



**Before:** Judge Goolam Meeran

**Registry:** New York

**Registrar:** Hafida Lahiouel

ANDREEV

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Miles Hastie, OSLA

**Counsel for Respondent:**

Elizabeth Gall, ALS/OHRM, UN Secretariat

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a P-4 level Population Affairs Officer in the Population Division of the Department of Economic and Social Affairs (“DESA”), contests the decision not to include him on the list of recommended candidates for a P-5 level post of Chief, Mortality Section, Population Division, DESA. He also contests the selection of another candidate for that position. The Applicant’s principal contentions are that he was not given full and fair consideration, particularly at the interview stage, and that the successful candidate was in fact ineligible for the post because he did not have two prior lateral moves, which are required for P-5 promotions. The Applicant seeks rescission of the contested decision and monetary compensation for lost earnings at the P-5 level.

2. The Respondent contends that the selection process was conducted in full compliance with ST/AI/2010/3 (Staff selection system), that the Applicant was given full and fair consideration, and that the successful candidate met the requirement of two lateral moves and was fully eligible for the post. The Respondent submits that even if the successful candidate did not have two lateral moves, the Applicant would still not have been recommended because the panel found that he only partially met the competencies of “leadership” and “managing performance”.

## **Procedural history**

3. The application was filed on 27 February 2015. The Respondent’s reply was filed on 1 April 2015.

4. This case was assigned to the undersigned Judge on 18 September 2015. By Order No. 238 (NY/2015), dated 22 September 2015,

the Tribunal directed Counsel and the Applicant to attend a case management discussion (“CMD”) on 29 September 2015. Among the issues dealt with at the CMD were: (i) proposed consolidation of this case with another case involving the same selection exercise (Case No. UNDT/NY/2015/009, filed by Mr. Gaigbe-Togbe, also a P-4 level Population Affairs Officer); (ii) identification of the core issues in this case; (iii) outstanding document disclosure requests; and (iv) preparation for a hearing on the merits.

5. By Orders No. 232 (NY/2015) and 250 (NY/2015), the Tribunal directed by consent that Cases No. UNDT/NY/2015/008 and No. UNDT/NY/2015/009 be subject to an order for combined proceedings. The Tribunal set the dates for a full merits hearing and directed the parties to file further documents and submissions in preparation for the hearing, including an agreed bundle to be relied on at the hearing.

6. The following witnesses gave evidence at the hearing held on 8–9 October 2015:

- a. Mr. Andreev, Population Affairs Officer, DESA;
- b. Mr. Gaigbe-Togbe, Population Affairs Officer, DESA;
- c. Mr. Wilmoth, Director, Population Division, DESA;
- d. Ms. Perucci, Chief, Statistical Services Branch, Statistics Division, DESA.

7. On 9 October 2015, the second day of the hearing, Mr. Gaigbe-Togbe requested that the proceedings in his case be stayed. The Tribunal made an *ex tempore* order granting his request. By Orders No. 265 and 266 (NY/2015), dated 12 October 2015, the Tribunal directed that the proceedings in the two cases be severed and each case be subject to separate consideration and

disposal. Accordingly, this judgment concerns only Case No. UNDT/NY/2015/008.

### **Facts**

8. The contested P-5 post was advertised on 21 August 2013. The Applicant applied and was invited for a written assessment. He scored 58 points on the written assessment. The successful candidate scored 72 points.

9. Four candidates, including the Applicant, were invited for competency-based interviews. The Applicant was interviewed on 15 April 2014 by a panel of three members: Mr. Cohen (the then Chief, Population Studies Branch, Population Division), who chaired the selection panel; Ms. Perucci (the then Chief, Demographic Analysis Branch, Population Division); and Ms. Tomita (Chief, Demographic and Social Statistics Branch, Statistics Division).

10. There was a conflict of evidence on whether the interviews were in person or by telephone. The Applicant recalled that the interviews were conducted in person, but Ms. Perucci thought they were by telephone. However, nothing turns on this point as no procedural breaches were alleged in this respect.

11. The Applicant was rated as partially meeting the competencies of “leadership” and “managing performance”. The panel gave him an overall rating of “partially satisfactory”. Accordingly, he was not recommended for appointment.

12. The panel’s assessment of the candidates was recorded in its Comparative Analysis Report. Ms. Perucci stated that the Comparative Analysis Report was prepared by Mr. Cohen, the panel’s chairperson. The Report was based on the panel’s discussion and the notes of the three

panel members. She seemed to recall reviewing the draft of the Comparative Analysis Report, but did not see it in its final version until shortly prior to the hearing. However, she confirmed that the Comparative Analysis Report was an accurate reflection of what was discussed during the interview and of the panel's evaluation of the Applicant's answers.

13. The panel found that the successful candidate was the only person who met all the requirements. Accordingly, he was the only candidate recommended for the post.

14. After the panel finalized its assessment and before the Comparative Analysis Report was transmitted to the Central Review Board ("CRB") for its review and endorsement, the panel's assessment was transmitted to Mr. Wilmoth, Director, Population Division, who was the hiring manager. Mr. Wilmoth testified that, upon receiving the panel's report and recommendation, he was surprised at the panel's finding that the Applicant did not fully meet all the competencies for the post. After the panel made its recommendation, he spoke separately and on more than one occasion with two of the panel members, Mr. Cohen and Ms. Perucci. The panel members explained and justified the basis for their assessment of the candidates, including the grounds upon which they concluded that the Applicant did not meet all the competencies of the post. Mr. Wilmoth then conferred with the Executive Officer of DESA, who informed him that, as the hiring manager, he should accept the panel's recommendation unless he had strong grounds to challenge it. Mr. Wilmoth stated that, following his discussions with the panel members and based on their explanations, he reached the conclusion that the panel was not incorrect in its assessment and recommendation.

15. By memorandum dated 26 May 2014, Mr. Wilmoth informed the Under-Secretary-General, DESA, of the outcome of the selection process,

including that only one candidate was recommended for the post.

The memorandum stated:

I am aware that the recommendation of a single candidate is contrary to the standard procedure followed by DESA in filling job vacancies. Nevertheless, having reviewed the pool of candidates and the procedures followed by the review panel, it seems that an exception is well justified in this particular case. Please note that all qualified candidates were invited to take the written test; of those, only 4 candidates wrote a passing exam; and of those, only one succeeded in demonstrating the full set of competencies required for this position.

In addition to the fair and thorough evaluation by the panel, this recommendation is guided by my personal familiarity with the work of [the successful candidate] over many years. He is a professional of the highest caliber, and his background and skills are especially well suited to the position in question. Given the highly specialized nature of the work, I believe there is no doubt that [the successful candidate] is uniquely qualified to fill this vacancy.

16. By memorandum dated 1 August 2014, Mr. Cohen, the chairperson of the selection panel, informed the CRB of the selection process and of the panel's decision to recommend the successful candidate for the post. Attached to the memorandum was the Comparative Analysis Report with the panel's assessment of the candidates' interviews.

17. Mr. Wilmoth testified that the CRB sent some comments, which was not uncommon as in Mr. Wilmoth's experience the CRB applied a high level of scrutiny when reviewing selection reports. Mr. Wilmoth could not recall what specific concerns were raised by the CRB in relation to this selection process. No further evidence was adduced at the hearing as to the nature of the CRB's enquires, but apparently those were in any event satisfied as the CRB approved the selection of the successful candidate.

18. On 15 August 2014, Mr. Wilmoth announced the selection of the successful candidate.

19. Both Mr. Wilmoth and the Applicant testified that shortly before the official announcement Mr. Wilmoth came to see the Applicant to inform him in person that he was not selected for the post. Mr. Wilmoth stated that the Applicant did not express any negative emotions and took the news rather well. Mr. Wilmoth testified that at a late stage of the selection process, after the panel had made its recommendation, he became aware that the successful candidate had also received an offer from UNICEF. Accordingly, Mr. Wilmoth was eager to finalize the recruitment process to make sure that the successful candidate was not “poached” by UNICEF. Mr. Wilmoth acknowledged that, in retrospect, he may have exhibited too much enthusiasm over the promotion of the successful candidate when he spoke to the Applicant. However, he felt that the Applicant was also relieved that their team would not lose the successful candidate.

20. Several days later, by letters dated 20 and 25 August 2014, the Applicant and Mr. Gaigbe-Togbe requested management evaluation with respect to: (i) the decision to select the successful candidate who, it was contended, did not meet a key criterion of eligibility in that he did not possess the required two lateral moves; and (ii) the decision not to include their names on the list of recommended candidates, sent to the CRB.

21. By letter dated 2 December 2014, signed by the Under-Secretary-General for Management, the Applicant was informed that, having examined his case, the Secretary-General decided to uphold the decision not to recommend him for the post. The Applicant was further informed that, in the Administration’s view, the successful candidate met the eligibility requirements as he had two lateral moves, as required.

## **Consideration**

### *Alleged deficiencies in the selection process*

22. The United Nations Appeals Tribunal has stated in a number of cases (see, e.g., *Zhao, Zhuang and Xie* 2015-UNAT-536) that, in matters related to selection procedures,

it is not the function of the Dispute Tribunal, or indeed of this Tribunal, to take on the substantive role with which the interview panel was charged, even in situations where elements of that procedure have been impugned. The jurisdiction vested in the Dispute Tribunal is to review alleged procedural deficiencies, and if same are established then, by the application of the statutory remedy it deems appropriate in all the circumstances, rectify such irregularity or deficiency as may have been found.

23. One of the Applicant's principal contentions is that he was unfairly treated during the interview and that the selection panel failed to properly carry out its functions. The Applicant alleged that not all of the relevant follow-up questions were asked of him during the interview to elicit further information, especially if the panel was not satisfied with his responses. The Applicant stated, in particular, that when he was answering the question about the competency of "managing performance", he was interrupted by Mr. Cohen, the Chairman of the panel, who said that it was "enough".

24. Ms. Perucci's evidence was to the effect that the Applicant provided an extensive answer to the question about the competency of "managing performance", concentrating on his experience serving on the board of a condominium. She did not recall Mr. Cohen or any member of the panel unfairly or improperly interrupting the Applicant during the interview. Each candidate was allocated an equal period of time to answer questions and the panel tried not to exceed the time allocated to each candidate. Ms. Perucci



stated that the example of service on the condominium board was fully explained by the Applicant but nevertheless did not demonstrate the competency of “managing performance” as required of UN staff in managerial positions.

25. The Tribunal observes that, generally, selection panels should refrain from adopting an overly rigid and narrow construction of the competency-based interview process and the assessment of relevant competencies. The Tribunal was concerned at the comment in the panel’s Comparative Analysis Report to the effect that the Applicant’s reference to his experience serving on the board of a condominium in response to the question on managing performance was “not relevant”. When questioned by the Tribunal, Ms. Perucci agreed that experience outside the Organization may well be relevant, but the candidate has to explain the relevance of such outside experience to the particular competencies assessed during the selection process. In this case, the panel reached the view that the Applicant did not succeed in explaining the relevance of his outside experience.

26. Ms. Perucci stated that, with respect to the competency of leadership, the Applicant did not demonstrate to the panel that he had the full set of skills required for this competency. Ms. Perucci stated that the Applicant provided two examples, including dealing with underperforming colleagues. She said that in that particular situation, the Applicant’s principal strategy was to report the matter to his supervisors, whereas the competency of leadership requires the use of different strategies and skills, such as ability to motivate and share one’s values and vision.

27. Mr. Perucci’s evidence was consistent with what was recorded in the Comparative Analysis Report. No evidence has been placed before the Tribunal to show that the panel’s record of the Applicant’s answers

contained significant errors or omissions. In fact, the Applicant conceded at the hearing that the summary of his answers, as contained in the Comparative Analysis Report, fairly represented what was said at the interview.

28. The Tribunal finds that Mr. Wilmoth's reaction to the omission of the Applicant from the list of recommended candidates was one of surprise. He decided to speak to the panel members individually. His purpose in speaking to them was to satisfy himself that full and fair consideration was given to all candidates. Based on the explanations provided by the panel members, Mr. Wilmoth decided that the conclusion reached by the panel was not incorrect. In the Tribunal's view, Mr. Wilmoth's enquiries were necessary and appropriate in the circumstances.

29. In carrying out his functions as the hiring manager, Mr. Wilmoth acted in the best interest of the team and the Division's tasks and objectives. He was concerned to be as transparent as possible in dealing with a difficult situation. On the one hand he had the panel's report and recommendation of a single candidate, and on the other hand he foresaw the risk that highly regarded staff would be demotivated by the selection panel's recommendation.

30. Having heard Ms. Perucci's evidence and having considered the documents, the Tribunal is not surprised that Mr. Wilmoth should have entertained some concerns regarding the competency-based interview and its outcome. It was for Mr. Wilmoth as the hiring manager to make the necessary enquiries in order to satisfy himself that full and fair consideration was afforded to all candidates.

31. Mr. Wilmoth also had discussions with the Applicant both before and after the selection process. There was a large measure of consistency in the recollections of Mr. Wilmoth and the Applicant as to their conversations, though the construction placed on them differed. The Tribunal finds absolutely

no evidence or indication that these discussions demonstrated bias on the part of Mr. Wilmoth against the Applicant.

32. It is settled law that in matters of staff selection the Tribunal cannot substitute its judgment for that of the decision-maker. Absent evidence of procedural error, irrationality or perversity the Tribunal cannot impugn the conscientious assessment and conclusion of the hiring manager.

33. The Tribunal finds that, notwithstanding some concerns identified in the course of the hearing (such as whether the panel should have asked additional probing questions to elicit more information), the Applicant has not demonstrated that there were any significant errors during the selection exercise that would vitiate the panel's assessment that he partially met the competencies for that particular position.

*Successful candidate's lateral moves*

34. One of the Applicant's principal contentions is that the successful candidate should not have been selected as he lacked two lateral moves and was thus not eligible for the post. The Respondent submits that the successful candidate does have two lateral moves, as was recorded in his file by the Office of Human Resources Management ("OHRM").

35. Sections 1 and 6.3 of ST/AI/2010/3 state:

**Section 1**

**Definitions**

...

(q) *Lateral move*: movement of a staff member to a different position at the same level for the duration of at least one year. The new position may be in the same or a different department or office, in the same or a different duty station and in the same or a different occupational group. ... Within

the same department or office, a lateral move will normally involve a change in functions with or without a change of supervisor. When the supervisor remains the same, there will be a lateral move if the responsibilities are substantially different, for example, if there is a different area of responsibilities or a change in the departments/offices serviced by the staff member. A change in supervisor without a change in functions does not represent a lateral move. ... ;

...

## **Section 6**

### **Eligibility requirements**

...

6.3 Staff members in the Professional category shall have at least two prior lateral moves, which may have taken place at any level in that category, before being eligible to be considered for promotion to the P-5 level, subject to the following provisions[.]

36. The successful candidate's first move at the P-4 level took place in April 2009, when his post was redeployed from the Estimates and Projections Section ("EPS") to the Population Policy Section ("PPS") of the Population Division. This redeployment (and related move) was formalized by an internal DESA memorandum dated 22 April 2009; the subject line of the memorandum was "Redeployment of post ... and reassignment of [staff]". The successful candidate's second move took effect on 19 April 2010, when he was reassigned from PPS to EPS. This move was formalized by an internal DESA memorandum dated 22 March 2010; the subject line of the memorandum was "Reassignment of staff within the Population Division".

37. Surprisingly, the parties did not seek to adduce any evidence at the hearing regarding the issue of the successful candidate's lateral moves. Therefore, the Tribunal is left to draw its own conclusions on the basis of its best efforts at construing the documents.

38. From the record before the Tribunal, it appears that the successful candidate's functions did in fact change when his post was redeployed from EPS to PPS in 2009. When he was reassigned again in 2010 from PPS to EPS, his functions changed again, largely reverting to what they were prior to 2009.

39. However, the issue of the lateral moves is complicated by the fact that the successful candidate's move in April 2009 was done by way of redeployment of his post from EPS to PPS. Thus, when he was moved from PPS to EPS one year later in April 2010, from OHRM's point of view he was not *going back* to PPS, as his post was no longer there, but was rather assigned to PPS laterally from EPS. This would mean that his assignment to PPS in April 2010 was a new lateral move as it included a change of functions as compared to his functions with EPS, where his post was now based.

40. The Tribunal also notes that sec. 1 of ST/AI/2010/3 states that "a lateral move will *normally* involve a change in functions with or without a change of supervisor" (emphasis added), which indicates a certain degree of discretion left to the Administration in assessing whether the conditions for recording of a lateral move have been satisfied.

41. OHRM found that the successful candidate satisfied the required two lateral moves needed for a promotion to the P-5 level. On the documents before the Tribunal, the Applicant has not persuaded the Tribunal that OHRM's determination was erroneous.

42. The Applicant submitted that the discrepancy in the dates of the memoranda formalizing the successful candidate's lateral moves and the dates on which the moves became effective indicated some impropriety. No evidence was introduced, however, to suggest that this indeed was due to some impropriety rather than administrative delay or inefficiency. The lateral moves were recorded several years prior to the selection exercise in question,

which renders it highly unlikely that these moves were made with the objective of conferring an unjustified benefit or privilege on the successful candidate in the context of this selection exercise. Based on the record, management of DESA had programmatic reasons for these lateral moves, although it has to be acknowledged that it gave rise to understandable suspicion on the part of the Applicant.

43. The Tribunal was concerned at the allegation that the successful candidate did not possess the two lateral moves as required under ST/AI/2010/3. It is understandable that the lack of absolute clarity about the successful candidate's eligibility may have given rise to suspicion on the Applicant's part, particularly considering that the Applicant was not placed on the list of recommended candidates despite his very good performance record and his prior service as Officer-in-Charge of his Section. However, on the evidence before it, the Tribunal is not persuaded that there was impropriety in connection with the successful candidate's record of lateral moves.

44. Finally, whether or not the successful candidate had two lateral moves is not determinative in this case. Based on the selection panel's assessment, the Applicant was not recommended for the post for reasons unconnected with the successful candidate's eligibility, namely partially meeting the competencies required for the post.

#### *Observations*

45. In examining the selection process, the Tribunal was further concerned that candidates at the P-4 level within DESA apparently have very little opportunity to develop their management skills and yet were asked to give examples of what they had actually accomplished in the areas of leadership and performance management. Such a question seemed to the Tribunal to have been in conflict with the duty to afford full and fair consideration to each

candidate. However, not without some hesitation, the Tribunal concluded that, taking into account the Applicant's evidence that the interview record was more or less a fair summary, as well as Mr. Wilmoth's searching questions of the panel members, Mr. Wilmoth acted within the ambit of his responsibilities and judgment in endorsing the panel's recommendations.

46. Some staff members may have concerns about the use of competency-based interviews, particularly the rigid application of the interview guidelines. However, competency-based interviews are an integral part of the selection process in the Organization. Application of this interview method is an attempt to implement, insofar as it is possible to do so, a selection process that is free from bias and subjectivity. However, interviews are not a robotic exercise and some degree of flexibility during the interview is not only allowed but should be encouraged, provided it does not unfairly favour or disadvantage any specific candidate and that it is within the permissible boundaries of a legitimate and necessary procedure to assess fairly and properly whether a candidate satisfies a particular competency. Above all, the task of the panel is to identify suitable candidates who meet the highest standards of efficiency, competence and integrity as required by art. 101.3 of the Charter of the United Nations. In making these assessments, selection panels must take into account proper factors and disregard irrelevant considerations.

47. It is also important to keep in mind that even if a candidate is not successful in a particular interview or selection process, it should not be viewed as a reflection of his or her overall competence and performance as a staff member. In this particular case, there is no doubt that the Applicant is regarded highly as a staff member, as reflected in his performance reports and in the evidence of the Director of the Population Division. It is hoped that the detailed examination of this selection exercise will have given the Applicant valuable insights into the way the promotion system is intended

to work, so as to benefit him and others with respect to future promotion opportunities.

**Conclusion**

48. The Tribunal is satisfied, from the documentary and oral evidence, that the Applicant was given full and fair consideration and that it is not for the Tribunal to substitute its judgment for that of the selection panel and the hiring manager.

49. The application fails and is dismissed.

*(Signed)*

Judge Goolam Meeran

Dated this 14<sup>th</sup> day of October 2015

Entered in the Register on this 14<sup>th</sup> day of October 2015

*(Signed)*

Hafida Lahiouel, Registrar, New York