

INTRODUCTION

1. This case concerns the proper meaning and effect of Section 10.4 of ST/AI/2010/3 (Staff selection system) with particular reference to the exercise of discretion vested in the Hiring Manager when the first of two suitable candidates recommended for promotion declines the offer, and a decision has to be taken as to whether to offer the position to the remaining candidate. The Tribunal will have regard to the guidance provided in the Manual for the Hiring Manager reminding itself that the Manual is not the law but has been prepared by the Administration and used in staff training as an instrument to aid in the interpretation of the applicable legal principles. This is particularly apposite in this case given the conflicting interpretations offered by the parties regarding the application of Section 10.4 to the facts as well as the opposing contentions regarding the integrity of the selection process.

2. On 21 October 2016, the Applicant, a former staff member of the United Nations Multidimensional Integrated Mission for Stabilization in Mali (MINUSMA), filed her application challenging the decision not to select her for the position of Gender Affairs Officer at the P-3 level (“Contested Decision”).

3. In defining the claim and response, the Tribunal had regard to the Application, the Reply, any clarification obtained in the course of case management, evidence and submissions at the hearing and taking into account paragraphs 25-27 of *Massabni* 2012-UNAT-238, which 0 0.0 0.0 rg 0.9998 057-334.32 641.76

contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

27. It follows from the above that the UNDT did have a legal basis to define the administrative procedure and decisions subject to review [...].

THE CLAIM

4. The Applicant claims that the decision not to select her for the P-3 Gender Affairs Officer post (“JO 39506”) that was advertised in January 2015 is unlawful in that:

a.

d. The Tribunal should draw the appropriate inferences from the fact that the job vacancies, JO 39506 and JO 63997, which the Applicant applied for in January 2015 and August 2016, respectively, were subsequently cancelled. The ones she did not apply for, TJO 61261 and JO 72373 that were advertised in May 2016 and February 2017, respectively, were not cancelled and went through the selection procedures and were finalised.

5. Additionally, the Applicant points out that when the May 2016 TJO was offered in turn to each of the three recommended candidates, all three of them declined the offer. However, the Mission refused to offer the post to her when the selected candidate declined.

6.

candidate on the recommended list who has passed the assessment exercise.

d. The stated objective of attempting to attract a wider pool of applicants is not a reasonable justification, nor is it a *bona fide* reason for re-advertising the post since there was no modification to the job description and no evidence was provided to the Tribunal

b. The Applicant did not have a right to be selected once the selected candidate declined the offer. The only right she had as a recommended candidate, who was not selected, was to be placed on the roster in accordance with section 9.4 of ST/AI/2010/3. In closing submissions, it was submitted that Section 10.4 of ST/AI/2010/3 does not provide for priority consideration of candidates on the roster.²

c. The Applicant's contention that she was entitled to be selected pursuant to section 10.4 of ST/AI/2010/3 is incorrect. The language used in this section is discretionary in that the SRSG is not required to select a candidate from the roster³ and even if it did, section 10.4 did not require him to select the Applicant.

d. Mr. Davidse widened the pool of candidates to find the best candidate. Although the Applicant was deemed to be suitable, and was placed on the roster, there were legitimate concerns that Mr. Davidse, as the hiring manager, felt obliged to take into account and to decide to widen the pool of candidates.

e. The Applicant did not have a legitimate expectation of appointment for two reasons. First, her interpretation of section 10.4 of ST/AI/2010 is incorrect and, second, Mr. Davidse did not give her any assurance that she would be appointed.

f. Lastly, the Manual for Hiring Managers is not legal authority and does not confer on the Applicant the right to be selected.⁴

FINDINGS OF FACT

9. The Tribunal held a hearing on 23 January 2018 and received evidence from the Applicant and the Hiring Manager, Mr. Koen Davidse, the Deputy Special Representative of the Secretary-General for Political Affairs (DSRSG/PA). Counsel made their final closing submissions on 26 January 2018.

² *Skourikhine* 2014-UNAT-468.

³ *Krioutchkov* 2016-UNAT-707; *Charles* 2014-UNAT-416.

⁴ *Asariotis* 2015-UNAT-496, para 21; see also section 2.6 of ST/AI/2010/3; *Villamoran* UNDT/2011/126; *Korotina* UNDT/2012/178.

The need to translate certain documents from French to English became evident at the hearing and the Tribunal's deliberations were postponed pending receipt of the official translations from DGACM.

10. The Tribunal finds the following facts proven on the basis of the oral and documentary evidence and taking into consideration the submissions of the parties.

a. On 17 November 2013, the Applicant was recruited on a temporary appointment as a Gender Affairs Officer at the P-3 level with MINUSMA. She was the Officer-in-Charge of the Gender Unit from 28 February 2015 following the departure of her supervisor, the Senior Gender Advisor.

b. Between 11 and 26 January 2015, MINUSMA advertised the vacancy of Gender Affairs Officer, P-3, as a fixed-term post (JO 39506). The Applicant applied and, after passing a written test and competency-based interview, she was one of two recommended candidates. There is no aspersion cast on the integrity of the selection process up to this point.

c. When the Applicant separated from service on 15 November 2015, at the end of her temporary appointment, no decision had been made as to JO 39506.

d. The interview panel met on 27 November 2015, ten months after the closing date for the JO 39506 and approximately two weeks after the Applicant's temporary contract had ended.

e. Though not subject to challenge, the Tribunal will deal briefly with the initial offer of appointment since it may have a bearing on the Respondent's contention that the claim is not receivable because there was no administrative decision. On 21 January 2016, the Hiring Manager

f. On 24 March 2016, MINUSMA informed the Applicant as follows: "...you are being informed that you are being placed on a roster of pre-approved candidates for potential consideration for future United Nations Secretariat job openings with similar functions at the same level." After offering advice as to where she could access further information on roster management the letter continued, "[...]" at the same time we encourage you to also actively apply for other positions advertised at [...]" This interoffice memorandum (IOM) clearly and unequivocally informed the Applicant that she was not being offered the appointment. The Tribunal finds that this constitutes notification of an administrative decision.

g. The record in Inspira shows that the Applicant's inclusion in the P-3 Gender Affairs Officer roster was with effect from 1 January 2016.⁵

h. The selected candidate was offered the post on 1 March and declined to accept it on 5 March 2016.

i. On 19 May 2016, the MINUSMA International Recruitment Team advised the Hiring Manager's office that the P-3 Gender Affairs Officer post would be included in the next POLNET semi-annual mobility exercise in July 2016. As a temporary measure, the Recruitment Team proposed that a temporary job opening should be posted to fill the gap until the regular recruitment was finalized.

k. On 3 June 2016, MINUSMA requested that the Office of Human Resources Management (OHRM) include the position of P-3 Gender

selection of a candidate for TJO 61261 that was advertised in May 2016. Her memorandum stated that three initially selected candidates had declined the offer. The SRSG approved the recommendation the same day. This was one of the job openings that the Applicant did not apply for.

r. On 17 February 2017, MINUSMA advertised the post of Gender Affairs Officer, P-3, in the semi-annual POLNET recruitment exercise (JO 72373). The Applicant did not apply for this job opening.

s. The Applicant was selected for JO 63968 with MINUSCA and was given a fixed-term appointment from 21 February 2017 – 20 February 2018.

CONSIDERATIONS

11. The Applicant contests the decision not to offer her the post when the first candidate declined to accept the offer. She alleges that the actions taken subsequently to fill the post were conducted in such a manner as to unfairly exclude her from consideration. In particular, the decisions to close the JOs when she did apply, and to proceed to finality when she did not apply, should be taken into account since they were deliberate attempts to exclude her and thereby deny her full and fair consideration.

12. The issues for determination are:

a. Is the Respondent correct in submitting that the application was not receivable because the Applicant was not contesting an administrative decision since no appointment had been made?

b. Did the Hiring Manager, or anyone with authority to do so, promise the Applicant that she would be appointed or otherwise give her such an indication?

c. In the event that the Tribunal finds the claim receivable, was she accorded full and fair consideration throughout the selection process and in the final decision not to offer her the position when the first preferred

candidate did not accept the offer. This will take into consideration whether the Hiring Manager properly exercised his discretion in deciding on what to do and whether the steps he took were in accordance with ST/AI/2010/3 and the “Manual for the Hiring Manager on the Staff Selection System” (the Manual).

d. If the application succeeds, what remedy should be afforded to the Applicant?

a. Receivability

13. In *Andati-Amwayi* 2010-UNAT-058, the United Nations Appeals Tribunal (UNAT) held that: “

What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

14. In Judgment No. 1157, *Andronov* (2002), the former United Nations Administrative Tribunal defined an administrative decision as:

A unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. ... Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application and they carry direct legal consequences.

This definition has been endorsed repeatedly in the jurisprudence of the United Nations Appeals Tribunal (the Appeals Tribunal/UNAT).⁷

15. In *Ishak* 2011-UNAT-152, the Appeals Tribunal 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 UNDT. In the event of *Ishak*'s non-promotion continuing after the recourse session, those decisions may well have become

in the office gave her similar assurances, he said that he had no way of knowing

selection process to determine whether Mr. Chhikara had received ‘fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration’.”¹⁰

25. In *Riecan* 2017-UNAT-802, the Appeals Tribunal clarified the role of the Dispute Tribunal in reviewing decisions as follows:

In terms of the discretion which vests in the Administration, under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent, and non-discriminatory manner. It is not the Tribunal’s role to substitute their decision for that of the Administration.¹¹

26. In *Rolland* 2011-UNAT-122, the Appeals Tribunal held that:

All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

27. Section 9 of ST/AI/2010/3 (Staff selection system), superceded by ST/AI/2016/1 (Staff selection system) was applicable at the material time. It provides at Section 9.4:

Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories. The roster candidate shall be retained in a roster for a period of two years for male candidates and three years for

¹⁰ See also: *Lemonnier* 2017-UNAT-762; *Ljungdell* 2012-UNAT-265; *Abassi* 2011-UNAT-110.

¹¹ See also: *Kucherov* 2016-UNAT-669; *Nikolarakis* 2016-UNAT-652; *Nwuke* 2015-UNAT-508; *Ljungdell* 2012-UNAT-265.

female candidates after the first day of the month following the selection decision. Candidates included in the roster may be selected by the head of department/office for a subsequent job opening, without reference to a central review body.

28. Section 10.4 provides that:

If the selected candidate fails to take up the functions within the specified time frames for personal reasons or vacates the position within one year, the head of department/office may select another candidate from the list endorsed by the central review body with respect to the particular job opening, or in the case of peacekeeping operations or special political missions, from the roster within the same occupational group. If no such candidate is available, the head of department/office may select another candidate from the roster or recommend the position be advertised in the compendium if no roster candidate is found to be suitable.

29. The introduction to the Manual for the Hiring Manager on the Staff Selection System, chapter 1.1, states that the Manual “provides guidance to the Hiring Manager on the process of filling vacant positions. It serves as a comprehensive step-by-step guide on the staff selection process.” Section 6.10 of the Manual for the Hiring Manager provides guidance on the modification or cancellation of a published job opening. Paragraphs 6 and 7 state:

6. In the event the assessment panel concludes that none of the applicants were found suitable for the position, the assessment of the applicants will be properly recorded in Inspira by the Hiring Manager. The Hiring Manager will then submit to the Senior Recruiter a request to cancel the job opening, along with a detailed written justification explaining the reason why none of the applicants were found suitable.

7. The Hiring Manager shall be aware that a job opening cannot be cancelled as long as there is one (1) suitable candidate on the recommended list who has passed the assessment exercise. In this respect, reference is made to a judgment made in the UN Tribunal¹² on cancellation of a vacancy announcement.

30. In *Asariotis* 2015-UNAT-496, the Appeals Tribunal held:

[...] this particular Manual, being an “Instruction Manual for the Hiring Manager on the Staff Selection System” (emphasis added),

¹² *Verschuur* UNDT/2010/153.

does not have the legal force attributed to it by the Dispute Tribunal. We refer to our jurisprudence in Charles that “[r]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General’s bulletins and administrative issuances.

31. The Tribunal will now deal with the steps taken by the Hiring Manager with particular reference to the reason/s he gave for not recommending to the Head of department that the Applicant be offered the appointment when the first selected candidate declined the offer.

32. When asked by the Tribunal to explain why the Applicant was not offered the post for JO 39506 after the selected candidate declined, Mr. Davidse said that the Applicant was considered. He found that there was a significant gap between the assessments of the two recommended candidates in that the Applicant was merely satisfactory or on the limit of satisfactory; and since he had just joined MINUSMA in October 2015, and did not know the Applicant, he decided to make some enquiries before making a decision. His enquiries revealed concerns about the Applicant’s interactions with certain stakeholder groups. When pressed for details he said:

I consulted the OIC of Gender at the time and the head of the Protection Unit who were both saying that there were some tensions between the Gender and Protection components when the Applicant was OIC of the Unit and who felt that the cooperation between the Units had improved after her departure.

33. In response to a request by Counsel for the Respondent, Mr. Davidse was asked to explain why this was an important factor to consider when deciding whether to select the Applicant he said:

I have a deep commitment to driving the gender parity agenda forward at MINUSMA. I made this a priority from the start and one of the elements of that is a proper integration, proper cooperation of the different elements in the mission that work on this agenda, including the human rights and protection divisions, the protection of women unit and the gender division. I thought it was incredibly important to press for cooperation. We have recently completed a new gender strategy, which emphasizes cooperation, synergy and the need to look at gender both as an interim mission issue and also externally to improve the position of women in the peace process, looking at improving both the

position and number of women in the civilian component of the

37. When asked by the Tribunal if he had prepared a contemporaneous note of the reason why he decided to widen the pool, and the advice he was given by HR, Mr. Davidse said that he

replaced by ST/AI/2016/1 which is applicable to JOs posted on or after 1 January 2017. It provides, in section 13.6, insofar as it is material to this issue, that if the selected candidate declines the offer the head of department or office:

[S]hall inform the Assistant Secretary-General for Human Resources Management or the Secretary-General, as appropriate, who shall make a new selection decision based on the selection recommendations previously submitted by the Job Network Boards or the Senior Review Board, as applicable. In the event that no candidate is available from the list of recommended candidates under sections 10.5 and 11.7 above, the vacant position shall be advertised in the next semi-annual staffing exercise.

41. There is no issue between the parties regarding the propriety of the selection process prior to the receipt by MINUSMA of the report of the Central Review Board (CRB) recommending two candidates. The starting point for an examination as to whether the Applicant was lawfully treated begins with the receipt of notification sent by the first recommended candidate that she declined the offer. In the circumstances, the Hiring Manager had to consider whether to recommend to the SRSG that the position be offered to the Applicant who was the only remaining candidate who had been recommended. The Respondent contends that the use of the word “may” in section 10.4 of ST/AI/2010/3 confers upon the Hiring Manager a discretionary power to appoint another candidate either from the list endorsed by the CRB or the roster or not at all. The Respondent submits that in this case the Hiring Manager had good grounds to be concerned that the Applicant had barely satisfied the selection requirements and that the negative comments made about her relationship with others caused him to entertain serious doubts about her suitability. Accordingly, the Respondent submits that he was justified in not offering the appointment to the Applicant and wishing to widen the pool to find a more suitable person. On the other hand, the Applicant reads section 10.4 together with section 7 of the Manual as placing an onus on MINUSMA to appoint her as the only remaining candidate who was also on the roster for this specific post.

42. The Tribunal accepts that the Respondent’s interpretation is reasonably permissible given that the language used in section 10.4 of ST/AI/2010/3 appears

provided in section 6.10 of the Manual for the Hiring Manager (the Manual). The Tribunal notes that any uncertainty has been removed by section 13.6 of ST/AI/2016/1 which, had it been applicable at the material time, would have favoured the Applicant's interpretation. However, the fact that the Hiring Manager had been advised by HR that he had the discretion not to offer the appointment to the Applicant and to cast the net wide to attract other candidates is not the end of the matter. Any such discretion has to be properly exercised.

43. In *Abdullah* 2014-UNAT-482 the Appeals Tribunal held that managerial discretion is not unfettered and that

a decision of the Administration may be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or was flawed by procedural irregularity or error of law.

44. In *Nikolarakis* UNDT-2015-071, the Tribunal considered that although the Applicant scored a low mark for "teamwork" in the competency based interview, the selection panel ought to have taken into account that in two successive performance appraisal reports, the applicant was rated as "outstanding" and "the ultimate team player". Bearing in mind that under art. 101.3 of the Charter, the paramount consideration in the employment of staff is the "necessity of securing the highest standards of efficiency, competence and integrity" and that the purpose of the competency based interview was to assess whether this standard was met and not whether the staff member was a good interviewee. The point at issue was whether the selection panel was entitled to take into account a matter that was not before them during the selection interview and whether the panel members' knowledge gleaned outside the interview process could legitimately be taken into account. The analysis in the UNDT judgment was rejected by the Appeals Tribunal in *Nikolarakis* 2016-UNAT-652. The Appeals Tribunal held that the UNDT "improperly relied on "logic" to insert a step into the assessment process that is not required under the staff selection system established under the Staff Regulations and Rules."¹³

¹³ *Nikolarakis* 2016-UNAT-652.

45. The Tribunal finds in this case that by taking into account adverse comments that were outwith the selection process and which the Applicant was never given an opportunity to challenge, MINUSMA failed to accord to the Applicant the full and fair consideration that she was entitled to.

d. Remedies

46. Article 10.5(b) of the UNDT Statute, which concerns remedies, was amended on 18 December 2014 by General Assembly resolution 69/203 to the effect that compensation may only be ordered for harm the existence of which must be supported by evidence.

47. Article 10.5 provides:

As part of its judgment, the Dispute 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

b. Payment of 10 months' net base salary for the P-3 position for the period between the date she would have been appointed to the impugned position in MINUSMA and the date of her appointment in MINUSCA;

c. Continuity of service by backdating the Applicant's entry-on-duty (EOD) and effective pensionable date to when she would have been appointed to the impugned position;

d. Payment of the Organization's pension contribution as well as that of the Applicant, for the period between when she would have been appointed to the impugned position in MINUSMA to when she was appointed in MINUSCA; and

e. Compensation for moral and specific damages incurred by the Applicant because of the impugned decision.

f. With respect to mitigation of losses, the Applicant submits that she applied for Gender Affairs Officer posts with other peacekeeping missions in May 2015 (JO 42440), June 2016 (JO 58920), August 2016 (JO 63968 and JO 64104) and October 2016 (JO 68217). She applied for a Gender and Humanitarian Specialist post with UN Women in July 2016 and a Gender and Development Specialist post with UNICEF in January 2018. She also applied for JO 63997 with MINUSMA in August 2016. She was selected for JO 63968 with MINUSCA on 21 February 2017

49. The Respondent made the following submissions on remedies:

a. Payment of the Organization's pension contribution as well as that of the Applicant should be rejected.

b. It would be unreasonable for the Tribunal to award compensation for 10 months. Even if the Applicant had been selected in March 2016, her onboarding would not have been immediate. Since she was on a temporary appointment and had applied for a fixed-term appointment, the preconditions for appointment would have been lengthier.

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52. The compensation awarded shall be paid within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of recovery to the date of payment. If the total sum is not paid within the 60-day period, an additional b49.9998 0.0 0.0 1.0 478.8 707.28 Tm [(da)-16(y)19()] TJ ET Q(d(w)-18(i)3