
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/026

Judgment No.: UNDT/2019/041

Date: 18 March 2019

Original:

New York

Registrar: Nerea Suero Fontecha

WILSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Daniel Trup, OSLA

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Case No. UNDT/NY/2017/026

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On 7 June 2016, the Applicant requested management evaluation of the decision not to select him.

On 15 June 2016, the Applicant filed an application for suspension of action of the contested decision pending management evaluation. On 20 June 2016, [the Dispute Tribunal] issued Order No. 147 (NY/2016), granting the suspension of action pending management evaluation.

On 30 August 2016, [the Management Evaluation Unit,] issued its evaluation letter, which rescinded the contested decision, and stated that [the Under-Secretary-General for the Department of Management] selection exercise should be recommenced, with additional requirements:

- UNJSPF should establish a panel, comprising a majority of individuals outside of the UNJSPF and with no prior involvement in this recruitment, to assist the hiring manager in the recruitment.
- The panel should assess whether the rostered candidates meet the requirements and competencies of the job opening. Such assessment should include a review by the panel of the candidates' applications and competency-based interviews, as well as any other evaluation mechanisms which the panel considers appropriate.
- The panel should prepare a documented record of its assessment of the rostered candidates.
- The hiring manager should submit the documented record of the panel and his/her own reasoned recommendation for selection to the UNJSPF Chief Executive Officer [] for his decision.

On 22 September 2016, the panel members evaluated the personal history profiles of the roster candidates, and confirmed that all of them met the requirements of the position.

On 23 September 2016, the rostered candidates were invited for interviews to take place on 28 September 2016 via Skype, and on 27 September the names of the panel members were disclosed:

- [Mr. PD, name redacted, Deputy Chief Executive Officer Deputy] UNJSPF Hiring Manager (D2)
- [Ms. OP, name redacted], Deputy Chief [Enterprise Resource Planning] Umoja UN Secretariat (D2)
- [Mr. CH], Director Chief Technology Officer UNDP (D1)

Applicant later came to know that the same candidate as before, [Mr. DCD] was the selected candidate.

On 8 and 11 December 2016, the Applicant requested management evaluation of the second selection decision.

On 9 December 2016, the Applicant filed an application for suspension of action of the contested decision pending management evaluation.

On 16 December 2016, [the Dispute Tribunal] issued Order No. 276 (NY/2016), which granted the suspension of action pending management evaluation.

On 12 January 2017, the MEU issued its evaluation of the second selection decision, in which the decision was upheld.

Procedural history

4. On 7 April 2017, the Applicant filed the application.
5. On 10 April 2017, the Registry acknowledged receipt of the application and,

Respondent to file the reply by 10 May 2017.

6. After having first emailed the Registry, on 12 April 2017, Counsel for the Applicant filed a motion for leave to amend the application contending, *inter alia*, that an erroneous date had been inserted in the form as the date on which the Applicant was notified of the contested decision (3 June 2016 instead of 7 December 2016).

7. By email of 12 April 2017, the Tribunal instructed the Respondent to provide his comments, if any, to

8. On 13 April 2017, the Respondent filed his comments to the motion in which he stated that he did not object to the motion being granted but requested be granted 30 days to reply to any amended Application .

9. By Order No. 77 (NY/2017) dated 17 April 2017, the Tribunal granted the and ordered Counsel for the Applicant

to immediately upload an amended version into the
and the Respondent to file his reply by 24 May 2017.

10. On 18 April 2017, the Applicant uploaded an amended version of the

11. On 15 May 2017, the Applicant filed a further motion to amend the
application, apparently in light of ~~9 May 2017~~ ^{9 May 2017} ~~and~~ ^{and}

disagreement over an issue, fact or statement, the submission shall

- a. A consolidated list of agreed and contested facts in two separate chronologies;
- b. A list of agreed and contested legal issues;
- c. A list of document(s), if any, which each party requests production of indicating the relevance of the document(s). If either party objects to the production of said document(s), the party shall state reasoned grounds for the objection;
- d. Whether the parties agree that this case may be decided on the papers or whether they request a hearing on the merits. If the parties request a hearing on the merits of the case, the jointly filed submission shall also include the following:
 - i. Precise reason(s) why a hearing on the merits is necessary;
 - ii. An agreed bundle of documents which the parties intend to rely upon at the hearing. The bundle shall contain an index of the documents contained therein, with each page of the bundle clearly paginated for ease of reference;
 - iii. A list of witnesses each party proposes to call, together with:
 1. A brief statement of the evidence each party intends to elicit from their proposed witnesses;
 2. testimony;
 3. A proposed order of appearance of each witness, confirming whether appearance is in person or remotely, and providing contact details;

... Following the filing of the joint submission, the Tribunal may give further directions as required on the further conduct of this matter.

17. On 17 August 2017, the Respondent filed his response to Order No. 138 (NY/2017), para. 14.

18. On 24 August 2017, the parties filed their joint submission pursuant to Order No. 138 (NY/2017), para. 15. In terms of production of documents, at the the Applicant requested him to produce (a) evidence of the completion of the [competency-based interview] training for each panel member and the date of the training; (b) the signed individual scoring sheets with the notes taken by each assessment panel member for each of the four candidates; and, (c) the final scores and comments signed by each member of the assessment panel (or emails attesting that they received the consolidated comments and agreed with their contents) be produced, to show that these correspond to those included in the Inspira assessment match. Neither party requested a hearing on the merits.

19. By Order No. 27 (NY/2019) dated 2 February 2018, the Tribunal ordered the Respondent to file the evidence and documents requested by the Applicant in the joint submission of 24 August 2017 by 22 February 2018, and the parties to file their closing statements based solely on the evidence on record by 15 March 2018. The Tribunal observed that it would thereafter determine the case on the papers before it.

20. On 22 February 2018, the Respondent filed the evidence and documents as instructed by Order No. 27 (NY/2018).

21. On 13 March 2018, the Respondent filed an amendment to his 22 February 2018 submission.

22. On 15 March 2018, the Applicant filed a motion for leave to respond to the Respondent 13 March amendment to his 22 February 2018 submission.

23. On the same date (15 March 2018), the Applicant further filed his comments
, and his closing statement.

24. Also on 15 March 2018, the Respondent filed his closing statement.

25. On 15 March 2018, the Respondent filed an additional amendment to his 22 February 2018 submission.

26. By Order No. 117 (NY/2018) dated 5 June 2018, the Tribunal ordered the parties to file their updated closing statements based solely on the submissions and evidence on record by 26 June 2018.

27. On

c. Considering the totality of the circumstances of the case, was the selection process otherwise tainted by ulterior motives or procedurally flawed?

d. In case the selection process is considered improper, what remedies is the Applicant entitled to?

The relevant legal framework for the selection exercise

34.

was governed by ST/AI/2010/3, which regulates the staff selections system in the United Nations Secretariat.

35. The sequence of events leading up to the contested selection decision for JO 57744 is as follows (a) In June 2016, the Deputy CEO during the first recruitment exercise made the first selection recommendation; (b) the CEO/UNJSPF chose Mr. DCD as a rostered candidate for the position; (c) the Applicant requested management evaluation of this decision; (d) the Dispute Tribunal suspended the decision pending management evaluation; and, (e) the USG/DM cancelled this first selection decision and provided the following specific instructions for a new and second round of the selection exercise:

a. UNJSPF should establish a panel, comprising a majority of individuals outside of the UNJSPF and with no prior involvement in this recruitment, to assist the hiring manager in the recruitment;

b. The panel should assess whether the rostered candidates meet the requirements and competencies of the job opening. Such assessment should include a review by the panel of th -
based interviews, as well as any other evaluation mechanisms which the panel considers appropriate;

debenus the Tribunal finds that, upon establishing an assessment panel and conducting competency-based interviews, the general rules and directives pertaining thereto must also be followed, even if the selection exercise is limited to rostered candidates. This must be particularly so where an election is made to follow such process, as in the current circumstances, pursuant to specific instructions from the USG/DM, and where the initial selection exercise appeared marred with irregularity so as to be set aside by the Administration.

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44. The standard of judicial review adopted by the Appeals Tribunal when considering a selection decision and the procedure involved therewith, is the notion of the presumption of regularity. See, for ~~ind~~ BT16nni general rules and dir

[staff member] who must show through clear andBT/F1 12 Tf1 0 0 1 327.07 38.544 7

International Labour Organization Judgment No. 179, In re Varney). In this regard, the Tribunal observes that other options were available on the possible design of the assessment panel. For instance, to avoid any allegations of actual or perceived partiality, the Deputy CEO

Applicant had already taken issue with the first selection decision by requesting (a) management to evaluate it, and (b) the Dispute Tribunal to suspend it during this pending management evaluation under art. 2.2 of its Statute. The Applicant was successful in both these requests. After these two interventions, it was only reasonable and prudent for the Applicant to await the second selection process in its new structure rather than immediately make objections. Had the Applicant done so, such objection could well have been regarded not only as premature, but also unnecessarily obstructive by not allowing the assessment panel to have an opportunity to prove its worth. In this regard, the composition of the panel could also have been regarded as only a preparatory step in the final selection decision because the panel was instructed by the USG/DM to assist the hiring manager. Similarly, in *Ishak 2011-UNAT-*

[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
. The same rationale could be applied in the Applicant .

In conclusion, the Tribunal finds that D was timely and appropriate.

59. Finally, it must be determined if the participation of the Deputy CEO as hiring manager and voting panel member could be seen to have corrupted or tainted the entire assessment panel considering the fact that the two other members were both external to UNJSPF and had not previously had any involvement in the exercise. In addition, the process was monitored by a staff member from the OHRM, who sat in on the competency-based interviews. In support of his contentions, the Applicant reproduced the contents of an anonymous email he received stating, heads up, so you understand the biased panel members who are seemingly external but are in fact the closest friends of the [Deputy CEO]. The interview report may

silent on the requirement for such training but, under
 was issued subsequent to Charles such training is mandatory as Chapter 9.3.3 on
 -based
 selection and interviewing skills and follow-up programme: Training module has
 been completed prior to serving on

64. While, pursuant to Asariotis and Charles

assessment panel whose members have all undertaken the relevant training in
 competency-based interviews, the Tribunal notes that all three panel members appear
 to have undertaken some training on competency-based interviews prior to the
 interviews, although all these training sessions took place many years ago. However,
 no evidence on record shows that any steps were taken to confirm the other panel
 compliance with the training requirement before the interviews the
 confirmations appear to only have been provided during the proceedings before this
 Tribunal. As such, it would therefore appear, even though there were no steps taken
 to ensure compliance under the Manual that the panel members had actually done the
 training in a timely manner, although not ideal as management tools are ever
 changing, this was not a circumstance that, by itself, would render the selection
 process flawed. However, when taken as a conspectus of circumstances, this fact may
 lead the Tribunal to arrive at a different conclusion.

Was the selection process otherwise tainted by ulterior motives or procedural flaws?

65. In addition to the Deputy CEO acting as the hiring manager and serving as a
 panel member in the second selection exercise, the Applicant points to some other
 circumstances to prove that the selection exercise was tainted by ulterior motives
 and/or procedural flaws, in particular: (i) that individual scoring sheets were not used
 by the interview panel members after assessing the candidates; (ii) that there was no
 consideration given to the positive ratings of the Applicant in his e-PAS reports; and

(iii) no account was taken of the alleged taint of anonymous emails during the recruitment procedure.

66. The Respondent contends that, in general, the Applicant has failed to demonstrate that the decision not to recommend him was arbitrary, unfair, or tainted by any procedural flaws.

Scoring sheets

67. **The Applicant** submits that the Tribunal should draw an adverse inference from the Respondent failing to produce the scoring sheets or notes from the panel members, as it is logical that three panel members who were interviewing four different candidates on five competencies each would have kept some manner of notes or individual account of each interview. From the

the sample competency-based interview questions and actual questions used in the interview in question, one discerns that there is a minimum of three questions for each competency. The Applicant further contends that it is almost impossible to imagine that the final record was created contemporaneously to each interview or that the three panel members had excellent enough memory to retain detailed information about 15 separate competency evaluations, and answers to over 45 separate questions between the date of the interviews, 7 October 2016, and the date the final record was signed by the panel members, 11 and 18 November, over 30 days later. The Applicant argues that in the relevant training and manuals, notetaking is a given. The failure to take notes should also suggest a procedural flaw and calls into question

during the interview. The lack of any

level, the hiring manager shall support such recommendation by a documented
therewith, according to the agreed facts, t

The panel should prepare a documented record of its assessment of the

No specific requirement is made anywhere that each panel
member shall make a separate scoring sheet, although this would seem to be a very
practical thing to do.

69. The Tribunal observes that in the case of **Staedtler** UNDT/2014/058, the
applicant challenged, as an administrative decision, failure to
provide the interview notes of individual panel members. The respondent submitted
that the individual panel members interview notes were not retained and were not in
possession, and further that by signing the evaluation report the
panel members had accepted that the report reflected the individual members
Also, that the allegation of bias on the part of the Panel members was without
supporting evidence and a grave impeachment of their character and conduct. The
Dispute Tribunal,
documents was misconceived as a substantive administrative decision, accepted this
explanation which was affirmed by the Appeals Tribunal in **Staedtler**
2015-UNAT-547.

70. Similarly, in the present case, as in **Staedtler** no such individual scoring sheets
were made available by the Respondent, who instead produced the finalized report of the
assessment panel signed by all panel members. In this report, the competency-based
interview of each candidate is summarized, and it follows that everyone was assessed
against the competencies of professionalism, planning and organizing, client orientation,
leadership, and managing performance. It further follows from the report, who the panel
members were, that an OHRM staff member attended the interviews as human resources
ex officio

drafting the report. It is also indicated that while the interviews were conducted on 7
October 2016, the panel members signed the report on, respectively, 11 November 2016
(Mr. PD and Mr. CH) and 18 November 2016 (Ms. OP). As hiring manager, Mr. PD then
signed a letter on 28 November 2016 in which he recommended the selection of

74. The Tribunal observes that, while ST/2010/03 is silent on the issue on what importance an assessment panel is -PAS reports, the Appeals Tribunal in *Rieca* stated as follows:

21. Second, in applying the above principles of our jurisprudence,

(see Chapter 7.1.5). In line herewith, the Tribunal finds that it would, in general, only be reasonable for a hiring manager to ensure that all relevant e-PAS reports are presented to the assessment panel along with the other components of the application in order to provide its members with a comprehensive understanding of each individual candidate and to all

performance on the competency basis. In view of the fact that the performance records are not available to the assessment panel, the Tribunal finds that it would be reasonable for the hiring manager to ensure that all relevant e-PAS reports are presented to the assessment panel along with the other components of the application in order to provide its members with a comprehensive understanding of each individual candidate and to all

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during which the relevant rostered candidates were to be appraised at competency-based interviews ba

the contested position and has therefore

Conclusion

87. In light of the above, the application is granted in part, but no monetary compensation is awarded to the Applicant.

(Signed)

Judge Ebrahim-Carstens

Dated this 18th day of March 2019

Entered in the Register on this 18th day of March 2019

(Signed)

Nerea Suero Fontecha, Registrar