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UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2020/020

Judgment No.: UNDT/2020/218

Date: 29 December 2020

Original: English

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**Before:** Judge Margaret Tibulya

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

SOBIER

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Victor Rodriguez

**Counsel for the Respondent:**

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

## **Introduction and procedural history**

1. The Applicant serves on a continuing appointment at the P-4 level as an Engineer at the United Nations Multidimensional Integrated Stabilisation Mission in Mali (“MINUSMA”). On 14 March 2020, he filed an application before the United Nations Dispute Tribunal in Nairobi to challenge the Respondent’s decision to not roster him following a selection exercise for generic job opening (“GJO”) #94302.
2. On 30 April 2020, the Respondent filed his reply to the application.
3. On 20 October 2020, the Tribunal met the parties for a case management discussion. The Tribunal sought the parties’ views on their willingness to resolve the matter *inter partes*, the need for an oral hearing and whether there were additional matters that needed considering before adjudication of the Applicant’s claims.
4. Both parties took the position that this matter could not be settled

## **Legal framework**

8. Article 101.1 of the United Nations Charter (“Charter”) provides that “[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly”.
9. Article 101.3 of the Charter states that “the necessity of securing the highest standards of efficiency, competence, and integrity” is the paramount consideration in the employment of staff and in the determination of conditions of service”.
10. Staff regulation 4.1 confirms that “the power of appointment of staff members rests with the Secretary-General”.
11. Staff regulation 4.2 provides that the paramount consideration in the appointment of the staff “shall be the necessity of securing the highest standards of efficiency, competence and integrity”.
12. ST/AI/2010/3 (Staff selection system) provides in relevant parts as follows:

## **Section 2**

### **General provisions**

- 2.1 The present instruction establishes the staff selection system (the “system”) which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat.
- 2.4 Selection decisions for positions at the D-2 level are made by the Secretary-General when the Senior Review Group is satisfied that the applicable procedures were followed.
- 2.6 This instruction sets out the procedures applicable from the beginning to the end of the staff selection process. Manuals will be issued that provide guidance on the responsibilities of those concerned focusing on the head of department/office/mission, the hiring manager, the staff member/applicant, the central review members, the recruiter, namely, the Office of Human Resources Management (OHRM), the Field Personnel Division of the Department of Field Support, executive offices and local human resources offices as well as the occupational group manager and expert panel. Should there be any inconsistency between the manuals and the text of the present instruction, the provisions of the instruction shall prevail.

13. The Tribunal will be guided by the following principles:
  - a. there is a presumption that official acts have been regularly performed<sup>1</sup>, which is satisfied once it is minimally shown that an applicant's candidature was given full and fair consideration. The applicant must then show through clear and convincing evidence that he was denied a fair chance of appointment in order to win the case.

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twice the admissible processing time frame. The Tribunal accepts that this was an inordinately long time and would urge the Respondent to do all that is necessary to ensure that selection processes are completed in a timely manner.

39. Be that as it may, the assertion that the long time the processing of the GJO took indicates malfunction of the process, and the intention to manipulate the results to suit certain continued intentions, fails for lack of evidence.

40. The fourth complaint relates to the administration of the written tests. To the extent that the Applicant passed those tests, his complaints that TAS used unauthorised criteria at the stage of processing the GJO to minimize the number of candidates who passed the written assessment, and that the pass rate was erroneously raised, further that the Geographical distribution criteria which is normally used to balance the workforce at the hiring stage but not during the process of evaluation of applicants was used, are moot.

41. Consequently, his request for disclosure by the Respondent of all paper work related to the selection exercise, and in particular the composition of applicants (Internal: female, male; External: female, male) throughout the process of GJO #94302 from the admission of applicants, pre-screening, written assessment, CBI, to final rostering, and of the mark he scored during the written assessment is rejected.

42. The fifth complaint relates to the administration of the CBI. He maintains that his responses in the CBI were fluent and smooth, and that based on his recordings of the CBI, he should have received ratings of satisfactory in relation to the competencies addressed during the CBI. This assertion is rejected because it is tantamount to self-evaluation, and it moreover essentially asks the Tribunal to consider the merits of the Applicant's candidature which is outside the Tribunal's mandate. The Tribunal cannot, and will not, substitute its own judgment for that of the Secretary-General in this regard, which by his submissions, the Applicant is asking it to do.<sup>15</sup>

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<sup>15</sup> *Abbasi* 2011-UNAT-110, para. 24, aff'd, UNAT-2011-110; *Rolland* 2011-UNAT-122, para. 20.

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demonstrated. The panel stated that he did not demonstrate most of the key indicators for the competency of Judgement/Decision Making, but the indicators they identified were not indicators for that competency but for Planning and Organizing. In contrast, the panel found him to be fully competent in Planning and Organizing using the same indicators he had failed in Judgement/Decision Making.

49. Even then a finding of bias and ill-motive was not made on account of the identified flaws.

50. The Applicant has not substantiated the allegation that the decision-maker(s) acted in bad faith, and/or that they deliberately intended to favour a particular group of candidates. The Tribunal finds that the assertion that the selection process was tainted by extraneous considerations, ill-motive and bias is not borne out in evidence and is rejected.

Whether the Respondent failed to fully and fairly consider his candidature with the result that the selection decision violated the staff regulations 4.2.

51. The Applicant cites the fact that there were procedural and substantive breaches of process and that the rules governing the selection process were not followed thus his right to be fully and fairly considered for the GJO was not respected.

52. The Tribunal has made a finding that the rules governing the selection process were not entirely followed, and that there were procedural flaws during the selection process.

53. The Tribunal has made a finding that the rules governing the selection process were not entirely followed, and that there were procedural flaws during the selection process. Those flaws were, however, addressed and rectified. The Applicant's candidature failed only at the very end of the process when he did not meet required indicators for the two competencies.

54. The Tribunal has also found that the anomalies in how the interview process was documented was the result of carelessness on the part of the Respondent, but that no bias or ill-motive could be attributed to him.

55. The Tribunal cannot therefore find that the Applicant's right to a full and fair consideration of his candidature was violated.

### **Remedies**

56. The Applicant requested the Tribunal to order the rescission of the selection decision not to roster him and to award him compensation for emotional harm (stress and depression) and career retrogression, and financial damage.

### **Rescission**

57. It is an established principle that the direct effect of an irregularity will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.<sup>18</sup> In *Chhikara*, the Appeals Tribunal ordered rescission of the selection decision on the basis of a finding that the IAR was null and void and inherently unreliable and that the panel's assessment of Mr. Chhikara was unlawful. Further, that there was no viable assessment in evidence on which the Tribunal could base a finding that Mr. Chhikara met only two of the five competencies.

58. In this case there is no real way of knowing whether or not there is a direct link between the irregularities and the Applicant's non-selection/not being rostered. The Tribunal is not equipped nor mandated to assess the substantive answers of candidates

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<sup>18</sup> *Bofill* 2011-UNAT-174, para. 28.



to an interview process. That is the role of the interview panel. The Tribunal cannot therefore assess if

is therefore rejected.

64. The Tribunal agrees with the Respondent that the claim for compensation for career retrogression and for financial damage is speculative since there is no guarantee that the Applicant would have been appointed a Regional Administrative Officer in Kidal even if he had been rostered. Membership on a roster does not entitle a staff member to be selected for any vacant position that may arise in the future; rostered or not since selection is a competitive process.<sup>21</sup> There is therefore no basis for the Applicant's claim that had he been rostered he would have been appointed a Regional Administrative Officer in Kidal and that there would have made an increase of at least USD1,000 a month to his salary and a significant financial contribution to his pension by both himself and the organization. Further, the Tribunal believed the Respondent's assertion that the Applicant's grade was in fact P-4/11 and not P-5, and that he was only temporarily performing higher level functions and receiving a Special Post Allowance at the P-5 level. In his application (at para. 1) the Applicant in fact states that he is at the P-4 level. The Applicant's assertion that the Senior Administrative Officer position in Kidal would have been a normal lateral move since he temporarily served as an SAO in Gao for the last three years is speculative.

65. There is therefore no basis for the award of compensation to the Applicant.

### **Conclusion**

66. Tribunal finds that the Respondent should have properly re-advertised the post (rather than extending the posting period). This was a procedural flaw. The Tribunal also finds that the flaw was addressed when the pool of invited applicants was broadened, because the Applicant - who is a male candidate - made it to the short shortlist of 35.

67. There is no evidence of bias, discrimination or other extraneous factors.

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<sup>21</sup> *Lemonnier* 2017-UNAT-762, para. 29; *Krioutchkouv* 2016-UNAT-707, para. 29; *Charles* 2014-UNAT-416 para. 28; ST/AI/2010/3, section 7.

68. Of the 35 candidates who were interviewed, only 15 were recommended and therefore placed in the pool of rostered candidates. Without capacity to assess the answers given by the Applicant, the Tribunal cannot say that the Applicant would have been one of the 15 candidates.

**Judgment**

69. The application is DISMISSED.

*(Signed)*

Judge Margaret Tibulya

Dated this 29<sup>th</sup> day of December 2020

Entered in the Register on this 29<sup>th</sup> day of December 2020

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi