiced.

18. In this case, the deletion of those questions further prejudiced the Applicant because as the YPP Team explained, he did not reach the minimum score *after* the deletion of the questions. The YPP have also refused to respond to the query on what questions the Applicant got correct or wrong, the specific ones which were deleted, etc.

19. The lack of transparency and refusal to provide candidates with comprehensive information on the outcome of their test shows bad faith on the part of the Administration. The Applicant submits that the Administration should provide information on which questions were deleted, and how the Applicant fared in all questions, for those that were retained and those that were deleted.

20. The Applicant has suffered irreversible harm because of the impugned decision. Beyond recruitment, the conduct of the process would have resulted in the rostering of successful current staff members for future vacancies.

21. The Respondent argues that the impugned decision was lawful. The Applicant received full and fair consideration in accordance with ST/AI/2012/2/Rev. 1.

22. The Applicant failed the Multiple-Choice Questions ("MCQs") of the Specialized Paper of the examination, which disqualified him for further consideration.

23. Four questions were removed from the "Summary & Conclusion" part of the Specialized Paper due to their biases for or against various groups. The removal of the four questions from the scoring did not adversely affect the Applicant. He would have failed the Specialized Paper even if the questions had not been removed.

24. There were no procedural irregularities that negatively impacted on the Applicant's chances of passing the MCQs part of the Specialized Paper. There was no change of format in the administration of the examination as the Applicant alleges.

Considerations

25. In *Duncan* UNDT/2019/078, the Tribunal held that in matters of staff selection, it is the role of the Dispute Tribunal to review the challenged selection process to determine whether the applicable regulations and rules have been applied and whether a candidate has received full and fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration.

26. In other words, the judicial review will be concerned with how the decision-maker reached the impugned decision and not the merits of the impugned decision. The Dispute Tribunal's role is to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent, and non-discriminatory manner.

27. In *Chhikara*, 2020-UNAT-1014, para. 18, the United Nations Appeals Tribunal ("UNAT/Appeals Tribunal") endorsed the minimum standards that must be applied when administering a written test:

a. Generally, while the Administration enjoys a broad discretion on how to administer a written test, it must nevertheless do so in a reasonable, just and transparent manner; otherwise, a job candidacy would not receive full and fair consideration;

b. As also stated in the Manual, any assessment must be undertaken on the basis of a "prescribed performance scale and response guide" and on a "predetermined passing grade". Accordingly, before a written test is administered, a proper and reasonable grading methodology must be adopted and shared with the graders;

c. If subsequent to the administration of the test, it becomes clear that mistakes were made in this methodology, or the written test turned out to be pointless in that no job candidates managed to pass it in accordance with the predetermined passing grade, then (a) a new written test must either be administered or (b) variations must be made

to the assessment methodology that do not prejudice any specific job candidates (the reverse impact of “the no difference principle”).

d. Records of the grading must be developed that clearly describe how each job candidate was assessed, which would allow a third party, such as the [Dispute] Tribunal, to review and verify that the entire process was handled in a proper manner.

27. In the present case, the record shows that the Applicant did not attain the passing score in the written test that would enable him to proceed to the next phase of the selection process. In particular, the exam comprised of six parts, five with multiple choice questions and the sixth which required drafting. The Applicant reached 50.80 (in core values), 37.50 in Summary and conclusions, 47.06 in Technical knowledge, 66.67 in Situational Judgment part, 83.33 in Reasoning, for a total of 285.36 points out of 500 (that is 57.07%).¹ The minimum for each part was 40%. The Applicant did not reach the minimum in the summary and conclusion parts, which reflected in the total score.

28. Out of over 2200 applicants and a total of 743 candidates attending the written examination, only 142 met the baseline threshold of earning at least 40% on each section for further consideration.

29. The Specialized Board in Security Affairs recommended that only candidates with a total score of 67.5% (337.81 points) met the standard required.

30. It has been admitted by the Respondent that certain questions - in the five - part MCQ specialized Paper, Summary and Conclusions part - were deleted after the test was administered. on the grounds that:

After thorough analysis, a question may be removed from the final scoring if we find that it statistically advantages or disadvantages certain groups of applicants (i.e., causes a disparate impact based on gender, internal v. external status, etc.).

31. The Applicant challenges the notion that the Administration has the authority to delete questions after the test was administered, mainly for two reasons: firstly, because, such a power is not provided for in the rules and is contrary to administrative instructions about the selection process; secondly, because the

¹ Respondent's Annex R7.

ground for deletion was related to avoiding discrimination between the different groups of people attending the test, which implies an identification of the candidates to know their gender, nationality, race, provenience from developed or not developed countries, the fact they were internal or external, which inevitably impacted the anonymity of the exams.

32. The Applicant's claim is well founded.

33. On the first point, the Tribunal recalls that ST/AI/2012/2/Rev.1 is clear that only changes relating to the format can be made to the exam, and even then, only prior to the exam being administered. It does not envision deletion of any questions, let alone once the candidates have sat for the exam and after the papers are marked.

5.4 The written and oral examinations shall normally follow a similar format in all job families. However, the *Specialized Boards of Examiners* for particular job families shall have the right to modify the *format* of both the written and oral examinations in order to test knowledge, skills and attributes of specific relevance to that area of work. Any change in the format *shall be communicated to all examinees* through the United Nations Careers portal *prior* to the actual examination.

5.8 Following the assessment of the written papers, the Specialized Board of Examiners shall transmit to the Central Examinations Board, for review and endorsement, the results of the written examination and a list of the examinees to be convoked to sit the oral examination for each job family. Upon receipt of the recommendation of the Central Examinations Board, the Office of Human Resources Management shall notify all examinees of the outcome of their performance in the written examination and convoke the examinees approved by the Board to take the oral examination.

34. As seen from section 5.4, the Specialised Board of Examiners can only modify the format of the written and oral exam, so as to test certain areas. Such changes shall be communicated to all examinees *prior* to the actual exam. Here too the Board cannot delete any questions, let alone after the exam has been done and the papers marked. The YPP Team and the Human Resource are not authorised to engage in this.

35. More importantly, from section 5.8, none of the Specialised Board of Examiners let alone the YPP Team or Human Resources (“HR”) can delete questions. Indeed, following assessment of the written papers, the Specialised Board transmits to the Central Examination Board for review and endorsement the results of the examination and the list of the examinees to be convoked to sit for the oral examinations. The role of Human Resources is then only to notify the examinees of the outcome of their performance, and nothing more.

36. Despite these clear policy provisions, the Administration chose to delete questions from several sections, not only after the candidates had already sat for the written examinations but also after the examinations had been marked.

37. What happened is contrary to the above-mentioned UNAT jurisprudence. If indeed there was a legitimate need to make a correction, which there is no proof that there was, the permitted action that the Administration could have taken as per *Chhikara* was either: (a) administer a new written test to all candidates; or (b) implement variations to the assessment methodology that would not have prejudiced any specific job candidates (the reverse impact of “the no difference principle”). Deleting questions was not an option – not according to established jurisprudence nor the relevant administrative instruction. The Administration’s actions were therefore unlawful.

38. Human Resources further explained that they exclude those questions from being considered as part of the final score and that this is done prior to the setting of cut-off scores or the pass mark is determined. As the Applicant observed, this is also problematic. Even for the Specialised Board of Examiners who are permitted to make changes to the format of the exam questions, such changes must be done prior to the exam being taken. And as per *Chhikara*, the pass mark must be determined prior to the test being administered.

39. The Respondent is silent on the legal authority to carry out such deletion of questions ‘after’ the test has been administered by the Specialised Board of Examiners. Within the ST/AI/2012/2/Rev 1, the only permissible changes which can be done by the Specialised Board of Examiners is to the ‘Format’ of the written

and oral examination and there too these format changes are permitted before the test/interview are administered (section 5.4).

40. The Tribunal notes that in this case the deletions of questions after the tests were administered resulted not simply in a deletion of questions but also a deletion of answers! It was a substantive change, which impacted the outcome of the results and interfered unduly with the selection process.

41. On the second point raised by the Administration, the Applicant convincingly objected that what the Administration calls “standard practice” is problematic on many levels. It is discriminatory and has the effect of illegally tampering/interfering with the outcome of the examinations. Indeed, a review of the Administration’s explanation shows that the practice is not taken in any anonymous manner as the factors they consider inevitably will require them to consider identifying particulars of a group of people e.g., one gender vs. the other gender, whether applicants are internal or external, etc.

42. It is true that, in general, the assessment by the Administration of lack of risk of discrimination may be conducted in an anonymous way by simply applying general criteria and testing their neutrality. However, the Tribunal has not been made aware by the Respondent of the specific assessment made, the specific questions deleted and the specific reason for each of them, the way questions impacted equality of arms, the group considered, and, given that the deletion was made after the test being taken, the cautions and wariness adopted to breach anonymity of candidates or to favour specific group of participants or specific candidates.

43. As observed by the Applicant, if such disparities are to be identified that would mean that a candidate’s gender, country, external/internal status was all identified even if his/her name was not, which could give rise to discrimination, manipulation, impropriety and scope for excluding one or the other group. Further, since the exam would have already taken place and been marked, any action to allegedly prevent disparate impact on one group, will mean that candidates of the other group, if they had scored correctly, will automatically be prejudiced.

44. To discriminate does not only mean the mistreatment of someone, but to treat a person differently from others. Removing discrimination causes the protection of the interests of persons belonging to certain disadvantaged group towards persons belonging to other groups, which means protecting some interests in detriment to other competing interests. There is a choice in the protection that is justified to the extent it is provided by rules; otherwise, it will be up to the decision maker to choose which interests (that is persons) must prevail.

45. Out of a well specified legal framework which allows anti-discrimination intervention, favouring some in detriment of others is unacceptable, in particular when it relates to candidates (where the general rule of equal treatment applies), and moreover when it relates to written tests that have been administered, and answered (competition already over).

46. Not only was there no basis for the deletion of results, but there was an objective manipulation of the results and the entire process lacked transparency.

47. The Respondent raises two important issues. Firstly, as indicated in the management evaluation decision of 26 May 2021, had no questions been removed and the Applicant was graded accordingly, his total score would have been 282.47, which is lower than the final score recognized.

48. Secondly, that even if the questions had not been deleted, the Applicant would have still not passed the examination because he did not reach the overall passing percentage of 67.5% (that is 337.5 points).

49. The Tribunal will examine the two points separately.

50. As to the first point, the Respondent alleges that the Applicant has no interest in challenging the deletion of some questions, because his score in those questions was poorer than the one obtained after the deletion.

51. It could seem an application of the resistance test (or strength test), which implies that an act, although vitiated, cannot be declared void and remains valid if, even removing the vice, the act would reach the minimum requirement to produce

effects. It is a principle applied for instance in the resolutions of shareholders' meeting: a resolution is compromised only if the vote expressed by a shareholder in conflict of interest has been essential for achievement of the majority; in general, we can say that, if a vote by a shareholder is not valid, the resolution stays if, also eliminating the vitiated vote, the resolution remains supported by a sufficient number of votes for its validity.

52. The Respondent's objection has no merit. The objection indeed is grounded on the application to the case of the resistance principle, which is not correct, because it cannot be applied to the deleted questions but to the total amount of questions.

53. Indeed, while the questions excluded by the Administration cannot be considered any more in the evaluation of the test, it remains the fact that the candidate (like the other candidates) must be evaluated for his answer to 20 questions and not 16. His interest in challenging the deletion of four questions is valid.

54. While the final scores were calculated based on the remaining items, the Applicant had the right to be evaluated on 20 items, that is the same number of questions foreseen - and administered - in the competition from the beginning (a number that the Administration, by any evidence, found fair for the assessment to be taken).

55. To keep the exclusion of the Applicant, it would be necessary to exclude that, even administering four additional questions to the candidates (replacing those ones removed) the candidate would not have reached the minimum score (40%) required.

56. No comment has been given by the Administration on this point.

57. However, the records show that the maximum score was 100, therefore the maximum for any of the 20 answers would be five. This means that the Applicant could have obtained 20 additional point answering to his best to the four questions not administered, and therefore reaching 57.37 % of answers and overcome the threshold of 40%.

58. While the Respondent's stand throughout the case that only four questions were deleted from the multiple-choice part 'Summary and Conclusions', perusal of annex R/7 to the reply shows that certain questions from 'Security Technical Knowledge' (three questions) and 'Security Reasoning' (two questions) were also deleted.

59. The Tribunal notes that the document is clear. It shows that nine questions were deleted from the whole test. This affected the overall percentage of the Applicant and adversely affected his overall passing percentage.

60. Similar issues are raised by the second objection by the Respondent.

61. The Respondent argues that, even considering the deleted question, the Applicant would have still not passed the examination because he did not reach the overall passing percentage of 67.5%.

62. The correct application of the resistance principle would require a scrutiny of whether the candidate would reach or not the said minimal percentage, if he would have had the chance to answer to the other nine questions (any, replacing those subjected to deletion).

63. For this profile, the Administration seems to be right in requiring the application of the resistance principle, because even adding 45 points to the total score, the Applicant could have reached 330.36 points, therefore lower than the minimal required score of 337.5.

64. In any case, the Tribunal is aware that the dispute raises other concerns, because no evidence has been provided that the passing grade for each MCQ examination (40%) and overall aggregate for all MCQ parts (67.5%) were determined by the Specialised Board of Examiners before the test were administered and evaluated (the opposite is evidenced by annexes R/3 and R/6 to the Respondent's reply).

65. The Respondent did not face the Applicant's doubts on this point and was silent on how the Specialised Board of Examiners arrived at a decimal point passing

grade (67.5%) and why a whole point percentage was not determined. The Respondent has also not presented the rationale for the determination of overall passing percentage (67.5 %).

66. The Tribunal finds that the Applicant's candidature was not given full and fair consideration. Many questions were deleted after the test, a grading methodology was developed after the test and even the passing grade was determined after the test.

Remedies

67. The Applicant requests the Tribunal to rescind the impugned decision; direct that the Applicant is allowed to participate in the next steps of the YPP recruitment program; and award compensation for the harm suffered.

68. The impugned decision is rescinded.

69. The Tribunal cannot afford the Applicant the opportunity to proceed to the next steps of the selection process. He can however be freshly evaluated on his answers to the questions that were deleted. Indeed, the consequence of the rescission of the challenged decision is that the Applicant has to be placed in the same position he would have been in if the illegality had not occurred, that is, he has to be granted an opportunity to be fairly considered.

70. It falls within the competence of the Tribunal to order the Administration to allow the Applicant to sit on a new test, without delay, and thus to give him the opportunity to be fairly considered in the selection process (*Fernandez Arocena* UNDT/2018/033; see also *Farr* 2013-UNAT-350, para. 28).

71. The Tribunal therefore directs the Respondent to set a new written assessment to be taken by the Applicant, without undue delay.

72. As the contested administrative decision concerns appointment and promotion, the Tribunal sets an amount of compensation that the Respondent may elect to pay *in lieu*, as an alternative to the rescission of the contested administrative decision or specific performance ordered.

73. Considering the nature of the dispute, the length of service and the chances of success in the selection process, the Tribunal sets an amount of six months' net-base salary at the FS-5 level as per the salary scale in effect at the time of the Applicant's application.

74. No evidence of moral harm has been offered by the Applicant.

Conclusion

75. In light of the foregoing, the application is granted.

- a. the challenged decision is rescinded;
- b. the Administration has to set a new written assessment to be taken by the Applicant, without undue delay;
- c. the Administration is to pay to the Applicant compensation in lieu at six months' net-base salary at the FS-5 level as per the salary scale in effect at the time of the Applicant's application;
- 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 compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Francesco Buffa

Dated this 7th day of October 2022

Entered in the Register on this 7th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi