



UNITED NATIONS DISPUTE TRIBUNAL

### **Introduction**

1. The Applicant has challenged a decision dated on or before 12 December 2014 not to roster or select him for the post of Senior Aviation Safety Officer in New York.

### **Procedural history**

2. The Applicant filed an Application with the United Nations Dispute Tribunal (“UNDT”) on 13 July 2015. The Respondent filed his Reply on 17 August.

3. Pursuant to Order No. 353 (NBI-3(.2 Tm [d]-32(e)-304 515t



b. The Chief, Flight Operations Section of the International Civil Aviation Organization (“ICAO”) at the P-5 level, Mr. Mitchell Fox; and

c. The Chief, Recruitment Section of the Field Personnel Division (“FPD”) of DFS at the P-5 level who was female.

15. The Applicant recorded his own answers to the interview using a mobile phone. The questions by the interviewers were not recorded<sup>3</sup>. He made a transcript of that recording which the parties agreed was accurate.

16. Mr. Fox from ICAO gave evidence about how the Panel conducted itself and reached its recommendations. He said he was the sole subject matter expert on the Panel. The expertise of the other Panel members was in United Nations transport needs and Human Resources. He described himself as a recognized specialist in competency-based assessments of candidates, having developed the ICAO standards for competency-based training and assessment, which are identical to those that apply in the United Nations system. He said that the positive and negative indicators (the indicators) for each core competency, taken from the United Nations Competency Development - A Practical Guide<sup>4</sup> (“Practical Guide”), are the objectively verifiable criteria used to assess the individual competencies.

17. Mr. Fox stated that each Panel member was at a different geographical location and before the interviews they met by phone to prepare the questions. He said he made copious notes of the interview which he later destroyed. He did not have a check list of positive and negative indicators during the interview but had the agreed questions and referred to ICAO guidelines which used the same indicators. He asked the candidates questions relating to the competency of professionalism.

18. Following the interview, the Panel had another teleconference in which they reflected on the interview performance of the candidates competency by competency. The FPD/DFS iFS/ bie34(y)31(-)197(Pe18(c)-3(a)ie)17-19yrg 0.9hee7iens09h0 1 279.z t19



candidate failed to provide concise answers to the questions asked. The panel further noted that he was not able to identify either his specific role as part of the team or the team goals. The panel agreed that through his example, the candidate did not provide evidence in demonstrating most of the key indicators of this competency except for working collaboratively with colleagues to achieve organizational goals and soliciting inputs and valuing others' ideas and expertise. The panel agreed that the candidate meets less than

The panel determined that the candidate is fully competent with regards to this competency. His answers to the question were thorough and insightful. The panel further noted that he responded in such a way that is in line with several of the key indicators of the competency such as developing clear goals that were consistent with agreed strategies, adjusting priorities and plans as necessary; as well as allocating appropriate amount of time and resources for completing work.

### Communication

28. The Panel's summary of the Applicant's answer to the question on communication read:

The candidate mentioned while in the Air Force there were many accidents of the MIG-21 Aircraft. He was appointed as leader of a special task force to investigate the reasons why these accidents were occurring. He put a plan together to analyze the reasons for the accidents, studied experiences of the aircrew, particularly the pilots, and discovered a lack of maintenance and spare parts. Based on the records he developed a plan and presented it to managers.

29. The Panel's observations and evaluation for communication reads:

The candidate requires development with regards to this competency. The panel determined that the candidate failed to provide concise answers to the questions asked. The panel agreed that through his example, the candidate did not provide evidence in demonstrating most of the key indicators of this competency except for working collaboratively with colleagues to achieve organizational goals and soliciting inputs and valuing others' ideas and expertise, and is willing to learn from others.

30. The only indicators referred to under the communications competency related to teamwork which was not one of the competencies 0yr the pusty.o7gthetehis example2(u)-131(940







40. Ms. Van der Berg, the Director of Logistics Support Division (LSD) DFS, was the Hiring Manager for this selection exercise. In her evidence to the Tribunal she said that the post of Chief Aviation safety officer is a critical position in DFS as it is entrusted with the management and oversight of ensuring safety and security of DFS air operations.

41. Her role was to ensure that the recruitment process was followed in accordance with the staffing policies and procedures to recruit a qualified candidate for the position. She was not involved with the evaluation of the candidates for the position but endorsed the two candidates recommended by the Panel and submitted them for further review and decision after being briefed verbally by one of the panelists and browsing through the Panel's observations

45. On 12 December 2014, the Applicant was informed that he had been neither selected for the post nor included in the roster of qualified candidates for future similar positions.

46. The Applicant told the Tribunal that he only saw the Interview Assessment Report and the Comparative Analysis Report which was entered into Inspira after he filed his challenge to the decision with the Tribunal. At that stage he noted that the answers attributed to him in the Interview Assessment Report did not reflect the answers he provided during the course of the interview as recorded on his phone.

47. For example, in response to a question related to the competency of

51. As his primary concern in bringing this case was never about money he requested USD1 for moral damages if his claim is supported.

### **Issues**

52. The issues to be determined are:

- a. Whether the competency-based interview of the Applicant was conducted and assessed lawfully;
- b. Whether the Organization acted unlawfully in deciding not to roster or select the Applicant for the post of Senior Aviation Safety Officer in New York following the recruitment exercise; and
- c. If the Tribunal determines that the Organization acted unlawfully under any of the heads stated above, what, if any remedies are due to the Applicant.

### **Submissions**

#### **Applicant**

53. The decision to consider the Applicant unsuccessful in the core value of “Professionalism” and the core competencies of “Communication” and “Judgement/Decision Making” was arbitrary, unfair and unreasonable.

54. With reference to the positive and negative indicators in the competency based methodology he submits that throughout the interview record there is: (i) no indication that he exhibited any of the negative indicators and (ii) ample evidence of him exhibiting most and, perhaps all of the positive indicators.

55. He was rated “requires development” in Professionalism, Communication and Judgement/Decision Making but such rating is not included in the Recruiters Manual 2012.

56. As at the date of the Application, the Administration had not produced the interview record. When no rational reasons are given the Tribunal is permitted to

draw adverse inferences.

57. Composition of the Panel:

a. The assessment panel included only one subject matter expert instead of the two required by section 1 of ST/AI 2010/3 (Staff selection system). The result was that the Applicant's technical and specialized answers had little chance of being properly understood and assessed.

b. Section 9.3 of the Recruiters Manual specifies the criteria for the composition of the assessment panel. They should have completed the training module on competency based selection and interviewing skills. If not this is a procedural flaw.

c. Section 9.3 of the Recruiters Manual suggests that the members participating in evaluating the assessment exercise be the same members as the panel conducting the competency based interview. If they were not this could be considered a major procedural flaw.

58. The eligibility criteria for the post were inadequate. The failings enable candidates with inadequate knowledge and or experience to apply. The Job Opening required candidates to hold either an Airline Transport Pilot License or a Commercial Pilot License, or equivalent but these licenses are not interchangeable. A Commercial Pilot License is manifestly insufficient for the role.

**Respondent**

59. It is not the role of the Tribunal to undertake a merits-based review and it should not substitute its own judgment for that of the decision-maker. It is the conscientious opinion of the panel members that is the essential element of the selection process<sup>5</sup>.

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<sup>5</sup> Abbasi UNDT 2010/086 and 2011-UNAT-110.

60.

higher level as the job opening.

69. The Applicant has confused suggestions and guidelines for Rules. Even if any of his assertions are found to be procedural violations, none of them entitle him to the rescission of the decision. He was not disadvantaged by the alleged violations. He was assessed as eligible, shortlisted, passed two written assessments and invited to participate in a competency based interview





77. Pursuant to paragraph 7.5 of the ST/AI, candidates are to be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview.

78. Paragraph 7.6 states that: “[...] the hiring manager [...] shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria [...]”.

79. Para 9.3 of the Recruiter’s Manual states that all assessment panels must

followed, that the members of the panel exhibited bias, or that irrelevant material was considered or relevant material ignored.

### The Assessment Panel

82. The first question is whether the Assessment Panel was correctly constituted in accordance with section 1(c) of ST/AI/2010/3 and section 9.3 of the Recruiter's Manual. Two issues arise: was Mr. Fox competent to be a panel member and did the panel have the required number of subject matter experts?

83. The Tribunal queried whether, as an employee of ICAO, Mr. Fox was a United Nations staff member for the purpose of Para 9.3 of the Inspira Manual. Having considered submissions from Counsel on this point the Tribunal is satisfied that Mr. Fox was not disqualified from being a member of the Panel as ICAO is part of the United Nations common system.

84. The Panel was comprised of three members, as normally required. One was from outside the relevant work unit and one was female. To this extent it complied with Section 1(c) of the ST/AI. However, according to the evidence, the Tribunal finds that Mr. Fox was the sole subject matter expert for the post of Senior Aviation Safety Officer. The Chief STS was a logistics expert but not an expert in ensuring the safety and security of DFS air operations.

85. The definition of an assessment panel in section 1(c) of ST/AI/2010/3 is "a panel normally comprised of at least three members, with two being subject matter experts [...]". This definition is open to interpretation in relation to the required number of subject matter experts. The word 'normally' could apply only to the total number of members of the panel (normally comprised of three members) or may be interpreted as attaching to the other provisions of the section including the number of subject matter experts. Is the requirement for two subject matter experts and a female member mandatory or is this provision advisory in nature? Both of these interpretations are reasonably possible.

86. Given the ambiguity of the section, the Tribunal refers to the other provisions relating to selection procedures which, given their place in the







full and fair consideration of his candidacy during his competency-based interview and the Panel's assessment of the Applicant was unlawful.

**Issue 2**

Did the Organization act unlawfully in deciding not to roster or select the Applicant for the post of Senior Aviation Safety Officer in New York.

101. The decision not to select or roster the Applicant was based on the recommendation of the Panel in an Interview Assessment Report that was fundamentally flawed and unreliable.

102. The Tribunal holds that the decision not to roster or select the Applicant for the Senior Aviation Safety Officer post was unlawful as it was tainted by procedural errors.

**Issue 3**

If the Tribunal determines that the Organization acted unlawfully under any of the heads stated above, what if any compensation is due to the Applicant?

103. In his evidence, the Applicant stressed that his desire was to be afforded a fair opportunity to compete for the post in question and that his primary concern has never been about money.

106. The facts in this case can be distinguished from those in **Hersh** 2014-UNAT-433/Corr.1

## **Conclusions**