



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2013/095

Judgment No.: UNDT/2015/079

Date: 4 September 2015

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ZILLNER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a Movement Control (“Movcon”) Officer with the United Nations Stabilization Mission in Haiti (“MINUSTAH”) at the Field Service (“FS”) level 6, is contesting the 6 February 2013 decision of Field Personnel Division (“FPD”), Department of Field Support (“DFS”), that he did not meet the educational requirements for the post as Chief of Movcon at the P-4 level at United Nations Mission in Liberia (“UNMIL”), for which he had been selected from the roster of pre-approved candidates on 7 May 2012. FPD/DFS found that the Applicant’s “Graduate Certificate” in business studies did not meet the educational requirements for the post, and following the decision, the Applicant was also removed from the roster.

2. In his initial application of 21 June 2013, the Applicant sought compensation for the loss of opportunity to take up the post at UNMIL and requested that the impugned decision be rescinded and that he be returned to the roster of Movcon Officers at the P-4 level. However, in February 2015, he was reinstated to the roster as a result of his obtaining a Master of Business Administration (“MBA”) degree in December 2014.

3. Accordingly, the substantive issues for the Dispute Tribunal to determine are whether it was proper for FPD/DFS to (a) reject the Applicant’s candidature for the UNMIL post and (b) then to remove him from the roster.

Facts

Relevant background

4. The following outline of facts is primarily based on the joint statement of agreed facts dated 17 September 2013 submitted by the parties in response to Order

No. 197 (NY/2013) dated 13 August 2013 as well as on the documents and submissions filed by the parties.

5. The Applicant entered into service with the United Nations in 1988.

6. On 13 October 2006, the Applicant received a Graduate Certificate in business studies from Charles Darwin University.

7. In September 2007, when the Applicant was serving at the FS level with the United Nations Interim Force in Lebanon, he applied for the position of Movcon Officer, at the P-4 level, and his academic qualifications were assessed.

8. By email of 25 September 2007, the Chief of Recruitment and Outreach, FPD/DFS, concluded that his Graduate Certificate from Charles Darwin University did not constitute a first-level university degree. On the same date, the Applicant responded that his Graduate Certificate from Charles Darwin University “is in fact a postgraduate degree as [the University] accepted [his] application in their graduate programme based on prior learning and work experience. It is **not** an undergraduate degree” (emphasis in original).

9. On 11 August 2010, the Applicant applied to a generic vacancy announcement for Movement Control Officers at the P-4 level, “VA No. 10-LOG-PMSS-424542-R-MULTIPLE D/S”. The educational qualifications were described as follows:

Advanced University degree (Master’s degree or equivalent) preferably in business administration, economics or transport management. A first level university degree with a relevant combination of academic qualifications and experience may be accepted in lieu of the advance university degree.

10. In the Personal History Profile (“PHP”) by which he applied to the position, under the heading “Education”, the Applicant indicated that the only university

degree or equivalent qualification he held was the Graduate Certificate in business studies from Charles Darwin University.

11. On 19 August 2010, the Applicant sent an email to FPD/DFS stating that (emphasis in original) “[his Graduate Certificate from Charles Darwin University] is in fact a postgraduate degree [and] **not** an undergraduate degree and the university acknowledged that [his] prior educational background was the equivalent of having attained a first level uni degree”.

12. The Applicant was interviewed and subsequently recommended to be placed on the roster for Chief Movcon Officer by the Field Central Review Body (“FCRB”). He was placed on the roster in January 2011.

13. On 5 May 2012, the Applicant received an email from UNMIL Human Resources, Civilian Personnel Section, advising him that the mission had selected him from the roster for the post of Chief Movcon Officer at the P-4 level. In response to Order No. 181 (NY/2015) dated 7 August 2015, the Applicant submitted that he was “not able to provide the position-specific job opening or his actual job application as to the best of his knowledge there was no position-specific job opening, nor did he directly apply for the post in question”. The Respondent contends that, “There was no position-specific job opening advertised for the position of [Movcon] Officer, P-4, with UNMIL. It was not an option for candidates, such as the Applicant, to apply for a position-specific job opening for the [Movcon] Officer position with UNMIL”.

14. The Applicant confirmed his availability and acceptance of the offer on 7 May 2012.

15. By facsimile of 8 May 2012, the UNMIL Director of Mission Support informed the Director of FPD/DFS that the Applicant had “been selected for the position [Movcon] Officer P-4 level, against VA # 424542”.

16. On 6 June 2012, the Applicant received an email from the Reference Verification Unit (“RVU”) of FPD/DFS at the United Nations Logistics Base in Brindisi requesting he contact the Registrar’s Office at Charles Darwin University to request that they complete a reference form. The email also asked for the Registry to clarify “the title obtained and dates of attendance [and] if this title is at a bachelor’s level”.

17. Upon the request of the Applicant, by email dated 13 June 2012, the Coordinator of Graduations, Student Administration and Equity Services, Charles Darwin University, informed RVU/FPD/DFS that the University “can confirm that a Graduate Certificate is a level 8 degree, equivalent to a Bachelor degree with honours” and submitted a copy of the Applicant’s academic transcript.

18. On 9 July 2012, the Applicant made a screen shot from Inspira (the online United Nations jobsite) of an “IAU/UNESCO list” indicating that the level of degree of a “Graduate Certificate/Diploma” from Charles Darwin University is a “Masters or Equivalent”. In connection therewith it was also stated that (emphasis added):

The following interface provides you with an opportunity to verify that your academic credential was obtained from an educational institution that is recognized or sanctioned by a competent national authority, included in the IAU/UNESCO list.

19. On 13 June 2012, RVU/FPD/DFS enquired of the Charles Darwin University about whether a “Graduate Certificate in Business Studies is equivalent to a bachelor degree with honours even if the student did not have a bachelor degree prior to enrollment to the course. How can, just a certificate of 40 credits be equivalent to a bachelor’s degree?”

20. On 19 June 2012, the Coordinator of Graduations in the Student Administration & Equity Services, Charles Darwin University, further explained that (emphasis added):

As mentioned in [the] previous email the Australian Qualification Framework [(“AQF”)] states that a Graduate Certificate is a level 8 qualification - as is a Bachelors with Honours and Graduate Diploma.

...

Generally a Graduate Certificate requires a bachelor qualification as an entry criteria, which goes some way to explaining its AQF level. In cases where a student has gained access to a Grad Cert on the basis of substantial relevant work experience, it is because a student has been judged to have achieved the learning outcomes of a Bachelor degree through their career. *In this way it can be seen that a Graduate Certificate does not replace, or is equivalent to a Bachelor degree, it simply has similar entry requirements in terms of previous education or experience.* Every employer should judge the suitability of a qualification to the job applied for.

21. On 22 October 2012, the Australian Government, through its Department of Industry, Innovation, Science, Research and Tertiary Education, informed that:

Graduate Certificates issued by Australian universities are postgraduate qualifications and are located at level 8 of the Australian Qualifications Framework. Level 8 also includes the Bachelor Honours Degree and the Graduate Diploma. For a point of reference, the Bachelor Degree qualification is located at level 7 and the Master Degree qualification is located at level 9. It is expected that those who graduate with a Graduate Certificate have advanced knowledge and skills for professional or highly skilled work and/or further learning, and a Graduate Certificate allows for further postgraduate study in a Graduate Diploma or Master Degree program. The notional volume of learning of an AOF Graduate Certificate is typically 0.5–1 year of full-time postgraduate study.

22. In November 2012, FPD/DFS informed the Applicant that the Office of Human Resources Management (“OHRM”), Department of Management (“DM”), was reviewing the matter.

23. In email of 24 December 2012, the Director of the Strategic Planning and Staffing Division, OHRM, stated that OHRM has delegated the authority to DFS “to select, recruit, determine the level and step of, and to appoint personnel for mission

assignments”, including verification of academic qualifications. She further stated that:

On academic qualifications, OHRM has provided that only a bachelor’s, master’s, or doctorate degree obtained from a nationally accredited institution shall be accepted as valid. The accreditation status of an institution is determined by the competent national authority of the Member-States, which shall be confirmed in the World Higher Education Database compiled by the International Association of Universities and the United Nations Educational, Scientific and Cultural Organization or directly with the Member-States themselves.

...

In light of the above, DFS has therefore the delegated authority to make a determination of the facts and to proceed as follows when a candidate has provided an unaccredited academic qualification or incorrect information regarding academic qualification or work experience in the personal history profile:

...

- c. DFS determines that a current staff member has not made a misrepresentation but does not possess the academic qualification and work experience required for the position to which he or she has applied and for his or her current position. DFS may exceptionally allow the staff member to remain in his or her current position taking into account factors such as the length of service and performance. Such a staff member shall not move or be assigned to another position or duty station in the Organization. The case shall be treated as an exception and will therefore need to be recorded and documented as such.

24. On 4 January 2013, the Acting Chief of Recruitment, FPD/DFS, informed the Applicant that OHRM/DM had confirmed that FPD has the delegated authority to make determinations on negative reference, such as whether the Applicant possesses the required educational requirements for the post as Movcon Officer at the P-4 level, and stated that FPD was further reviewing the matter.

25. On 24 January 2013, OHRM/DM reiterated to the Acting Chief of Recruitment, FPD/DFS, that:

The United Nations does not have the authority to equate academic qualifications with standardized degrees, such as Bachelor's, Master's or higher. The United Nations only recognizes what is recognized by the national government from which the academic qualification is obtained.

26. On 6 February 2013, the Acting Chief of Recruitment, FPD/DFS, emailed the Applicant stating (emphasis in original):

The Charles Darwin University, a fully accredited institute, has accepted your life experience as an entry requirement for its Graduate Certificate Programme which offered 40 credit points. You do not possess an undergraduate degree. The Graduate Certificate does not replace, neither is it equivalent to a Bachelor[']s degree, it simply has similar entry requirements (of a BA) in terms of previous education or experience. FPD has no authority to grant an equivalency for a certificate, which is part way en route to the completion of a Master[']s degree]. Graduate Certificates and diplomas are recognized as foundation courses for Masters level study. If a student does not have a Master[']s conferred by a University, **such certificates and diplomas cannot be considered as** a full degree, as the [O]rganization only recognizes Master[']s degrees. The Graduate Certificate is thus not equivalent to a postgraduate [Master's] degree.

27. On 28 May 2013, the Acting Chief of Recruitment, FPD/DFS, requested the Chief of the Headquarters Staffing Section, OHRM/DM, to remove the Applicant from the roster.

28. By email of 22 December 2014, the Applicant requested RVU/FPD/DFS to verify his academic qualifications as he had "recently [apparently on 3 December 2014] completed a [Master of Business and Administration] (Shipping & Logistics) at Middlesex University London (UK), explaining that he applied for a post of Movcon Officer at the P-4 level and that he was "seeking reinstatement of [his FCRB] clearance and to [be] placed back on the roster".

29. On 4 February 2015, the Enterprise Service Centre confirmed that the Applicant had been reinstated on the roster of Movcon Officer at the P-4 level.

Procedural history

30. On 6 February 2013, the Applicant requested management evaluation of the 6 February 2013 decision of the Acting Chief of Recruitment, FPD/DFS, which is the decision which the Applicant is contesting in the present case.

31. On 19 June 2013, the USG/OHRM upheld the impugned decision, finding that “there is no evidence to suggest that the Administration erred when deciding that [the Applicant] were not in possession of either a Bachelor’s or Master’s degree and thus deeming [him] not eligible to be appointed at the professional level category”.

32. On 21 June 2013, the Applicant filed his application with the Dispute Tribunal.

33. On 24 June 2013, the Registry acknowledged receipt of the application and transmitted it to the Respondent. On 24 July 2013, the Respondent filed his reply, and on 17 September 2013, the parties filed the joint statement of agreed facts.

34. On 27 November 2013, the Respondent requested leave to file a supplemental submission, citing a Federal Court case from Australia. The motion was granted by the Tribunal in Order No. 329 (NY/2013) dated 3 December 2013, also allowing the Applicant to file a response to the Respondent’s submission by 9 December 2013. On 9 December 2013, the Applicant filed his comments and also requested leave of the Tribunal to file further evidence.

35. By Order No. 69 (NY/2015) dated 24 April 2015, the Tribunal granted leave for the Respondent to comment on the further evidence adduced by the Applicant and ordered him to provide:

An account of the procedure and legal basis upon which a roster member may be removed from the roster, and in particular, on the discovery of her/his alleged lack of academic qualifications. This outline shall, at the very minimum, state who the appropriate decision-maker is, and detail how such process is initiated and conducted.

36. In his response dated 13 May 2015, paras. 18 and 19, the Respondent detailed the procedures, prior to and post 31 March 2014, by which a roster member who did not meet the academic qualifications of a job opening could be removed from the roster, and which were applied in the case of the Applicant. However, the Respondent failed to indicate the precise legal basis, such as any administrative issuance or the like, with the relevant paragraph number(s), from which the followed procedures derived or were promulgated.

37. By Order No. 136 (NY/2015) dated 8 July 2015, the Tribunal directed the Respondent to provide:

... the precise reference and legal basis, (citing specific references to any administrative issuances and the like), if any, for the correlated procedures, outlined in his 13 May 2015 response, at paras. 18 and 19.

38. The Tribunal further instructed the parties that, “Thereafter, pleadings shall be deemed to be closed, and insofar as the Tribunal will not deem further submissions necessary, it shall proceed to rendering its decision on the papers before it”. On 15 July 2015, the Respondent filed his response.

39. By Order No. 181 (NY/2015) dated 7 August 2015, the Tribunal instructed the parties to file and serve the position-specific job opening, and for the Applicant to file his actual job application for the contested post with UNMIL, or to provide an explanation why he could not do so. On 13 and 21 August 2015, the parties duly filed their responses.

Applicant’s submissions

40. The Applicant’s contentions may be summarized as follows:

a. The Respondent’s decision to remove him from the roster does not take into account guidance from his own Manual for the Hiring Manager on

the Staff Selection System of 12 October 2012; from Australian authorities; or from the academic focal point for UNESCO in OHRM;

b. The Manual for the Hiring Manager, sec. 5.4.3(4)(b), relies on the fact that the task of assessing the equivalence of qualifications has been handed to specific expert bodies who have compiled the list of International Association of Universities (“IAU”) and UNESCO list;

c. A search of the IAU/UNESCO list demonstrates that the IAU and UNESCO’s evaluation is that the Applicant’s qualification is equivalent to a Master’s degree;

d. It is not FPD/DFS’s role nor does it have authority to gainsay the evaluation provided by the IAU/UNESCO list;

e. The purpose of providing staff members with access to the IAU/UNESCO list must be to provide clarity in terms of the equivalence of academic qualifications. By going behind the evaluation contained therein FPD/DFS have exceeded its authority and created a situation where staff members lack certainty and where evaluations in this highly complex area are conducted by unqualified staff;

f. This has given rise to a situation where a staff member, plainly capable of performing the functions of a post for which he had been FCRB cleared and selected, has been forced to wait almost a year to discover his qualifications would not be accepted. Also, UNMIL’s selection of him was overturned;

g. The information available to the Applicant at the time he applied for the generic post was that contained in the IAU/UNESCO list and the Manual for the Hiring Manager. The Applicant relied on this information when

applying for the post, when he was placed on the roster, and when he was selected for a P-4 post;

h. It was only nine months later that FPD informed that his qualifications would not be accepted. As a result, the Applicant was not able to take up the post for which he had been selected and he has now been removed from the roster of P-4 candidates. Given the information made available to the Applicant by the Administration, it was reasonable for him to conclude that his qualifications were sufficient to secure a P-4 post. The Applicant relied on this information in making his application and accepting the post offered to him. In the circumstances, the Administration should be estopped from subsequently arguing that his qualifications were not sufficient for the post;

i. The United Nations cannot grant an equivalence not recognised by the national government, it cannot deny an equivalence recognised by the national government, and under the Australian Qualification Framework (“AQF”), the Australian Government grants an equivalence between a Graduate Certificate and a Bachelor’s with honours as a level 8 qualification. However, FPD based their rejection of this equivalence on an email from a non-government source, namely the Charles Darwin University;

j. When considering the equivalence of one qualification to another the relevant consideration should be the outcome from the course completed—the level 8 Graduate Certificate in terms of knowledge and skills is more advanced than those for a level 7 Bachelor’s degree and the Administration is essentially preferring a less rigorous qualification with less advanced learning outcomes;

k. The case of the Federal Court of Australia, *Bhatt v. Minister for Immigration and Citizenship* [2012] FCA 918 (28 August 2012), filed by the

Respondent in his supplemental submission of 27 November 2013, is not relevant to the present case;

l. Before joining the roster, the Applicant was considered by the Occupational Group Manager, the “Expert Panel” and finally by the FCRB. Part of the role of each of these bodies is to review the information provided by applicants against the requirements of the post applied for. Each of these bodies would have considered, *inter alia*, whether the Applicant met the minimum educational requirements for the post. Each body concluded that he did;

m. However, the information provided by the Applicant in his PHP remains entirely accurate. Part of the role of the Occupational Group Manager, the “Expert Panel” and FCRB is to assess the information in candidate’s PHP and draw conclusions as to how it applies to the job criteria. It is not the case that the Applicant has been found not to hold the qualification; all that has changed is the interpretation of that qualification by the FCRB and the RVU/FPD/DFS, respectively. Initial review bodies considered that the Applicant’s qualification met the minimum requirements for the job;

n. The Applicant does not accept that circumstances justifying his removal from the roster existed. The Applicant relied on the information disseminated by the Organization to conclude that his qualification meant that he met the minimum educational requirements for the post, namely the IAU/UNESCO list, and acted in good faith disclosing accurate information regarding his qualifications;

o. The issue referred to in *Castelli* 2010-UNAT-037 was a failure by the Organization to comply with its own recruitment requirements. It was held that where the staff member had acted in good faith and the error was purely

the responsibility of the Administration, any detriment to the staff member should be mitigated to the extent possible. The instant case can be contrasted since here there was no fault in the recruitment exercise conducted. All the appropriate bodies considered the information in the Applicant's PHP and concluded that he met the minimum education requirements. The information provided in that PHP has been found to have been accurate;

p. Verification of qualification implies an assessment as to whether the information provided in the PHP is true and correct. In the present case, RVU/FPD/DFS has essentially reassessed the question as to whether the Applicant met the minimum education requirements forming a different conclusion to that of previous review bodies based on the same information.

Respondent's submissions

41. The Respondent's contentions may be summarized as follows:

a. The Applicant was fully and fairly considered for the UNMIL post. He had not obtained a Master's degree or a first level university degree at the time of applying for the P-4 level post and did not meet the educational requirements of the post. The contested decision was therefore lawful and reasonable;

b. Section 6.4 of ST/AI/2010/3 (Staff selection system) provides that staff in the Field Service category at the FS-6 level, such as the Applicant, "may apply to positions at the P-3 and P-4 level, provided that they ... meet the academic qualifications required for an appointment to the Professional category";

c. The Charles Darwin University, where the Applicant obtained his Graduate Certificate, has confirmed that this qualification is not equivalent to

either a Master's degree or a first level university degree, which was required according to the job opening for the post;

d. The OHRM's "Guidelines for determination of level and step on recruitment to the Professional category and above" indicate that for the P-4 level, the minimum requirement is a Master's degree and seven years of relevant experience, or a Bachelor's degree and nine years of experience;

e. Under sec. 5.4.3.4 of the Manual for the Hiring Manager and sec. 3.3.4.4(a) of the Manual for the Applicant on the Staff Selection System of 8 October 2012, "A first level university degree may not be substituted by relevant experience";

f. The Charles Darwin University accepted the Applicant's life experience in lieu of a prior university degree in accepting him into the Graduate Certificate program and has confirmed that it waived its usual entry requirement of a Bachelor's degree. This does not mean that the Graduate Certificate itself, which only required 40 academic credits, can be considered equivalent to a Bachelor's degree, which requires 240 total credit points;

g. The reason the Graduate Certificate is listed at level 8 in the AQF table is that the usual entry requirements for admission to this course are the completion of a first level university degree, which is listed at level 7 in the AQF. Where a candidate has not completed a first level university degree, completion of the Graduate Certificate does not substitute for, and is not equivalent to, completing the first level degree, and the Applicant does not hold a Bachelor's degree;

h. In *Neault* UNDT/2012/123, para. 38, the Dispute Tribunal explained that, "It is a matter of fairness and transparency that the vacancy announcement should inform clearly and fully potential candidates of the requirements of an advertised post. This is all the more imperative with

respect to evaluation criteria which will be decisive in the assessment of the candidates' suitability for the post". There is no ambiguity in the educational requirements for generic job opening for the Movcon Officer post at the P-4 level;

i. It is incumbent on the Administration to apply the educational requirements in the interests of transparency and fairness to all applicants, including potential applicants, who refrained from applying to the position for the reason that they did not possess the relevant qualifications. Hence, FPD/DFS determined that it could not accept the Applicant's Graduate Certificate as meeting the educational qualifications;

j. The Applicant argues that since he was rostered against a generic job opening for Movcon Officer at the P-4 level, the principle of estoppel is applicable. This argument has no merit because it is established practice within the Organization to verify applicants' credentials, including work experience and educational qualifications, after the selection decision has been made. This practice is partly due to the large number of verifications required at any given time, and each applicant's affirmation and representation when applying for the post that they meet the advertised educational requirements. At no time did the Organization waive the requirement that the Applicant was required to have a Master's degree or first level university degree with qualifying experience, in order to be considered for posts in the Professional category;

k. The Applicant's Graduate Certificate was neither a first-level university degree nor a Master's degree. In *Bhatt v. Minister for Immigration and Citizenship* [2012] FCA 918 (28 August 2012), the Federal Court of Australia considered whether a "graduate certificate" fell within the natural meaning of "postgraduate diploma"—"when is a 'graduate certificate' not a 'degree', 'postgraduate diploma' or 'diploma'" and whether a "graduate

certificate is an attainment higher than a bachelor's degree". The Federal Court of Australia concluded that "graduate diplomas" and "graduate certificates" are not "interchangeable or that their qualifications are of equal attainment";

l. The Applicant's reliance on the IAU/UNESCO list is misplaced. The IAU/UNESCO list within Inspira does not state or otherwise lead to the conclusion that the Applicant has obtained the academic qualification required by the job opening;

m. The Organization is also obliged to set aside from the recruitment process job applicants who do not meet those requirements (*Smoljan* UNDT/2014/104). Proceeding otherwise would be unfair as it would harm not only other job applicants who were not selected on the grounds that they did not meet the requirements of a job opening, but it would also be unfair and harm other potential job applicants who refrained from applying, conscious that they did not fulfil the same;

n. The staff selection system is silent on the procedures to be used in removing unqualified candidates from the roster, and the Applicant was removed from the roster following the procedures of DFS for doing so;

o. The discretion of the Secretary-General in this regard was recently upheld in *Scheepers et al.* 2015-UNAT-556. In that case, the Appeals Tribunal overturned the Dispute Tribunal's holding that the Secretary-General erred in adopting a requirement that was not formally promulgated in an administrative issuance. The Appeals Tribunal in announcing its judgment stated that the discretion of the Secretary-General under art. 101.3 of the United Nations Charter must be respected, absent any procedural infringements, bias or discriminatory practices;

p. In *Castelli* 2010-UNAT-037, the Appeals Tribunal recognized that “[w]here the administration commits an irregularity in the recruitment procedure, it falls to it to take such measures as are appropriate to correct the staff member’s situation”. Not only does the Organization have a legitimate interest in ensuring that only job applicants who meet the minimum requirements compete for selection for vacant positions, it is required to withdraw job applicants who do not meet the minimum requirements for the selection process (*Smoljan* UNDT/2014/104, para. 31);

q. DFS has been delegated the authority to create rosters. As such, DFS is required to administer the rosters consistent with the principles of the staff selection system, which includes correcting any errors in the membership of a roster;

r. Consistent with sec. 7 of ST/AI/2010/3 on pre-screening, the DFS strives to identify and eliminate from consideration unqualified candidates at the earliest possible stage to prevent their placement on a roster. It is not possible, however, for DFS to eliminate all unqualified candidates at the initial stage of the selection process. A complete verification process of each applicant cannot be completed due to the volume of applications received. As such, prior to the credential verification process, DFS relies on the information provided by staff members in their PHPs;

s. When applicants submit inaccurate information in their PHPs, the pre-screening functions of Inspira will not work. In these instances, the candidates will proceed further along in the recruitment process than they should. When the formal verification process discovers that a candidate does not have the qualifications indicated in his or her PHP, and DFS, consistent with its obligations under the staff selection system, corrects those errors;

t. The implemented DFS procedures ensure a fair and consistent application of its obligation to remove unqualified candidates from the rosters it administers. Those procedures provide job applicants with notice of any issue impacting their roster membership, and provide them with an opportunity to comment and provide evidence to support their roster membership. If the job applicant is unable to establish that they have the necessary qualifications, the Organization is required to take measures to correct the roster. Prior to 31 March 2014, this was accomplished by removal of the candidate from the roster. After 31 March 2014, this was accomplished by requiring the job applicant to remove the incorrect information from the PHP, which automatically resulted in their removal from the roster.

Consideration

Scope of judicial review

42. It follows from the Appeals Tribunal in *Luvai* 2014-UNAT-417, para. 31, that the Dispute Tribunal may examine all steps of a recruitment exercise, which would therefore also include whether the Applicant satisfied the educational requirements for the UNMIL post and whether it was lawful to remove the Applicant from the roster for Movcon Officers at the P-4 level:

It is established in the jurisprudence of this Tribunal that with regard to promotion cases, every stage of the selection procedure is subject to judicial review, in order to ascertain (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

43. The *Luvai* case is of course distinguishable as in this case the Applicant was selected for the post, whilst in *Luvai*, the applicant was not selected despite being recommended by the interview panel as one of 11 candidates to be considered for selection, notwithstanding that he had not passed a United Nations firearms qualification course. In the Applicant's case, he was initially interviewed and cleared

by the FCRB, rostered in 2011, thereafter selected in May 2012, and only given a final decision some eight months later in February 2013 that his qualifications were not accepted and the offer of appointment withdrawn.

44. Under *Abbassi* 2011-UNAT-110, para. 24, the Dispute Tribunal's review is, however, limited in that:

The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the [Dispute Tribunal] or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

Did FPD/DFS fully and fairly consider the Applicant's candidature for the UNMIL post?

45. The Respondent contends that the Applicant was fully and fairly considered but did not meet the education requirements for the post as he held neither a Master's degree or equivalent, or alternatively, a first-level University degree with a relevant combination of academic qualifications and experience. Instead, he held a Graduate Certificate in business studies. The crux of this case is whether the Applicant's graduate certificate constituted a first level University degree with the relevant combination of academic qualifications and experience, and whether the Respondent's reasons for rejecting the Applicant's qualifications are reasonable.

46. It is trite law that the Secretary-General has a broad discretion in the appointment selection and promotion of staff. The Applicant does not deny the Respondent's averment in the reply that he had previously applied for P-4 level posts in 2007 and 2010 and was informed that his graduate certificate did not meet the educational requirements of a post at that level.

47. It is clear that in order to register for a Graduate Certificate, a Bachelor's degree is required as an entry criterion at an Australian university, alternatively

“substantial relevant work experience” will suffice. The Applicant did not have a Bachelor’s degree but had relevant work experience to enroll for the Graduate Certificate course. The correspondence from the Charles Darwin University confirms that “a graduate certificate does not replace, or is equivalent to a bachelor degree, it simply has similar entry requirements in terms of previous education or experience. Every employer should judge the suitability of a qualification to the job applied for”.

48. The Applicant therefore did not have a Master’s degree or equivalent, or a first-level University degree at the material time. The Tribunal also finds that the Applicant’s reliance on the IAU/UNESCO list, as indicated by the screenshot from Inspira, is misguided. The Graduate Certificate is a precursor to the Master’s degree, and in his case, the list serves to simply verify that the academic credential was obtained from a recognised and accredited educational institution. In all the circumstances, the Tribunal finds that the decision that the Applicant did not meet the educational requirements for the post, was not manifestly unreasonable nor unlawful, and was correct. He therefore could not have been considered as a candidate qualified for the post.

49. It was unclear from the papers what the job opening and the applicable educational requirements for the UNMIL post for which the Applicant was selected from the roster were. By Order No. 181 (NY/2015) the Tribunal requested that the Applicant file the position specific job opening and his actual job application for the contested post with UNMIL. The Applicant responded that to the best of his knowledge there was no position-specific job opening advertised for the position of Movcon Officer at the P-4 level with UNMIL, “nor did he directly apply for the post in question”. In response thereto, the Respondent clarified that there was no such position-specific job opening for the UNMIL post, that it was not an option for the Applicant to apply for it, and that the Applicant had applied for and was selected from the roster for the generic position as Movcon Officer at the P-4 level (10-LOG-PMSS-424542-R-MULTIPLE-D/S). The Tribunal notes that UNMIL’s facsimile

transmission dated 8 May 2012, confirms the Applicant's selection as Movcon Officer against "VA # 424542", which appears to be the same job opening number as that of the generic job opening of 2010, for which he had already been rostered in 2011.

50. The Tribunal notes that, pursuant to sec. 9.5 of ST/AI/2010/3 (Staff selection system), as amendment by ST/AI/2010/3/Amend.1, roster candidates may "be selected for *job openings* in entities with approval for roster-based recruitment" (emphasis added) and that sec. 4.2 of ST/AI/2010/3 requires that position-specific job openings shall be issued when:

- (a) A new position is established or an existing position is reclassified;
- (b) The incumbent separates from service;
- (c) The incumbent is selected for another position under the provisions of this instruction or as a result of a lateral reassignment by the head of department/office within that department or office.

51. The Tribunal is therefore puzzled about the process by which Applicant was initially selected for the UNMIL post since no position-specific job opening was apparently ever issued for the recruitment for this position and the Applicant was selected without even having applied for it.

52. In conclusion, the Tribunal finds that it was proper for FPD/DFS to reject the Applicant's candidature for the UNMIL post.

Was it proper for FPD/DFS to remove the Applicant from the roster for Movcon Officer at the P-4 level?

53. In the Respondent's 13 May and 15 July 2015 submissions, responding to the Tribunal's Order No. 69 and 136 (NY/2015) dated 24 April and 8 July 2015, the Respondent contends that while the selection system is silent on the issue of removing a staff member from a roster, DFS has adopted some procedures and

practices to handle such situations. As legal basis for these procedures, the Respondent submits that they derive from “the discretion vested in the Organization to implement the staff selection system”, “the policies underlying the staff selection system” and “the jurisprudence of the Dispute and Appeal Tribunal interpreting the same”.

54. The Respondent contends that the relevant DFS procedures at the time of the removal of the Applicant from the roster, namely prior to 31 March 2014, were as follows:

Step 1: Job applicant submits a PHP indicating educational qualifications and work experience.

Step 2: An initial review of an applicant’s PHP was conducted by an [Occupational Group Manager]. At this stage, the job applicant’s educational qualifications and work experience were not verified. Clearance at this stage was based solely on the information provided by the job applicant. Following a [FCRB], job applicants could be fostered at this stage. This would occur prior to a verification of the educational requirements and work experience listed in the job applicant’s PHP because there was a backlog of job applicant profiles that required verification.

Step 3: The RVU would verify the roster candidate’s listed educational qualifications and work experience, either because they were going through the backlog and/or because a request was made to verify a certain job applicant due to the job applicant’s selection for a job opening. As part of this process, the RVU would, inter alia:

1- Contact the job applicant and request that he or she place the RVU in touch with the relevant references such as educational institutions, and former employers;

2- Conduct a review of the documents provided by the references. Diplomas and degrees would be verified with the UNESCO database;

3- If a “negative reference” arose, i.e., if there was a problem with one of the listed qualifications or with the work experience, the RVU would research the issue and liaise as necessary with the job applicant, educational institutions, accreditation institutes, and former employers.

Step 4: If, after the RVU had completed its research, the negative reference had not been explained satisfactorily or otherwise remedied,

the matter would be referred to the RU [unknown abbreviation] of FPD.

Step 5: The RU would then review the matter conducting its own research in a process similar to that set out in Step 3 above, and would seek additional clarification from the relevant parties as necessary.

Step 6: If, after the RU had completed its research and the negative reference had not been explained satisfactorily or otherwise remedied, the RU would notify the job applicant of the negative reference and provide the staff member with the information obtained. The staff member had the opportunity (usually 10 business days) to provide comments and evidence to clarify and/or explain the situation.

Step 7: If, after the job applicant had provided comments and/or evidence, and the negative reference had not been satisfactorily explained or otherwise remedied, the RU would submit a report to the Director of FPD, through the Field Personnel Specialist Support Service (FPSSS).

Step 8: The Director of FPD would decide whether or not to approve the RU's recommendation that the job applicant was not eligible, due to the negative reference, to remain on the roster.

Step 9: If the Director of FPD determined that the job applicant was not eligible to remain on the roster, notification of such would be given to the job applicant and OHRM.

Step 10: OHRM would remove the job applicant from the roster (in Inspira) and DFS would remove the job applicant from the roster (in Nucleus, where applicable).

55. However, the Respondent has not submitted any document, internal or external, in which the DFS procedures were actually promulgated, or at best set out—they were simply copied into the submission in response to the Tribunal's Order No. 69 (NY/2015) as a quotation and no source was disclosed.

56. In *Eggelsfield* 2014-UNAT-399, in dealing with a matter where the Secretary-General had failed to establish conditions for reinstatement within the requirement of staff rule 4.18(a), the Appeals Tribunal stated that past practices cannot and do not substitute for an administrative issuance establishing such conditions. The Tribunal finds that, whilst respecting management's discretion to establish practices and procedures to facilitate numerous applications to vacancies, in line with the rationale

in the *Eggelsfield* case, past practices and internal unpublished procedures do not augur well for fairness, transparency and accountability.

57. Nevertheless, in this instance the correspondence shows that the Applicant was given the considerable opportunity to verify his qualifications and to make submissions, and the Administration also engaged in a vigorous back and forth in trying to ascertain whether the Applicant's qualifications met the requirements. In other words, he was afforded due process on the facts of this case.

58. Regarding the obligation of the Administration to correct its own mistakes, (that is on finding the Applicant did not have the appropriate educational requirements, to remove him from the roster), the Respondent cites *Castelli* 2010-UNAT-037, para. 26, which states that, "Where the administration commits an irregularity in the recruitment procedure, it falls to it to take such measures as are appropriate to correct the staff member's situation". Based thereon, in essence, the Respondent avers that FPD/DFS was required to remove job applicants from the roster on the discovery of them not meeting the minimum requirements from the selection procedure.

59. The Tribunal agrees that, in principle, the Administration is obliged to correct its own mistakes, and at the same time, to make good any harm suffered by the staff member as a result of such error. However, the present case is distinguishable from *Castelli*—when correcting a mistake in *Castelli* the Administration then was obliged to grant certain entitlements to a staff member, the Administration in the present case placed the Applicant in an adverse position by removing him from the relevant roster.

60. When the Administration intends to deprive a staff member of a certain status or right that may otherwise have been afforded to him, and particularly as in the present case, when no proper regulatory guidance is provided, as a minimum, it should do so by ensuring a minimum level of appropriate procedural safeguards.

Otherwise, the Administration would risk arbitrary, or even worse, ill motivated decisions, or at least possibly give the perception thereof.

61. In the present case, in order to get on the roster, the Applicant's application was assessed by several different entities, as set out in ST/AI/2010/3, sec. 7: (presumably) a FPD/DFS prescreening unit, the hiring manager, an interview panel, the FCRB and the final decision-maker. The many different reviews, particularly by FCRB, an external and independent body, are intended to ensure that selection exercises are conducted properly and untainted by ulterior motives. However, when removing the Applicant from the roster, this was a sole FPD/DFS decision and no other entities were involved. This exposed the process to potential mistakes or abuse. The circumstance that the RVU/FPD/DFS may have experienced a backlog of cases at the moment of selecting the Applicant for the roster is not a justification—his recruitment could simply have been delayed until his educational background had been verified by the RVU.

62. The Tribunal has found that the decision that the Applicant did not meet the educational requirements was not manifestly unreasonable and was correct. Therefore, as the Applicant did not possess the minimum educational requirements at the time, it is given that the Applicant would have needed to be removed from the roster, bearing in mind basic procedural safeguards. In accordance with *Charles* 2013-UNAT-283, para. 22, any errors committed by the Respondent did not deprive the Applicant of the real opportunity to be promoted or even included in the roster, and the procedural shortcomings did therefore not by themselves affect his status as a staff member and thereby his rights under his employment contract.

63. In any event, the only compensation that the Applicant claims is for loss of opportunity to be recruited to the UNMIL post and not for being removed from the roster. Although the Applicant may not have been provided appropriate and adequate due process guaranties, the Tribunal cannot award any damages for this (*Abboud* 2010-UNAT-100, para. 48).

Conclusion

64. For all the reasons set out above, the application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 4th day of September 2015

Entered in the Register on this 4th day of September 2015

(Signed)

Hafida Lahiouel, Registrar, New York