



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

WILSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Daniel Trup, OSLA

Counsel for Respondent:

Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant contests the decision not to select him for job opening number [Job Opening, “JO”] 57744, Chief, Information Management Systems Services at the D-1 level in the United Nations Joint Staff Pension Fund (“UNJSPF”). As remedy, the Applicant requests that he be granted six months’ salary for “violation of his rights and loss of opportunity in career advancement” and that the contested decision be rescinded.

2. The Respondent contends that the application is without merit because the Applicant received full and fair consideration for the relevant post.

Facts

3. By their joint submission of 24 August 2017, the parties provided the following agreed facts:

... The Applicant joined the [United Nations] in 1994. In November 2010, he was granted a permanent appointment.

... In 2008, he was promoted to the D-1 level as Chief, Financial Information Operations Service, Division of Management, Office of Programme Planning, Budgets and Accounts (OPPBA).

... By virtue of his above selection, and subsequently via JO 23941 in 2012 and JO 25327 in 2013, the Applicant is rostered at the D1 level.

... On 14 April 2016, the Applicant received notice of JO 57744, Chief, Information Management Systems Service, D-1, UNJSPF. The Applicant applied the same day and received confirmation that he would be identified as a rostered candidate.

... On 3 June 2016, eight days before the end of the advertisement period, the Applicant received notice via Inspira [the United Nations online jobsite] that a rostered candidate had been selected for the JO.

... On 6 June 2016, the Applicant learned that [Mr. DCD, name redacted], a P5 in the ICT Audit Section of Office of Internal Oversight Services (OIOS) had been selected.

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

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

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 On 30 August 2016, [the Management Evaluation Unit, “MEU”] issued its evaluation letter, which rescinded the contested decision, and stated that [the Under-Secretary-General for the Department of Management, “USG/DM”] selection exercise should be recommenced, with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

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

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

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

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

- [Ms. NC], Chief Unit [Headquarters] Staffing Section [the Office of Human Resources Management, “OHRM”] – UN Secretariat (P5), *ex officio*

... The panel members, with the exception of the hiring manager, were external to the UNJSPF. In addition, none of the external panel members had any prior involvement in the selection exercise.

... The Applicant’s interview was scheduled for 9:00am on 28 September 2016. Immediately thereafter, the Applicant wrote to [Ms. NC], copying the MEU, stating that he had received an anonymous email to his UN email account, which alleged irregularities in the selection process. The interview was canceled.

... The Applicant also wrote to the panel stating that on 28 September 2016, prior to the scheduled time of the 9:00am interview, another anonymous email was sent to the Applicant’s [United Nations] email account, which purported to share sample questions from the upcoming interview.

... On September 28 and 29, the Applicant received emails regarding the re-scheduling of his interview.

... On 30 September 2016, the Applicant wrote to both [Ms. CDLR, name redacted] and [Ms. NC] regarding his concern with the email circular cited in the anonymous email.

... On 3 October 2016, [Ms. NC] replied to the Applicant.

... On 1 October 2016, the Applicant was informed of his new interview date for 7 October 2016.

... On 7 October 2016, panel interviewed the roster candidates, including the Applicant. The competencies assessed were Professionalism, Planning and Organizing, Client Orientation, Leadership, and Managing Performance.

... In its evaluation, the assessment panel found that the Applicant did not fully demonstrate all the required competencies. The panel concluded that, though the Applicant fully demonstrated the competencies of professionalism and client orientation, he did not demonstrate the competencies of planning and organizing, and leadership. As such, the assessment panel did not recommend the Applicant for selection.

... The panel concluded that two of the roster candidates fully demonstrated the competencies of the position. It unanimously recommended one roster candidate for the position.

... On 7 December 2016, the Applicant noted in Inspira that the status of JO 57744 had changed to “Selected from roster.” The

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

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

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

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

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

Procedural history

4. On 7 April 2017, the Applicant filed the application.
5. On 10 April 2017, the Registry acknowledged receipt of the application and, pursuant to art. 10 of the Dispute Tribunal's Rules of Procedure, instructed the Respondent to file the reply by 10 May 2017.
6. After having first emailed the Registry, on 12 April 2017, Counsel for the Applicant filed a motion for leave to amend the application contending, *inter alia*, that an erroneous date had been inserted in the form as the date on which the Applicant was notified of the contested decision (3 June 2016 instead of 7 December 2016).
7. By email of 12 April 2017, the Tribunal instructed the Respondent to provide his comments, if any, to the Applicant's motion, by 17 April 2017.
8. On 13 April 2017, the Respondent filed his comments to the motion in which he stated that he did not object to the motion being granted but requested that "he be granted 30 days to reply to any amended Application".
9. By Order No. 77 (NY/2017) dated 17 April 2017, the Tribunal granted the Applicant's motion to amend the application and ordered Counsel for the Applicant

to immediately upload an amended version into the Dispute Tribunal's eFiling portal and the Respondent to file his reply by 24 May 2017.

10. On 18 April 2017, the Applicant uploaded an amended version of the application into the Dispute Tribunal's eFiling portal.

11. On 15 May 2017, the Applicant filed a further motion to amend the application, apparently in light of the decision in *Reican* UNDT/2017/029 issued on 26 April 2017.

12. On 24 May 2017, the Respondent filed his reply.

13. By Order No. 113 (NY/2017) dated 8 June 2017, the Tribunal granted the Applicant's request to amend the application, ordering him to file the amended application by 16 June 2017 and the Respondent to file his amended reply, if any, by 11 July 2017.

14. On 16 June 2017, the Applicant filed his amended application, including a request for the Applicant to produce certain documentation, as reflected in para. 14 below.

15. On 12 July 2017, the Respondent filed his amended reply.

16. By Order No. 138 (NY/2017) dated 21 July 2017, the Tribunal issued the following orders (emphasis in the original):

... By **5:00 p.m. on Thursday, 17 August 2017**, the Respondent shall file:

a. The list of questions asked by the interview panel during the interview on 7 October 2016;

b. The list of questions prepared by the Panel before the originally scheduled interview on 28 September 2016;

... By **5:00 p.m. on Thursday, 24 August 2017**, the parties shall file a jointly signed submission, which shall include responses under separate headings to each of the issues listed below. Where there is

disagreement over an issue, fact or statement, the submission shall identify the parties' respective positions.

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

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

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

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

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

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

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

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

23. On the same date (15 March 2018), the Applicant further filed his comments on the Respondent's production of evidence as per Order No. 27 (NY/2018), his comments on the Respondent's amended reply, and his closing statement.

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

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

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

27. On 12 October 2018, the Applicant emailed the Registry (the email has been uploaded in the eFiling portal), in essence, requesting a status update on the case proceedings.

28. By Order No. 200 (NY/2018) dated 12 October 2019, in light of the above, particularly the parties' further submissions and as neither party had filed the updated closing statement as per Order No. 117 (NY/2018), the Tribunal ordered the parties to file their updated closing statements based solely on the submissions and evidence on record by 16 November 2018.

29. On 16 October 2018, the parties filed a joint submission in which they stated that,

... To assist the Tribunal in avoiding duplication of submissions, the parties after reviewing their pleadings already submitted, respectfully seek that judgment be rendered on the material already before the Dispute Tribunal.

... Both parties have determined that there are no additional submissions that they would wish to put before the Dispute Tribunal before consideration of the matter is given.

Consideration

Scope of the case

30. In sum, as apparent from the agreed facts, the pertinent JO 57744 was initially advertised from April to June 2016, following which a candidate was selected eight days prior to the closing date of the advertisement. Following a management

evaluation request and suspension of action order in the Applicant's favor, upon the recommendation of the MEU, the Under-Secretary-General for Management decided to rescind that original decision and directed that the selection process be recommenced. This process was recommenced in September 2016 and the same candidate who had initially been selected was again selected; and the Applicant is now contesting this second selection exercise.

31. In *Fasanella* 2017-UNAT-765, para. 20, the Appeals Tribunal held that the Dispute Tribunal “has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review” and that it “may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed”.

32. In the joint submission, the parties agree that the fundamental legal question is whether the Applicant was given full and fair consideration for the contested job opening. In particular, the parties agree that the contested elements arising are, *inter alia*, whether it was proper for the Deputy CEO of UNJSPF to be actively involved in both selection processes, whether there was an appearance of conflict of interest in the selected candidate, and whether the selection process was procedurally defective.

33. Based on the parties' submissions in totality and the case record, the issues of the present case may be defined as follows:

a. When limiting a selection exercise to rostered candidates and conducting competency-based interviews by an assessment panel, what legal framework should be applied—is it the same as the one guiding a full selection process under ST/AI/2010/3?

b. Was the assessment panel properly composed? This entails a review of (i) the propriety of the Deputy CEO acting as hiring manager and voting panel member, and (ii) its members allegedly not having undertaken the training on competency-based interviews from the United Nations Secretariat.

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

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

The relevant legal framework for the selection exercise

34. It follows from the parties' submission that the selection exercise for the post was governed by ST/AI/2010/3, which regulates the staff selections system in the United Nations Secretariat.

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

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

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

c. The panel should prepare a documented record of its assessment of the rostered candidates; and

d. The hiring manager should submit the documented record of the panel and his/her own reasoned recommendation for selection to the CEO/UNJSPF for his decision.

36. Following the above instructions, the Deputy CEO, who again served as hiring manager and a voting assessment panel member in the second selection exercise, following the advice of the panel, again recommended Mr. DCD, the same selected candidate as before, who was subsequently chosen from amongst the rostered candidates. This panel, had all the basic characteristics of an “assessment panel” in accordance with ST/AI/2010/3, namely (see sec. 1(c)): “a panel normally comprised of at least three members, with two being subject matter experts at the same or higher level of the job opening, at least one being female and one being from outside the work unit where the job opening is located, who will undertake the assessment of applicants for a job opening”. In line therewith, in the Respondent’s submissions in his closing statement, the panel is consistently referred to as an “assessment panel” as comprised in accordance with the administrative instruction.

37. However, it also appears from the Respondent’s submissions that the contention is that the legal framework that otherwise ordinarily applies to the composition of an assessment panel and competency-based interviews is not applicable when a selection exercise involves only roster candidates, submitting that,

... The Applicant does not identify any legal basis to contest the composition of the panel. The staff selection system does not require an interview panel to assess roster candidates. A hiring manager may select such candidates directly from the roster. The panel was convened upon the recommendation of the USG/DM following a review of the Applicant’s request for management evaluation.

38. The relevant legal framework provides little guidance for a situation where a selection exercise is limited to a pool of rostered candidates. ST/AI/2010/3, para. 9.4 simply states that candidates included in the roster may be selected by the head of

department/office for a subsequent job opening without reference to a central review body, and para. 9.5 adds that the hiring manager may recommend the roster member's immediate selection to the head of department/office/mission without reference to the central review body. No mention is made of any special rules on assessment panels or competency-based interviews if the selection exercise is limited to rostered candidates.

39. The Tribunal notes that some guidance can be found in the most recent selection system manuals applicable at the time of this selection exercise, namely the Manual for Recruiter, release 4.0 of March 2015 and the Manual for the Applicant, release 4.0 of March 2015 (no proper list of Manuals is maintained in Inspira, which only includes the new "Manual Staff Selection System" of 21 January 2019). However, the Tribunal observes that the legal authority of such Manuals is limited as stated by the Appeals Tribunal in *Asariotis* 2015-UNAT-496 regarding the equivalent Hiring Manager's Manual:

21. We hold that this particular Manual, being an "Instruction Manual for the Hiring Manager on the Staff Selection system" (emphasis added), does not have the legal force attributed to it by the Dispute Tribunal. We refer to our jurisprudence in *Charles* [2013-UNAT-286, para, 21] that "[r]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative issuances." [footnote omitted]

22. At most, the Manual in this appeal provides "guidance" on the "responsibilities" of the Hiring Manager, as envisaged by Section 2.6 of ST/AI/2010/3; it does not purport to vest a staff member with an entitlement to be apprised in advance of an interview of the names of the panel members.

40. Nevertheless, also bearing in mind the above caveat regarding the impact of non-promulgated issuances, the Applicant's Manual, chapter 14.7.3, states that (emphasis in original):

... Once a position specific (standard) job opening is advertised, **Hiring Managers** may immediately recommend the selection of a qualified roster applicant or qualified roster applicants

(when filling multiple positions) from among the released applications. **Hiring Managers** are not required to interview roster applicants but are encouraged to do so in a less formal setting in order to establish a sense of the applicant's overall fit within the team/unit. In order to speed up the process, under such circumstances the **Hiring Manager** need not record his/her evaluation of new non-rostered applications. Selection of a roster applicant is not required to go through a review by a **Central Review body**. One or preferably several roster applicants found suitable may be recommended for selection at this stage.

41. Similarly, the Recruiter's Manual, chapter 9.13, provides that (emphasis in original):

... **Hiring Managers** may immediately recommend the selection of a qualified roster applicant from among the released rostered applications. **Hiring Managers** while not required to interview the rostered applicant are encouraged to do so in a less formal setting in order to establish a sense of the applicant's overall fit within the team/unit. In order to speed up the process, under such circumstances, **Hiring Managers** need not record his/her evaluation of new non-rostered applications. The selection process of a roster applicant is not required to go through a review by a **Central Review body**. One or preferably several roster applicants found suitable may be recommended for selection at this stage.

42. When interviewing rostered candidates, both Manuals accordingly encourage the conduct of interviews in "a less formal setting in order to establish a sense of the applicant's overall fit within the team/unit". This would appear to suggest that the hiring manager need not establish an assessment panel or conduct the interviews as competency-based as otherwise required by ST/AI/2010/3. However, the situation, as in the present case, where it was nevertheless decided to do so, as directed by the USG/DM, is nowhere contemplated in the legislative framework.

43. Accordingly, considering the lack of any regulatory guidance (for instance, if an exception and/or distinction was made for a selection exercise limited to rostered candidates), referring also to the general legal principle that "where the law does not distinguish, one should not distinguish" (*ubi lex non distinguit nec nos dissinguerere*

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

The standard of the Tribunal's judicial review

44. The standard of judicial review adopted by the Appeals Tribunal when considering a selection decision and the procedure involved therewith, is the notion of the presumption of regularity. See, for instance, *Lemonnier* 2017-UNAT-762 (references to footnotes omitted):

30. Initially, the Secretary-General has “broad discretion” in staff selection decisions under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1.12. However, the Secretary-General’s “discretion is not unfettered and is subject to judicial review”. [Footnote omitted]

31. Judicial review of a staff selection decision is not for the purpose of substituting the Dispute Tribunal’s selection decision for that of the Administration. [Footnote omitted] Rather, as we stated in *Abassi* [2011-UNAT-110], the Dispute Tribunal’s role in reviewing an administrative decision regarding an appointment is to examine: “(1) whether the procedure laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration”. The role of [the Dispute Tribunal] is “to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner”. [Footnote omitted]

32. As the Appeals Tribunal has explained, the starting point for judicial review is a presumption that official acts have been regularly performed: [Footnote omitted]

... But this presumption is a rebuttable one. If the management is able to even minimally show that the [staff member’s] candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the

[staff member] who must show through clear and convincing evidence that [h]e was denied a fair chance of promotion.

The composition of the assessment panel

45. The Applicant submits, in essence, that the composition of the assessment panel was improper because the Deputy CEO served as hiring manager in both the first and the second round of the selection exercise and the panel members did not have the required training in competency-based interviews.

46. In rebuttal, in support of the argument that the Applicant's candidature received full and fair consideration, the Respondent contends that an assessment panel interviewed and evaluated the roster candidates, and found that the Applicant did not fully demonstrate all the required competencies. While the Applicant fully demonstrated the competencies of professionalism and client orientation, he did not demonstrate the competencies of planning and organizing, and leadership, and therefore the assessment panel did not recommend the Applicant for selection. The Respondent further submits that the panel concluded that two of the roster candidates fully demonstrated the competencies of the position, and thereafter unanimously recommended one roster candidate for the position. Finally, the Respondent argues that, based on the panel's assessment, the hiring manager submitted the panel's recommendation for selection to the CEO on 28 November 2016. On the same day, the CEO as head of office selected the roster candidate who he considered to be best suited for the functions.

Mr. PD as hiring manager and a voting panel member

47. The Applicant challenges the propriety of the Deputy CEO's involvement and impartiality as a hiring manager on several grounds, in particular: (a) that the Deputy CEO was the sole person responsible for selecting Mr. DCD in the first recruitment exercise, which was subsequently cancelled; (b) the Deputy CEO's high-level role in UNJSPF and connection to the selected candidate; and (c) the fact that

the Deputy CEO alone found the Applicant unsuitable in the prior run of the contested recruitment exercise. In support of the Applicant's submissions, he refers to *Valentine* UNDT/2017/004, para. 24, and *Diatta* UNDT/2015/054, paras. 84 and 87.

48. In response, the Respondent does not deny that the Deputy CEO also served as hiring manager in the previous selection exercise as well but contends that, in essence, the assessment panel was composed in compliance with the USG/DM's instructions (see above). Furthermore, the Respondent submits that the Applicant was notified of the composition of the panel prior to his interview and did not object thereto following this notification, referring to *Faust* UNDT/2016/213, paras. 48-52.

49. It goes without saying that a hiring manager and/or panel member should not be, or even be perceived as, biased or partial in a selection exercise. The United Nations Charter, art. 101.3 also provides that "[t]he 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". In line herewith, staff regulation 4.2 provides that, "paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity". Specifically, on conflict of interest, staff regulation 1.2(m) states that,

(m) A conflict of interest occurs when, by act or omission, a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

50. Furthermore, aside from the general principles on conflict of interest, the Recruiter's Manual provides that the panel members must have "[f]reedom from outside pressure: [t]here is no appearance of a conflict of interest" (see Chapter 9.3.3 on "advising on composition of the assessment panel"). This therefore would also

apply to all the panel members of the assessment panel in this instance, including the Deputy CEO in such capacity.

51. It is common cause that the Deputy CEO acted as the hiring manager in the first recruitment exercise, and that after he made his selection recommendation, the CEO/UNJSPF chose Mr. DCD for the position as a rostered candidate, whilst at the same time the Applicant had also applied for the job and was on the relevant roster. Subsequently, this selection decision was overturned after a management evaluation by the USG/DM, who then instructed an assessment panel to be established to assist the hiring manager with appraising the relevant rostered candidates based on competency-based interviews. Following the second selection exercise, the Deputy CEO was, once again, appointed hiring manager as well as a voting panel member, and Mr. DCD was, once again, selected for the position by the CEO/UNJSPF.

52. As stated above, an actual or possible conflict of interest arises when, by act or omission, a staff member's personal interests interfere with, or can be perceived to interfere with, the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required of that individual. Furthermore, when an actual or possible conflict of interest does arise, in terms of staff regulation 1.2(m), the conflict shall be disclosed by the staff member and appropriate action taken in the interests of the organization. This may include the withdrawal of the staff member concerned from the decision-making. After all, the Tribunal need not make an actual finding of bias; what is required is to assess whether there are any circumstances that may compromise impartiality. As stated by the Appeals Tribunal in *Finniss* 2014-UNAT-397, para. 22:

We refer to the persuasive holding by the Administrative Tribunal of the International Labour Organization (ILOAT) in *Varnet v. UNESCO*, Judgment No. 179, where the ILOAT stressed that:

It is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to his jurisdiction must withdraw in cases in which his impartiality may be open to question on reasonable grounds. It is immaterial that,

subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the person affected by the decision to suspect its author of prejudice. Persons taking part in an advisory capacity in the proceedings of decision-making bodies are equally subject to the above-mentioned rule. It applies also to members of what is required to make recommendations to decision-making bodies. Although they do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence on the decision to be taken.

53. In the *Finniss* case, the Appeals Tribunal was of the view that there could have been a perception of bias on the part of the staff member concerned and the Dispute Tribunal should have assessed whether his animosity towards the applicant compromised his impartiality in the evaluation of the applicant in that case.

54. Although there is no allegation of animosity or the like in the instant case, after having served as hiring manager in the first round of the selection exercise, the Deputy CEO also acted as hiring member and voting panel member in the second selection exercise. As hiring manager in the first exercise without an assessment panel, the Tribunal finds that it could reasonably be inferred that the Deputy CEO having made a prior assessment regarding one or more candidates, could be perceived to have a preconceived opinion about the candidates in the second exercise since he had already assessed all the job applications as part of the first round and, based thereon alone made a selection recommendation. Furthermore, following his recommendation, the selection decision was then made by the CEO/UNJSPF. Thereafter in the second selection exercise, the Deputy CEO was a voting, and therefore deciding member of the assessment panel, but also held the additional role as hiring manager. He was therefore placed in a conflict of interest situation in having to possibly overturn his original recommendation upon which the first selection was made. As stated in *Finniss*, this set of circumstances may be reasonably perceived by the fair-minded observer to have compromised impartiality, and “it is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision” (see para. 22, referring to the persuasive holding of the Administrative Tribunal of the

International Labour Organization Judgment No. 179, *In re Varnet*). In this regard, the Tribunal observes that other options were available on the possible design of the assessment panel. For instance, to avoid any allegations of actual or perceived partiality, the Deputy CEO could simply have acted as hiring manager but not also as a voting panel member.

55. As stated hereinbefore, the Tribunal need not make an actual finding of bias, what is required is to assess whether there are any circumstances that may compromise impartiality. Therefore, the Tribunal finds that it has been demonstrated that there was, at least, the appearance of a conflict of interest and that the circumstances created were such as to compromise impartiality, such that this inappropriately opened up the selection process to, if not a real but at least a perception of, prejudgment or partiality.

56. One other matter raised by the Applicant is that the selected candidate was conflicted, having been involved in a prior audit of the UNJSPF. The Tribunal notes that it has not been substantiated that Mr. DCD's alleged previous role as part of an audit of UNJSPF has had, or been able to, influence the Deputy CEO's role as an impartial hiring manager and panel member or the CEO/UNJSPF's ultimate decision.

57. The next question is therefore whether the Applicant's current appeal against the Deputy CEO's acting as a hiring manager and voting panel member in the second exercise was timely or if he should have made this objection immediately when he was notified about this prior to the interviews. In support of the latter position, the Respondent refers to the Dispute Tribunal's judgment in *Faust* UNDT/2016/213.

58. This Tribunal finds that the Dispute Tribunal in *Faust* did not firmly hold that an applicant must always object to the inclusion of certain panel members at the moment they realized who they are—rather *Faust* seems to suggest that, in the particular circumstances of that case where allegations of harassment were only made subsequently, this would have been appropriate. In addition, the Tribunal notes that the present case is clearly distinguishable from *Faust*. In the present case, the

Applicant had already taken issue with the first selection decision by requesting (a) management to evaluate it, and (b) the Dispute Tribunal to suspend it during this pending management evaluation under art. 2.2 of its Statute. The Applicant was successful in both these requests. After these two interventions, it was only reasonable and prudent for the Applicant to await the second selection process in its new structure rather than immediately make objections. Had the Applicant done so, such objection could well have been regarded not only as premature, but also unnecessarily obstructive by not allowing the assessment panel to have an opportunity to prove its worth. In this regard, the composition of the panel could also have been regarded as only a preparatory step in the final selection decision because the panel was instructed by the USG/DM *to assist* the hiring manager. Similarly, in *Ishak* 2011-UNAT-152, para. 29, the Appeals Tribunal stated that, “[a] selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to [the Dispute Tribunal]”. The same rationale could be applied in the Applicant’s situation. In conclusion, the Tribunal finds that the Applicant’s objection against Mr. PD was timely and appropriate.

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

60. In *Finniss*, the Appeals Tribunal found that one biased member tainted the entire panel and that “in the circumstances, the test for apparent bias applied by the [Dispute Tribunal]—whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the interview panel was biased—was correct”. Similarly, in this case, the Tribunal finds that whilst no reliance can be placed on unsubstantiated rumors, in the particular circumstances a “real possibility” arose that the entire assessment panel could be biased, or at least be seen to be so, in particular as the Deputy CEO encumbered both the role of hiring manager and panel member and the role of the assessment panel was limited to “assist” the hiring manager under the instruction of the USG/DM. Furthermore, staff regulation 1.2(m) requires that where an actual or possible conflict of interest does arise, the conflict shall be disclosed by the staff member to their head of office and mitigatory action taken. There is no evidence before the Tribunal that this was done.

61. Accordingly, the Tribunal finds that the involvement of the Deputy CEO in both rounds of the selection exercise constituted an actual; if not, a perceived conflict of interest; or at the very least gave the appearance thereof. In the instant case, therefore, the Tribunal finds upon the particular facts that a reasonable apprehension of partiality or bias arose, sufficient to establish that the Applicant did not receive full and fair consideration.

The panel members’ lack of training in competency-based interviews

62. The Applicant contends that the assessment panel members did not have the required training in competency-based interviews at the time these interviews took place. The Respondent submits that, prior to the competency-base interview, Mr. PD and Ms. OP completed the United Nations Secretariat training on 3 November 2006 and 17 May 2007, respectively, and that Mr. CH completed a similar training from the International Atomic Energy Agency on 19 November 2008.

63. In *Charles* 2013-UNAT-286, para. 24, the Appeals Tribunal noted that “the relevant administrative instruction on the staff selection process, ST/AI/2010/3, is

silent on the requirement for such training” but, under the Recruiter’s Manual, which was issued subsequent to *Charles*, such training is mandatory as Chapter 9.3.3 on “advising on composition of the assessment panel” states that “[c]ompetency-based selection and interviewing skills and follow-up programme: Training module has been completed prior to serving on the panel”.

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

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

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

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

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

Scoring sheets

67. The Applicant submits that the Tribunal should draw an adverse inference from the Respondent failing to produce the scoring sheets or notes from the panel members, as it is logical that three panel members who were interviewing four different candidates on five competencies each would have kept some manner of notes or individual account of each interview. From the Respondent's production of the sample competency-based interview questions and actual questions used in the interview in question, one discerns that there is a minimum of three questions for each competency. The Applicant further contends that it is almost impossible to imagine that the final record was created contemporaneously to each interview or that the three panel members had excellent enough memory to retain detailed information about 15 separate competency evaluations, and answers to over 45 separate questions between the date of the interviews, 7 October 2016, and the date the final record was signed by the panel members, 11 and 18 November, over 30 days later. The Applicant argues that in the relevant training and manuals, notetaking is a given. The failure to take notes should also suggest a procedural flaw and calls into question whether the final notes about the Applicant's answers reflect his actual answers given during the interview. The lack of any contemporaneous record by the panel of the Applicant's responses should cast doubt on the validity of the final record, the integrity of the process and ultimately whether the Applicant was given full and fair consideration.

68. The Tribunal notes that under sec. 9.3 of ST/AI/2010/3, "When recommending the selection of candidates for posts up to and including at the D-1

level, the hiring manager shall support such recommendation by a documented record”. In line therewith, according to the agreed facts, the USG/DM’s instructions were that, “The panel should prepare a documented record of its assessment of the rostered candidates”. No specific requirement is made anywhere that each panel member shall make a separate scoring sheet, although this would seem to be a very practical thing to do.

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

70. Similarly, in the present case, as in *Staedtler*, no such individual scoring sheets were made available by the Respondent, who instead produced the finalized report of the assessment panel signed by all panel members. In this report, the competency-based interview of each candidate is summarized, and it follows that everyone was assessed against the competencies of professionalism, planning and organizing, client orientation, leadership, and managing performance. It further follows from the report, who the panel members were, that an OHRM staff member attended the interviews as human resources “*ex officio*”, and that a UNJSPF staff member assisted the panel with notetaking and drafting the report. It is also indicated that while the interviews were conducted on 7 October 2016, the panel members signed the report on, respectively, 11 November 2016 (Mr. PD and Mr. CH) and 18 November 2016 (Ms. OP). As hiring manager, Mr. PD then signed a letter on 28 November 2016 in which he recommended the selection of

Mr. DCD. On the same date, by checking a box in the letter and countersigning it, the CEO/UNJSPF approved this recommendation.

71. Taking into account the assessment panel's report and the recommendation letter, the Tribunal finds that a fully documented record was prepared. The circumstance that the individual panel members might not have prepared their own notes but instead relied on the notetaker and the finalized report does not, by itself, invalidate the selection process, although the Tribunal is surprised to learn that no such notes were taken by the individual panel members, even if they were not available to the Respondent for submission to the Tribunal. This circumstance could be perceived as one of the indicators that the selection process was procedurally deficient and not conducted with the required level of impartiality.

The Applicant's e-PAS reports

72. The Applicant contends that although *Riecan* 2017-UNAT-802 was reversed on appeal, the Tribunal can still consider the factual existence of the Applicant's positive ratings in his electronic performance appraisal system ("e-PAS") reports. Particularly so as there is a marked contrast between the final interview scores in the competencies of planning and organizing and leadership during the selection process, and the Applicant previously having received "exceeding or fully meeting expectations" on these competencies while already serving at the D-1 level for eight years.

73. The Respondent contends that the Applicant's past performance evaluations do not establish an error in the assessment panel's appraisal of the Applicant because the staff selection system does not require the consideration of performance documents when evaluating job applicants (*Riecan*, paras. 20 and 21). As stated by the Dispute Tribunal in *Abassi* 2011-UNAT-110, "it is the conscientious opinion of the panel members that is the essential element of the process, not the opinion of any candidate's supervisor".

74. The Tribunal observes that, while ST/2010/03 is silent on the issue on what importance an assessment panel is to attach to a job applicant's e-PAS reports, the Appeals Tribunal in *Riecan* stated as follows:

21. Second, in applying the above principles of our jurisprudence, we find that the mere fact that the interview panel did not take into consideration Mr. Riecan's e-PAS reports, which were available to them, while relying on their own assessment of his competencies during the competency-based interview, does not render the selection process unreasonable or unfair. Nor does the failure of the interview panel to address Mr. Riecan's e-PAS reports especially in the context of the disparity between its ratings and those of his reporting officers on the same competencies.

75. Consequently, it is not a procedural irregularity if a job applicant's e-PAS reports are not considered when these reports were available to the assessment panel. However, this does not mean that such failure cannot be considered in the larger context of circumstantial evidence to prove ulterior motives in the exercise, for instance, if such e-PAS reports were deliberately not made available to an assessment panel in an effort to favor certain candidates or discredit others. As stated by the Appeals Tribunal in *He* 2016-UNAT-686, although in the context of a non-renewal case, "The mental state of the decision-maker usually will be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence".

76. In the present case, the Tribunal observes that when perusing the report of the assessment panel, it contains no reference whatsoever to the Applicant's or any other candidates' e-PAS reports, and it would therefore appear that the assessment panel took no notice of any of these reports for any of the candidates when making its evaluation. At the same time, it is also not clear whether the hiring manager actually made the relevant e-PAS reports available to the assessment panel, and the Appeals Tribunal in *Riecan* does not pronounce itself on whether this in itself would be a procedural irregularity. Although not vesting any right in the Applicant, the Recruiter's Manual specifies that, "A complete application consists of ... [t]he e-PAS reports" in addition to the cover letter, part of the profile and the application form

(see Chapter 7.1.5). In line herewith, the Tribunal finds that it would, in general, only be reasonable for a hiring manager to ensure that all relevant e-PAS reports are presented to the assessment panel along with the other components of the application in order to provide its members with a comprehensive understanding of each individual candidate and to allow the panel members to compare the candidates' performances at the competency-based interview against their performance records from their respective work places. It would have been particularly prudent in this instance in light of the particular circumstances of this case and the contentious history of this matter.

77. In the circumstances of the present case, the Tribunal therefore finds that the fact that no reference is made to the e-PAS report in the assessment panel's finalized report, by itself, does not render the selection exercise unlawful. Also, in the absence of any evidence whatsoever showing that the e-PAS reports were not made available to the panel members in a deliberate attempt to influence the selection process, the Tribunal finds that the Applicant has not substantiated that the hiring manager did this with any ulterior motives in mind.

Anonymous emails

78. The Applicant refers to two "anonymous emails", which he appends to his application as annexes, and submits that they tainted the recruitment procedure relating to the Deputy CEO's alleged actual or potential conflict of interest and relationship with the selected candidate, Mr. DCD. No paper copy of either email is presented in their original forms; instead, the Applicant appears to have copied the alleged content into a new document—accordingly, the regular heading of an email is not displayed, showing sender, addressee, date and time, and subject line. As for the content, in the first email, the date is stated by the Applicant as 27 September 2016 and, in essence, the sender allegedly states that: the Applicant is not going to be selected as the position has already been promised to Mr. DCD; that the panel members are biased and friends of the Deputy CEO; and that the interview report might already have been prepared. Also, the content of an alleged email from

UNJSPF to various staff members is set out in which concern is expressed that the Applicant had access to confidential information regarding the selection exercise. In another email, apparently dated 28 September 2016 which the Applicant says he received in the early morning of 29 September 2016, the interview questions were allegedly shared but it is unclear with whom.

79. The Respondent submits that the Applicant's submissions are without merit as the UNJSPF undertook prompt and appropriate action to ensure that the anonymous emails did not adversely impact the recruitment process. The Respondent contends that UNJSPF postponed the scheduled interviews, drafted new interview questions, and took measures to ensure that the new questions were not shared electronically.

80. The Tribunal notes that as the emails are not presented in their original form, their evidentiary value is limited. However, from the Respondent's submissions it would appear to follow that UNJSPF, as there is no denial of the existence or contents of these, apparently believed that the emails were genuine and therefore took some action to prevent any adverse effects. In light of the remedial action, even if the emails were actually sent, the Tribunal does not find that it is proved they had any direct impact on the selection exercise although they do cloud the appearance of a fair process. In addition, the Tribunal notes that the fact that the Panel Members deemed the breach of confidentiality serious enough to meet in person and agree a new set of interview questions, is evidence that the original questions had been leaked. This circumstance casts sufficient doubt on a selection process which had already been set aside once, such as to alert the administration that utmost caution and proper compliance was required the second time round.

Conclusion

81. The Tribunal appreciates the efforts made, particularly by OHRM and the USG/DM, to ensure a full and fair selection process. From the case record, it is, however, not clear why the first round was cancelled by the USG/DM and why detailed instructions were subsequently provided on the conduct of the second round

during which the relevant rostered candidates were to be appraised at competency-based interviews by an assessment panel. As stated in *Valentine* UNDT/2017/004, often in a case “there is not a single fact, but rather an accumulation of facts that leads the Tribunal to infer that the selection process for the contested post was not conducted with the required level of impartiality” (see para. 26). With reference to the above considerations, the Tribunal therefore finds it is regrettable that, given the history of this matter, having served as hiring manager in the first round at which he made a selection recommendation, the Deputy CEO, who knew both the Applicant and the selected candidate, was, once again, appointed as the hiring manager and also participated in the panel as a voting member, as this only served to create a perceived, if not actual, conflict of interest. Coupled with all the other circumstantial factors highlighted in this judgment, this gives rise to a reasonable impression of partiality or bias, and at the very least to a finding that the selection exercise was flawed, and that the Applicant therefore did not receive full and fair consideration.

Remedies

82. The Applicant submits that he can be awarded compensation for violation of his rights alone, referring to *Asariotis* 2013-UNAT-309, para. 36, and *Appelton* 2013-UNAT-347, para. 27. The Applicant further contends that, by his non-selection, he also suffered a loss of opportunity, at least a 25 percent chance for a lateral move to a new job and different career path, and feelings of disappointment and demoralization from the Organization he has served for over 20 years. For this reason, the Applicant avers that he should be awarded six months’ net base salary for violation of his rights and loss of career opportunity.

83. The Respondent contends that the Applicant does not establish any relationship between the procedural irregularities that he alleges, and the contested decision. The Applicant was not selected for the position because he failed to demonstrate to the assessment panel that he possessed the required competencies for

the contested position and has therefore failed to establish that the contested decision was unlawful and is not entitled to any relief. In addition, art. 10.5(b) of the Dispute Tribunal's Statute provides that compensation for harm may be awarded only where supported by evidence. The Applicant has not produced evidence of harm, or efforts to mitigate harm.

84. The Tribunal observes that art. 10.5(b) of the Dispute Tribunal's Statute provides that compensation for harm must indeed be "supported by evidence". In line herewith, the Appeals Tribunal confirmed in *Pinto* 2018-UNAT-878 that, "A mere procedural violation is not sufficient to warrant moral damages in the absence of concrete evidence of harm" (see para. 26).

85. In the present case, while the Tribunal has found that the selection process was flawed in several respects, the Applicant has provided no evidence whatsoever of any either pecuniary or non-pecuniary harm. As for loss of opportunity, a particular method by which income loss can be calculated typically in non-promotion cases (see, for instance, *Andersson* 2013-UNAT-379, para. 13), the Tribunal notes that the Applicant is currently employed and serves at the D-1 level which is the same level as the relevant position in the JO and for which reason he cannot have suffered any potential income or other similar monetary loss.

86. In conclusion, the Tribunal rejects the Applicant's claim for compensation. For the same reason, the contested selection decision is not rescinded as no basis exists for awarding the Applicant *in lieu* compensation in accordance with art. 10.5(a) of the Statute of the Dispute Tribunal, which is also subject to the evidence requirement under art. 10.5(b).

Conclusion

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

(Signed)

Judge Ebrahim-Carstens

Dated this 18th day of March 2019

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

(Signed)

Nerea Suero Fontecha, Registrar