



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

KYEI-ASARE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a P-5 level section chief in the Field Budget and Finance Division (“FBFD”) in the Department of Field Support (“DFS”) in New York filed an application contesting the decision not to select her for the D-1 level post of Chief in the Budget and Performance Reporting Service (“BPRS”) in FBFD, DFS (“D-1 Post”). The Applicant seeks rescission of the decision or, in the alternative, appropriate compensation for losses incurred and for emotional distress.

Factual background

2. The Applicant, a Ghanaian national, joined the Organization in November 1993 in FBFD where the D-1 Post was located. At the time of the application, she held a permanent appointment with the Organization at the P-5 level, step 10. From December 2007 to December 2009, she exercised functions at the D-1 level in the African Union/United Nations Hybrid Operation in Darfur (“UNAMID”).

The selection for the D-1 Post

3. On 8 July 2009, a temporary vacancy announcement (“TVA”) was published in anticipation of the D-1 Post becoming vacant in September 2009.

4. On 1 September 2009, Mr. M, who was on a two-year fixed-term appointment in DFS at the P-5 level, step 5, was selected against the TVA and assigned to the D-1 Post for a period of six months, until 28 February 2010.

5. On 9 October 2009, a Vacancy Announcement (“VA”) #09-FIN-DFS-422634-R-NEW YORK for the D-1 Post was advertised in Galaxy, the former United Nations job website, with a deadline of 8 December 2009 for applications. Both the Applicant and Mr. M. applied.

6. In January 2010, the Applicant ended her assignment in UNAMID and resumed her duties at the P-5 level at FBFD in New York.

7. Mr. M's initial temporary appointment of six months against the TVA for the D-1 Post was extended for one month to 31 March 2010, and thereafter further extended for six months to 30 September 2010.

8. On 13 August 2010, eight months after the closing date of the VA, short-listed candidates for the D-1 Post took a written test.

9. On 13 and 14 September 2010, candidates for the D-1 Post were interviewed by a panel comprising Ms. Donna-Marie C. Maxfield, Chief of Staff of the USG/DFS, Ms. Elizabeth Morrin, Deputy Director, Peacekeeping Finance Division; Mr. Movses Abelian, then Secretary of the Fifth Committee in the Department of Management ("First panel"). The First Panel was assisted by a note taker, Ms. Hannah Davies. Following the interview, the Applicant, Mr. M, and a third candidate were short-listed for recommendation.

10. On 1 October 2010, Mr. M's temporary assignment on the D-1 Post was further extended for another period of six months, to 31 March 2011.

11. On 25 October 2010, the then USG/DFS, Ms. Suzanna Malcorra, sent the following email notification to DFS staff:

Mr. James Mutiso has taken up duties today, as Director [on the D-2 Post], *ad interim* of [FBFD]. James succeeds [Mr. M] who has served as officer-in-charge [on the D-2 Post] for the past 14 months.

12. On 2 February 2011, Ms. Maxfield provided the First Panel's report to Ms. Malcorra (court bundle, pp. 121-122), stating in the covering memorandum that:

5. ... Based on the competency-based interviews, the interview panel assessed that three of the five interviewed candidates – listed in alphabetical order – meet all of the requirements of the vacancy announcement: [...], Ms. Beatrice Kyei-Asare (female, Ghana); and Mr. M (male, Australia).

13. On 1 April 2011, Mr. M's assignment to higher level functions as Chief of Section, BPRS, was initially extended for three months, to 30 June 2011. On the same date, his assignment period was modified and extended from 1 July 2011 to 2 September 2011. On 3 September 2011, Mr. M's fixed-term appointment was extended to 2 September 2013. On the same date, his assignment to higher level functions on the D-1 Post on the TVA, was extended to 31 December 2011.

14. No steps on the recruitment on the D-1 were taken until 2 September 2011, a year after the first interview for the D-1 Post, when the Applicant and Mr. M were called to a second round of interviews. The panel comprised Ms. Malcorra, USG/DFS, Mr. Anthony Banbury, Assistant Secretary-General in DFS and Ms. Maxfield as note taker ("Second Panel").

15. On 7 September 2011, the Second Panel sent its selection report to Ms. Malcorra (court bundle, pp. 23-26). The report stated that (emphasis added):

4. ...at the opening of the interview, the [USG/DFS] explained that the delays in finalizing the selection of the Chief, BPRS, FBFD were linked to the repeated, unsuccessful efforts to fill the D-2, Director, FBFD position. ... Both candidates expressed understanding of the reasons for the delay and appreciation for the explanation. ...

5. The overall assessment of each candidate is reproduced below:

a. [the Applicant]: The candidate's responses to the questions revealed that she is a highly-educated, experienced staff member, who is devoted to service. Throughout the interview, however, her responses remained at the detailed operational and process level, missing the broader, strategic picture. Despite follow-up probing questions to encourage her to respond at a more strategic level, she was quite detailed and long-winded in her responses, and focused more on a description of her experiences than on the intent of the questions to reveal her strategic approach to the role of FBFD and DFS in addressing current operational changes while striving for organizational improvement. While considered to fully meet the technical requirements of the job as set out in the vacancy announcement, she did not demonstrate a capacity to deliver the strategic, big-picture approach required to fulfil both the strategic and operational requirements of the Chief, BPRS/FBFD position at this time of organizational change.

b. Mr. M: The candidate demonstrated a keen awareness of the strategic and operational challenges before DFS and its leadership, as well as the ability to articulate viable approaches to address those challenges. He is a strategic thinker, who knows not only his own area of expertise but also the other areas of DFS. He is able to focus on both the big picture and day-to-day management, articulating the need for strong financial governance and management to enable missions to fulfil their mandate while ensuring accountable financial management and addressing Member State concerns about the “affordability” of UN field operations. He has internalized the need to build gender-balanced and geographically diverse teams, demonstrating concern not only for achieving, but also effectively managing, diversity for results. He is deemed *highly suitable for the position*.

6. In that, based on the evaluation of their personal history profiles and competency-based interviews conducted, the [Second panel] found three candidates *to fully meet the requirements* [for the D-1 Post] [...] approval is sought for the recommendation of all three candidates...; with the eventual selection of [Mr. M] as the most suitable candidate for the [D-1 Post]...

16. On 17 October 2011, the Central Review Board (“CRB”) concluded its review of the selection process for the D-1 Post. The CRB noted that the vacancy announcement was posted on 9 October 2009, that the recommendation of the three candidates in the transmittal memorandum was dated 15 September 2010 and that the selection was finalized on 9 September 2011. The CRB requested clarification as to the reasons for the delay in finalizing the recruitment exercise. The CRB returned the case to Ms. Maxfield for further clarification.

17. On 19 October 2011, the DFS Executive Office provided the clarifications requested as follows (emphasis added):

...Based on these interviews, the panel agreed that [redacted], *Mrs. Beatrice Kyei-Asare and Mr. M. met all of the requirements and competencies of the VA and are therefore recommended*. The delays in finalizing the selection [for the D-1 Post] were linked to the *repeated unsuccessful efforts to fill the [D-2 Post]*. *It had been hoped that D-2 and D-1 leadership positions in FBFD would be filled as a team, with a balance of complementary experience, skills and expertise*. The [VA for the D-2 Post] was circulating (*sic*) unsuccessfully three times and new efforts are again underway. It was

decided to proceed with filling the D-1 post as it was no longer tenable to await completion of the D-2 selection process.

18. On 21 October 2011, the CRB informed Ms. Malcorra that it endorsed the proposal for filling the vacancy.

19. The Applicant was informed via email dated 24 October 2011 that she had not been selected for the D-1 Post but she had been placed on a roster of candidates pre-approved for similar positions at the D-1 level.

20. On 1 November 2011, Mr. M. took up his functions on the D-1 Post.

The selection for the post of Director, D-2, FBFD

21. The following is a brief account of the delay experienced in filling the post of Director, D-2, FBFD (“D-2 Post”).

22. On 28 January 2009, a vacancy announcement was issued in relation to the D-2 Post in anticipation of the post becoming vacant in April 2009 due to the departure of its incumbent, Mr. Mutiso.

23. On 28 July 2009, a new job opening was advertised for the D-2 Post, following the withdrawal of the candidate selected initially.

24. In or about September 2009, Mr. M became Officer-in-Charge and performed the duties and functions of the D-2 Post.

25. On 28 September 2010, the D-2 Post was re-advertised for a third time since the second selection process yielded no suitable candidates.

26. On 25 October 2010, following unsuccessful attempts to fill the D-2 Post, Mr. Mutiso, was called back to resume, temporarily, his duties on the D-2 Post until December 2010.

27. In April 2011, the USG/DFS requested that Mr. Mutiso return permanently to the D-2 Post which he continued to encumber until his retirement in 2012.

28. From 22 August 2012 to 1 December 2014, Mr. M was assigned to higher level functions on the D-2 Post, until his promotion to this post on 1 December 2014.

Procedural background

29. On 17 November 2011, the Applicant requested management evaluation and was notified of the Management Evaluation Unit's response on 2 February 2012.

30. On 19 March 2012, the Applicant filed her application. The Respondent's reply, filed on 17 April 2012, contended that the application was filed out of time and, in any event, that the Applicant was accorded full and fair consideration for the D-1 Post and that she failed to demonstrate that the decision was based on improper motives.

31. By Order No. 83 (NY/2014) dated 22 April 2014, the Respondent was directed to indicate whether he continued to maintain that the 19 March 2012 application was filed out of time in light of the recent judgments of the United Nations Appeals Tribunal in *Faraj* 2013-UNAT-331 and *Neault* 2013-UNAT-345.

32. On 28 April 2014, the Respondent withdrew his contention that the application was not receivable.

33. During a Case Management Discussion ("CMD") on 13 June 2014, Counsel for the Applicant confirmed that the Applicant's claim concerned the selection decision in relation to the D-1 Post, made by the panel chaired by Ms. Malcorra. The Applicant also confirmed that the recruitment exercise for the TVA on the D-1 Post carried out in 2009 constituted necessary contextual and background evidence. The Applicant stated that this would enable the Tribunal to make a determination on (i) whether the Administration exercised its discretion in a proper manner during the selection for the D-1 Post against the VA; (ii) whether full and fair consideration was accorded to her candidacy and, in that respect, whether due regard was given to relevant policies and resolutions on geographical distribution, gender balance and

the fact that she was from a leading troop contributing country when the USG/DFS made her final decision on whom to select.

34. By Order No. 144 (NY/2014), dated 13 June 2014, the Applicant was granted leave to file a response to the reply on the issue relating to the hiring manager's availability to participate in the selection process together with any supporting evidence. The Tribunal further directed the Respondent to disclose a copy of the evaluation report relating to the first set of interviews as well as any reports or communications from the Central Review Board ("CRB") in relation to the Panel's deliberations, conclusions and recommendations.

35. On 20 June 2014 and 27 June 2014 respectively, the Respondent and Applicant complied with Order No. 144 (NY/2014). The Tribunal was informed that there were ongoing attempts at exploring an amicable resolution. However, on 11 July 2014, the parties informed the Tribunal that a hearing was necessary to determine the present case.

36. At a hearing held on 22 and 23 October 2014, Ms. Maxfield and Ms. Morrin appeared as witnesses. The Applicant also gave evidence.

37. The parties' closing submissions were filed on 31 October 2014. On the same date, the Respondent filed additional information and documentation that was requested at the hearing.

38. On 7 November 2011, the Applicant submitted her comments on the Respondent's closing submissions.

39. On 24 November 2011, the Respondent provided additional information regarding the notes taken by the members of the First and Second panels.

40. By Order No. 324 (NY/2014) dated 25 November 2014, the Tribunal ordered the Respondent to produce further evidence in relation to the first and second sets of interviews and granted leave to the parties to file additional comments and/or

submissions. The parties complied with Order No. 324 (NY/2014) on 2 and 8 December 2014.

41. By Order No. 28 (NY/2015) dated 11 February 2015, the Tribunal ordered the Respondent to disclose Mr. M's employment record with the Organization, including any communications between the Office of Human Resources Management ("OHRM") and the Executive Office ("EO") in DFS in relation to the renewal of his contract(s) between 1 January 2010 and 31 December 2012. On 20 February 2015, the Respondent complied with the Order.

42. By Order No. 35 (NY/2015) dated 27 February 2015, the Tribunal ordered the Respondent to state whether, in relation to the second set of interviews, the Respondent accepts that: (a) there are no specific provisions relating to the second interview in the Staff Regulations, Staff Rules, administrative issuances, bulletin or any other guidelines; and (b) in these circumstances, whether the Respondent agrees or disagrees that the principles underlying the staff selection system, including the keeping of records, is applicable to the second set of interviews.

43. On 5 March 2015, the Respondent filed his response to Order No. 35 (NY/2015) and, on 13 March 2015, the Applicant filed her comments to the Respondent's responses to Orders No. 28 (NY/2015) and No. 35 (NY/2015).

Issues

44. The issues to be determined by the Tribunal are as follows.

- a. Whether the applicant is correct in alleging that the recruitment process was flawed due to the fact that Mr. Mutiso was not involved in the selection process;

b. Whether the very fact that a second set of interviews was conducted was lawful; and if so, was the composition of the Second Panel procedurally correct?

c. Whether the lengthy delay in the selection procedure infringed the Applicant's right to be fully and fairly considered;

d. Whether the final selection decision failed to take into account important criteria relating to gender balance, geographical distribution and the special consideration to be given to candidates from troop contributing countries.

Considerations

45. No issue of receivability arises since the Respondent abandoned his contention in this regard.

46. Article 101.3 of the United Nations Charter states:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

47. ST/AI/2006/3 (Staff selection system) of 15 November 2006, applicable at the time the VA was published, sets out the mandatory selection requirements and procedures to be followed. On 11 January 2010, a new administrative instruction, ST/AI/2006/3/Rev.1 (Staff selection system) was issued, superseding ST/AI/2006/3. ST/AI/2006/3/Rev.1 did not set forth any transitional measures and was applicable as at 11 January 2010.

48. On 21 April 2010, ST/AI/2010/3 (Staff selection system) was issued. Section 12 (Transitional measures) provides that ST/AI/2006/3/Rev.1 shall continue to

govern recruitment, placement and promotion in respect of applications for job openings advertised before 22 April 2010 through the “Galaxy” system.

49. The D-1 Post was advertised in Galaxy on 9 October 2009. ST/AI/2006/3 was therefore applicable to the early stage of the recruitment process (advertisement of the VA) and ST/AI/2006/3/Rev.1 governed the remaining stage of the recruitment process until the final selection decision (namely, from its entry into force on 11 January 2010 until the date of the final selection in late October 2011).

50. In matters of selection and promotion, the Secretary-General has broad discretion and it is not for the Tribunal to substitute its own decision for that of the Secretary-General. However, the exercise of managerial prerogative is not absolute and the Tribunal may examine whether the selection procedure was carried out in an improper, irregular or otherwise flawed manner, as well as assess whether the Applicant was given full and fair consideration or whether the resulting decision was tainted by undue considerations or was manifestly unreasonable (*Abbassi* 2011-UNAT-110, *Charles* 2012-UNAT-242).

Whether the Applicant is correct in alleging that the recruitment process was flawed due to the fact that Mr. Mutiso was not involved in the selection process

51. The Applicant contends that upon his return to the D-2 Post, Mr. Mutiso, Director, D-2, FBFD should have been involved, in the recruitment exercise or provided with the opportunity to recommend a candidate against the D-1 Post, in his capacity as hiring manager.

52. The Respondent submits that the selection decision was made in accordance with ST/AI/2006/3/Rev.1, which provides that the USG/DFS, as the Head of Department, is responsible not only for the manner in which a selection exercise is conducted but also, ultimately, for the selection decision, the programme managers being subordinate to the USG and required to assist in conducting selection procedures.

53. Responsibilities of a programme manager are set out in detail in Annex II of ST/AI/2006/3/Rev.1, which provides that (emphasis added):

2. Programme managers must start the process early for anticipated vacancies, and as soon as an unanticipated vacancy occurs. To expedite the process, they are encouraged to conduct as many steps as possible quickly and simultaneously.

3. For posts up to and including at the D-1 level, programme managers propose, through the head of department/office, one candidate or, preferably, a list of qualified, unranked candidates found suitable for the functions. If a central review body finds that the proposed candidates were evaluated on the basis of the pre-approved evaluation criteria and/or that the applicable procedures were followed, the programme manager recommends to the head of department/office selection of one of these candidates, supporting such recommendation by a documented record. ... Should the recommended candidate be a male candidate where an equally qualified female candidate exists and the gender targets set out in the department action plan have not been met, the documented record must be submitted for approval to OHRM...

54. Ms. Maxfield testified that when the VA for the D-1 Post was advertised in October 2009, Mr. Mutiso had already relinquished the D-2 Post. Ms. Malcorra, USG/DFS, therefore decided to delegate authority to Ms. Maxfield to conduct the recruitment exercise for the D-1 Post. Ms. Maxfield explained that Mr. Mutiso had relinquished his D-2 Post and was not on assignment, hence no longer reporting to Ms. Malcorra. Therefore, Ms. Malcorra could not have asked him to run the recruitment exercise for the D-1 Post.

55. The Tribunal observes that, at the date of Mr. Mutiso's temporary return to DFS on 25 October 2010 (until December 2010), the written test for the D-1 Post had already taken place. The First Panel had also already conducted the interviews of the candidates and a report had been provided to its members and was in the process of being finalised. Further, the First Panel's report, dated 2 February 2011, had already been sent to Ms. Malcorra prior to Mr. Mutiso's permanent return to his position as Director, FBFD. A reasoned and documented record of the evaluation of

the proposed candidates for the D-1 Post was prepared in accordance with ST/AI/2006/Rev.1, to allow a review by the CRB and the Head of the Department.

Finding

56. The Tribunal accepts that in the absence of any incumbent of the D-2 Post, the decision of the USG/DFS, as Head of Department, to assume direct responsibility for the recruitment process through Ms. Maxfield, was not an improper exercise of discretion.

Whether the very fact that a second set of interviews was conducted was lawful and if so, was the composition of the Second Panel procedurally correct?

57. The Applicant's contentions in respect of the lawfulness of the second interview are twofold. The Applicant submits that there is no legal basis for holding a second round of interviews and she contests the composition of the Panel. The Applicant submits that the Second Panel should have comprised Mr. Mutiso and that Ms. Malcorra, as final decision-maker in the selection procedure, should have recused herself from chairing the Second Panel given that the chair of the panel is making the recommendation to the Head of Department, in this case, to herself.

58. The Respondent contends that following the return of Mr. Mutiso, Ms. Malcorra continued to be directly involved to ensure continuity in the evaluation of the candidates given that Mr. Mutiso had not been involved in the earlier stage of the selection procedure.

59. The Respondent conceded that the Regulations, Rules and administrative instructions of the Organization do not provide any guidance in respect of holding a second set of interviews but contended that it has been the practice of the USG/DFS to conduct such interviews, under exceptional circumstances, prior to making a final selection decision. Second interviews were routinely conducted for appointments at the Director level where there was insufficient information on record following the first round of interviews for the USG/DFS to decide which of

the candidates was best suited to the functions. The Respondent stated that during the tenure of Ms. Malcorra as USG/DFS, there were 13 appointments at either the D-1 or D-2 levels. Four appointments were made at the D-2 level and, in each instance, there was a second set of interviews. Nine appointments were made at the D-1 level. In two cases, a second round of interviews was conducted, in five cases there was no second round of interviews and in the remaining two cases, the Respondent has been unable to determine whether one or two rounds of interviews were conducted.

60. The Second Panel's report emphasized that it was clear from the First Panel's report that the Applicant and Mr. M. had performed more strongly than other candidates during their first interviews and that both had served at the D-1 level on temporary assignments. Ms. Maxfield explained that upon being provided with the First Panel's report, Ms. Malcorra considered the information provided as insufficient to enable her to make a final selection. Ms. Malcorra therefore decided to have a second round of interviews with the Applicant and Mr. M before arriving at the decision as to whom to appoint.

61. The Tribunal observes that the Second Panel comprised Ms. Malcorra, Mr. Banbury and Ms. Maxfield, who acted as a note-taker and who drafted the Second Panel's report provided to Ms. Malcorra, in her capacity as Head of Department, for a final selection decision.

62. ST/AI/2006/3/Rev.1, applicable at the time the second interview was held in September 2011, does not set out a definition of the "assessment panel", unlike ST/AI/2010/3 (Staff selection system), which entered into force on 22 April 2010 and specifically states that an assessment panel is "normally comprised of at least three members [...] [including] one being from outside the work unit where the job opening is located, who will undertake the assessment of applicants for a job opening".

63. There was no requirement regarding the composition of the panel for the second interview. Further, the involvement of Ms. Malcorra is logical given that

the very purpose of this second interview was for the USG to satisfy herself as to which of the two appointable candidates best met the particular requirements of the post at that particular point in time. Ms. Maxfield explained in evidence that the hiring manager would, in any event, not have been invited to participate in the second round of interviews which are usually held by the USG and her deputy.

64. The Tribunal held in *Tiwathia* UNDT/2015/021 that:

Having considered the reasons [as stated in paras 50-53 of this judgment] and explanations put forward [by the decision-maker, i.e. Ms. Pollard, Head of Department, who testified before the Tribunal], the Tribunal accepts that, in this case, Ms. Pollard's decision to hold a second interview was a proper exercise of discretion as a hiring manager faced with three equally appointable candidates.

65. The Applicant has not shown that there was a violation of ST/AI/2006/3/Rev.1 in the decision not to involve Mr. Mutiso in the final stage of the recruitment process upon his return in DFS in October 2010 or in April 2011. Further, and in the absence of any evidence of an ulterior motive, Ms. Malcorra's decision to hold a second interview and not to involve Mr. Mutiso at that stage was a proper exercise of her discretion as a head of department faced with two equally appointable candidates.

Finding

66. The Tribunal finds that the decision to hold a second round of interviews, and the composition of the Panel, does not amount to a procedural irregularity in the particular circumstances of this case.

Whether the lengthy delay in the selection procedure infringed the Applicant's right to be fully and fairly considered

Undue delay

67. The Applicant contends that the unacceptably long delay for Management to complete the recruitment process not only contravened the target established in

the DFS 2011 Human Resources Management Objectives but also the resolutions of the General Assembly and applicable administrative instructions. Geographical distribution could have been independently achieved as soon as Management realized the difficulties in attracting a suitable candidate for the D-2 Post. The underlying thrust of the Applicant's case was that the lengthy delay was designed to favour the successful candidate.

68. The Respondent submits that the delay was the result of difficulties that had not been anticipated in relation to the selection for the D-2 Post. Possible irregularities in the recruitment procedure for the D-1 Post, if proven, would, in any event, have no bearing on the non-selection of the Applicant. The latter was not the result of the manner in which the selection was conducted. The successful candidate was selected in accordance with the broad discretion vested in the Administration in selecting the candidate considered most suitable for the D-1 Post.

69. The Tribunal notes that while there are no specific regulations, rules or administrative instructions setting out what would constitute a reasonable time frame for the finalization of a recruitment exercise, the General Assembly requested, in its resolution 63/250 (Human resources management) adopted on 24 December 2008, that "all anticipated and immediate vacancies are properly advertised and filled quickly". The General Assembly also recognized, in its resolution 65/247 (Human resources management) adopted on 24 December 2010, the "paramount importance of speeding up the recruitment and staffing process" and requested the Secretary-General to "conduct a comprehensive review of the entire recruitment process to improve the overall response time with a view to realizing the benchmark of 120 days for filling a post" or, in other words, four months for the completion of a selection procedure.

70. Ms. Maxfield testified as to the difficulties that were encountered in the filling of the D-2 Post which was advertised for the first time at the end of January 2009 in anticipation of the departure of Mr. Mutiso in April 2009. She explained that the first round of recruitment yielded no result and the D-2 Post

was re-advertised on 28 July 2009 with a closing date of 26 September 2009. In the meantime, the VA for the D-1 Post was advertised on 9 October 2009 with a closing date for application of December 2009. At this stage, the second attempt at a selection for the D-2 Post had been ongoing for five months. Ms. Maxfield stated that she was not sure as to the timeline of events but she remembered that either the second or third round of selection for the D-2 Post failed because of the absence of a female candidate at the reference check stage. Ms. Maxfield acknowledged that Ms. Malcorra was falling short on the recruitment of female staff members at the director's level who were under-represented both at the D-2 and D-1 levels at that time. Ms. Maxfield explained that this was also the reason why the VA for the D-2 Post had to be re-advertised as there had been no qualified female candidates for the D-2 Post.

71. The Tribunal observes that the overall length of the selection procedure for the D-1 Post, namely over 24 months, is excessively long having regard to the General Assembly's request to "improve the overall response time with a view to achieving the benchmark of 120 days *for filling a post*", i.e. 4 months. It should have become apparent, at least by September 2010, when the written test and interviews for the D-1 Post took place and a year prior to the second round of interviews that the recruitment for the D-2 post had turned out to be problematic. The temporary return of Mr. Mutiso on the D-2 Post from 25 October 2010 to December 2010 shows that the third round of the recruitment exercise for the D-2 Post did not yield an immediate result. His permanent return on the D-2 Post in April 2011 should have made it abundantly clear that by that date the D-1 and D-2 Posts will not be filled simultaneously through a recruitment process. At this stage, the extension of the temporary appointment of Mr. M until 30 June 2011 should have enabled the completion of the selection procedure for the D-1 Post without delay. The Tribunal received no clear explanation for the further five months delay before the second round of interviews was held or for the reasons underpinning the further extension of Mr. M's temporary appointment to 2 September 2011 and then to 31 December 2011.

72. Given the circumstances linked to the absence of a Director at the D-2 level and the difficulties of recruiting against the D-2 Post to achieve a balance of complementary skills between the D-1 and D-2 Posts, the delay was the consequence of a legitimate attempt, albeit unacceptably tardy, to pursue a reasonable organisational objective.

Finding

73. Although unnecessarily excessive the delay in the recruitment for the D-1 Post was not in violation of the Staff Regulations, Staff Rules or administrative issuances applicable at the relevant time.

Allegations of bias

74. The Applicant submits that Ms. Malcorra indicated to her, during a visit in Sudan in October 2010, that she had not been selected against the TVA because UNAMID needed her. She submits that the recruitment process for the D-1 Post under the VA was thereafter deliberately delayed to ensure that the candidate initially selected for the TVA, Mr. M, would gain sufficient experience to be eventually selected against the D-1 Post. The delay in finalizing the selection procedure was designed to give the incumbent of the TVA an opportunity to gain additional experience, through the repetitive extensions of his temporary appointment, and to bolster his credentials given that he had barely two years of experience at the United Nations when he applied to the D-1 Post and no field experience, whilst the Applicant served for 18 years at the United Nations within DFS and had two years' experience in the field.

75. The Applicant further contends that bias against her was evidenced by the fact that, in spite of having been placed on the roster of candidates qualified for the Post, and placed on a D-1 level post in UNAMID, she had not been placed on the D-1 Post in New York when it had become vacant temporarily after Mr. M's assignment against the D-2 post, as Acting Director/FBFD from November 2012 to December 2013. The Applicants also asserts that the vacant D-1 Post was never

filled, resulting in a potential loss of legitimate SPA entitlements for that period. However, given that this contention was not included in the application, the Tribunal will not consider the Applicant's submission in this respect.

76. The Respondent submits that the Applicant has not established the existence of bias against her, or that the selection decision was based on improper motives, was otherwise flawed or that the Applicant suffered any disadvantage from the delay. Candidates for the D-1 Post were assessed against their respective performances and the Applicant simply did not perform well during the second round of interviews, despite being provided opportunities through follow-up probing questions. The Second Panel recognized that the Applicant was a highly-educated, experienced staff member who is devoted to the service but considered that she did not demonstrate the ability to fulfill both the strategic and operational requirements of the post and, therefore, was not the best suited candidate for the position.

77. An allegation of bias or likelihood of bias has to be established on the balance of probability by the person making the allegation. However, whilst a conjecture may be plausible, it is of no legal value, for its essence is that it is a mere guess (*Macharia* 2011-UNAT-128). The Applicant has the burden of establishing that there was a *real likelihood* that the delay was *designed to favor* Mr. M (see Appeals Tribunal *Orders No. 100* and *No. 103* (2012)).

78. As the Tribunal held in *Tadonki* UNDT/2013/032:

144. The standard of proof required is "a preponderance of the evidence" or on "a balance of probabilities". That degree is well-settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say: "we think it more probable than not," the burden is discharged but, if the probabilities are equal, it is not.

145. In a case where improper motives or extraneous motives are invoked it is very rare that direct evidence is available to prove such assertions. The task of a court of law is to scrutinise and peruse all the evidence presented by the parties both in support and in rebuttal of the assertions. A party making an assertion of extraneous factors or improper motive must establish a *prima facie* case that this is so. This

would require a court of law, in the absence of direct or confirmatory evidence of such assertions, to draw reasonable inferences from the evidence. Once the party making the assertion has established *a prima facie case the burden shifts to the opposing party to establish on a balance of probabilities that the actions taken were not prompted by extraneous or improper motives.*

79. The Applicant seems to have relied on Ms. Morrin's testimony to demonstrate possible bias against her on the grounds that her answers in relation to her strategic understanding of the duties of the post were not initially fully and adequately translated in the First Panel's report. The Applicant referred to Ms. Morrin's statement that she had found Mr. M's performance at the first interview unimpressive. However, Ms. Morrin confirmed in evidence that her comments relating to the Applicant's performance were fully translated in the First Panel's report that was communicated to the CRB. She further confirmed that she did not suggest any amendments to the report, despite finding Mr. M's performance unimpressive. Further, her evidence that the other member of the First Panel concurred with her views remained uncorroborated. In any event, the final selection decision, by the USG, as to who was best suited for the functions of the D-1 Post, was based on the second round of interviews.

80. The Tribunal also examined the circumstances surrounding the repetitive renewals of Mr. M's temporary assignment to assess whether, as alleged by the Applicant, those extensions were evidence of bias.

81 Staff rule 4.12 (Temporary appointment) of ST/SGB/2009/7, dated 16 June 2009, was applicable at the time of Mr. M's appointment against the TVA for the D-1 Post. It states that a temporary appointment shall be granted for a period of less than one year to meet seasonal or peak workloads and specific short-term requirements and that such appointment may be extended for up to one year only when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates. In any event, a temporary appointment "and any subsequent extension shall not exceed a total period of less

than twenty-four months at any given time”. This latter provision has been removed from ST/SGB/2010/6, adopted on 2 September 2010.

82. However, ST/AI/2010/4 (Administration of temporary appointments), which entered into force on 27 April 2010, was applicable to Mr. M’s renewed appointment as at this date. It was superseded by ST/AI/2010/4/Rev.1 only on 26 October 2011, which entered into force on its date of issuance. Sections 1.1, 2.1 and 2.2 of ST/AI/2010/4 state that the purpose of a temporary appointment is to enable the Organisation to effectively and expeditiously manage specific short-term staffing needs and to meet seasonal or peak workloads. Section 15.1 sets out the exceptional circumstances under which a temporary appointment may be extended beyond 364 days. Section 15.2 mirrors the provision of staff rule 4.12 of ST/SGB/2009/7 and states that “[u]nder no circumstances shall the continuous period on a temporary appointment exceed 729 days”, or 24 months. Further, sec. 15.3 provides that

a recommendation for an exceptional extension of a temporary appointment leading to continuous service of one year or more shall be sent by the programme manager to the Executive Office or the local human resources office, as appropriate. It shall be accompanied by a written justification, which must be consistent with the provisions of the present instruction. The Executive Office or the local human resources office shall decide whether or not the recommendation will be approved.

81. On 20 February 2015, in his response to the Tribunal’s Order No. 28 (NY/2015) dated 11 February 2015, the Respondent indicated that “[t]here were no communications between the OHRM and [Mr. M’s] Executive Office in relation to the renewal of his contract(s) between 1 January 2010 and 31 December 2012”. The Respondent further indicated that “[f]rom 1 September 2009 to 1 November 2011, [Mr. M] was assigned to higher level functions at the D-1 level as Chief of Service, BPRS”. The record shows, and the Respondent confirmed, that Mr. M remained on the TVA from the date of his appointment on the D-1 Post on 1 September 2009 until his appointment against the VA on 1 November 2011, namely for approximately 27 months. However, there is no evidence of exceptional approval of Mr. M’s repeated renewal on TVA beyond the 364 days benchmark or of

any written justification to the DFS Executive office in that respect, as required, in accordance with sec. 15.3 of ST/AI/2010/4. Whether his fixed term appointment with the Organization had been renewed in September 2011 is not material.

82. In the circumstances, the length of Mr. M's temporary assignment appears to be in violation of staff rule 4.12 and the absence of exceptional approval and justification to that end is in violation of sec. 15.3 of ST/AI/2010/4.

83. It is, in this context, entirely understandable that the Applicant should have been concerned not only about the delay but also about the fact that Mr. M's temporary appointment continued to be extended for up to 27 months thereby, in her view, giving him the unfair advantage over other candidates of gaining more experience on the D-1 Post.

84. However, there is no evidence of a *real likelihood* that the delay was *designed to favor* Mr. M, rather than due to the inability to find a suitable candidate for the D-2 Post.

85. The key issue is whether the violation of staff rule 4.12 and ST/AI/2010/4 impacted upon the Applicant's right to be fairly considered for the position. The Tribunal observes that according to the Second Panel's report, the second interview "focused on the critical, required competencies *set out in the vacancy announcement* [for the D-1 Post]" (emphasis added). Ms. Maxfield stated in evidence that the questions asked during the second interview were not linked to the functions of the job but were based on public knowledge as to where the division was going. Upon assessment of the documents on record and the performance of the candidates at the second interview, the Tribunal is satisfied that procedural irregularities did not impact on the Applicant's right to be fairly considered for the position.

86. The chronology of events gave rise to concern on the part of the Applicant and the Applicant's suspicions are entirely understandable given the repeated delays in the recruitment exercise for the D-1 Post. The overall length of the recruitment

process for the D-1 Post is not compliant with the aforementioned General Assembly's resolutions and it is a matter for the General Assembly to consider the advisability of imposing a strict time limit in circumstances where the Administration decides to recruit to a higher graded post first in order to achieve a balance of skills. Unless this is done, there will continue to be a risk that temporary appointments could be used in a manner that would lead to actual or perceived bias in favour of the temporary post-holder to the detriment of other eligible staff members. However, notwithstanding this observation the Tribunal is satisfied that the explanation for such unacceptable delay in this case was in pursuance of a legitimate operational objective.

Finding

87. In the absence of hard evidence, it would be speculative for the Tribunal to infer that the fact of delay, in and of itself, was to the Applicant's detriment or designed to favour the actual incumbent of the D-1 Post who was one of the candidates.

Whether the final selection decision failed to take into account important criteria relating to gender balance, geographical distribution and the special consideration to be given to candidates from troop contributing countries

88. It is the Respondent's case that all organizational imperatives, including efficiency, competence, geographical, gender considerations and level of troop contributions were properly taken into account by the USG/DFS in reaching the selection decision. The Respondent contends that the Applicant did not demonstrate the abilities that were paramount to the D-1 Post whereas Mr. M's capacities to deliver the approach required to fulfill the strategic and operational requirement for the D-1 Post were considered adequate. Therefore Mr. M. was considered best suited for the D-1 Post. In the circumstances, there was no need under sec. 9.2 of ST/AI/2006/3/Rev.1 to seek approval from OHRM for

the appointment of Mr. M. given that the Applicant was not equally qualified for the position.

89. ST/AI/1999/9 (Special measures for the achievement of gender equality) entered into force on 1 October 1999. It has not been repealed or superseded.

90. In *Tiwathia* UNDT/2015/021, the Tribunal found that:

Section 13.3 of ST/AI/2010/3 (Staff selection system) states that its provisions shall prevail over any inconsistent provisions contained in other administrative instructions in force at the time of issuance. The Tribunal considers that sec. 1.8 of ST/AI/1999/9 (Special measures for the achievement of gender equality) is inconsistent with sec. 9.3 of ST/AI/2010/3, which clearly states that the head of department “shall select the candidate he or she considers to be best suited for the functions”. Consequently, in accordance with sec. 13.3 of ST/AI/2010/3, the Tribunal finds that sec. 9.3 of ST/AI/2010/3 prevails, and the head of department has broad discretion to choose the candidate they consider best suited to the position.

91. However, in the present case, the selection procedure for the D-1 Post was governed by ST/AI/2006/3/Rev.1 which, unlike ST/AI/2010/3, contains the additional requirement for the head of department to give due regard to geography and gender. ST/AI/1999/9 was therefore applicable. Considering that the representation of female staff members at the Director level was at issue (sec. 1.9), secs. 1.8 and 4 of ST/AI/1999/9 were to be complied with.

92. Section 1.8 of ST/AI/1999/9 provides that:

1.8 (a) Vacancies in the Professional category and above shall be filled, when there are one or more women candidates, by one of those candidates provided that:

(i) Her qualifications meet the requirements for the vacant post;

(ii) Her qualifications are substantially equal or superior to those of competing male candidates;

...

(c) In evaluating women candidates, particular emphasis shall be given to potential to perform at the higher level, although women may not have been offered such an opportunity in their prior service;

(d) *When the qualifications of one or more women candidates match the requirements for the vacant post and the department or office recommends a male candidate, the department or office shall submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation, indicating how the qualifications and experience of the recommended candidate, when compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended;*

...

93. Section 4 of ST/AI/1999/9 states (emphasis added):

4.1 Heads of departments and offices shall have primary responsibility and shall be accountable for the implementation of the special measures set out in the present instruction.... They shall prepare and submit a department action plan for achievement of the goals set in section 1.1 of the present instruction, including a succession plan, which will be fully synchronized with the revised human resources planning cycle, and shall submit reports on the progress achieved under the plan to the Secretary-General through OHRM and the Special Adviser on Gender Issues and Advancement of Women.

4.2 All recommendations presented to the appointment and promotion bodies for recruitment, promotion or interdepartmental lateral transfer shall be accompanied by an explanation of how the recommended action will affect the representation of women in the department or office concerned, both at the level of the post to be filled and overall for posts in the Professional category and above.

94. The Second Panel concluded that the Applicant was found to fully meet the technical requirements of the job as set out in the VA but she did not demonstrate that she was the best or most suitable candidate for the position. Ms. Maxfield testified that the USG/DFS did not consider the Applicant's performance during the second round of interviews to be substantially equal to or superior to the male candidate. All cumulative conditions set out in sec. 1.8(a) of ST/AI/1999/9 were therefore not met and there was no obligation to fill the vacant D-1 Post by appointing the Applicant.

95. With regard to the issue of geographical distribution, at the outset, the Tribunal notes that, pursuant to sec. 9.2 of ST/AI/2006/3/Rev. 1, the head of department/office is only required to have due regard to geography. The importance of having due regard to gender and geography is also set out in sec. 7.7 of ST/AI/2006/3/Rev.1 in the following terms:

The head of department/office shall ensure that, in making the proposal [to the CRB], he or she has taken into account the Organization's human resources planning objectives and targets, especially with regard to geography and gender, and provide a certification to that effect to the central review body.

96. The Tribunal notes that the memorandum provided to the CRB (pp. 27-29 of the court bundle) addresses the issues of geography and gender in the following terms:

I also certify that this proposal is reasoned and objectively justifiable based on the pre-approved evaluation criteria and that in making this proposal I have taken into account the Organization's human resources planning objectives and targets, as reflected in the Departmental Human Resources Action Plan, especially with regard to geography and gender balance

97. Ms. Malcorra did not appear before the Tribunal to give evidence on how she had taken into account the Organisation's human resources planning objectives and targets, especially with regard to gender, in making her final decision in respect of the D-1 Post. However, the Tribunal notes that she had a duty to appoint the person whom she considered best suited to the post. The evidence before the Tribunal supports the conclusion that she concluded on the basis of performance at the second interview that Mr. M was the candidate best suited for the position. In the absence of affirmative evidence, or factual findings from which a legitimate inference could be drawn, that the USG had exercised her discretion inappropriately or had taken into account impermissible factors, any administrative error would, in any event, not have had an impact upon her final selection decision or upon the Applicant's right to be fully and fairly considered.

98. The Tribunal further observes that there are no requirements in ST/AI/2006/3/Rev.1 regarding the consideration at the stage of the final selection of the level of troop contributing countries (unlike ST/AI/2010/3 which imposes such a requirement but which was not applicable to the selection process in the present case). Therefore, the Applicant's contention on this point fails.

Conclusion

99. The application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 22nd day of May 2015

Entered in the Register on this 22nd day of May 2015

(Signed)

Hafida Lahiouel, Registrar, New York