

# UNDT/2012/125, Appleton

## UNAT Held or UNDT Pronouncements

The Applicant applied twice for the position of Director of Investigations, Office of Internal Oversight Services (“OIOS”) (“the Post”) at the D-2 level. The Post was first advertised in a vacancy announcement in 2008 and again in 2009. A selection panel set up by OIOS recommended him as the only qualified candidate for the Post in each instance. Neither of these recommendations was approved by the Special Review Group (“SRG”) and, as a result, no appointment was made to the Post. A third vacancy announcement was issued, for which the Applicant did not apply. The Applicant submits that he should have been selected for the Post. The Tribunal found that: (1) Both selection processes were conducted by OIOS in accordance with the relevant procedural requirements at the programme manager level. The suitability of all candidates was appropriately assessed against the evaluation criteria. The recommendation of only one suitable candidate, namely the Applicant, and the absence of suitable women candidates for the Post were adequately explained. While the submission of the second recommendation directly to the Secretary-General by the USG/OIOS was a procedural error, this was rectified by the Chef de Cabinet and had no influence on the process; (2) The SRG’s handling of the selection process was unlawful. In respect of the first selection process, the SRG found that the vacancy for the Post should be re-circulated on the incorrect basis that it had not been widely advertised and, in the face of reasonable explanations from the USG/OIOS, it continued to insist upon having three recommended candidates, including a female, without regard to the exceptions in the Secretary-General’s policy on gender. In respect of the second selection process, the SRG similarly and unlawfully refused to endorse the recommendation of the USG/OIOS of the Applicant as the only candidate for the Post; (3) The Secretary-General did not violate the Applicant’s rights when he did not select him, but the failure of the programme manager, namely the USG/OIOS, to notify him about the outcome of the process was a breach of the Applicant’s right to be treated in good faith. Regarding compensation, the Tribunal found that the chances of the Applicant being selected for the Post were very high had the selection exercise been done without the errors of the SRG that led to the decision to cancel the vacancy announcements. The Applicant failed to mitigate his income loss by applying for other similar positions, but was awarded USD30,000 in compensation for stress and anxiety.

## Decision Contested or Judgment/Order Appealed

Non-selection. The Applicant applied twice for the position of Director of Investigations, Office of Internal Oversight Services (“OIOS”) (“the Post”) at the D-2 level. The Post was first advertised in a vacancy announcement in 2008 and again in 2009. A selection panel set up by OIOS recommended him as the only qualified candidate for the Post in each instance. Neither of these recommendations was approved by the Special Review Group (“SRG”) and, as a result, no appointment was made to the Post. A third vacancy announcement was issued, for which the Applicant did not apply. The Applicant submits that he should have been selected for the Post. The Tribunal found that: (1) Both selection processes were conducted by OIOS in accordance with the relevant procedural requirements at the programme manager level. The suitability of all candidates was appropriately assessed against the evaluation criteria. The recommendation of only one suitable candidate, namely the Applicant, and the absence of suitable women candidates for the Post were adequately explained. While the submission of the second recommendation directly to the Secretary-General by the USG/OIOS was a procedural error, this was rectified by the Chef de Cabinet and had no influence on the process; (2) The SRG’s handling of the selection process was unlawful. In respect of the first selection process, the SRG found that the vacancy for the Post should be re-circulated on the incorrect basis that it had not been widely advertised and, in the face of reasonable explanations from the USG/OIOS, it continued to insist upon having three recommended candidates, including a female, without regard to the exceptions in the Secretary-General’s policy on gender. In respect of the second selection process, the SRG similarly and unlawfully refused to endorse the

recommendation of the USG/OIOS of the Applicant as the only candidate for the Post; (3) The Secretary-General did not violate the Applicant's rights when he did not select him, but the failure of the programme manager, namely the USG/OIOS, to notify him about the outcome of the process was a breach of the Applicant's right to be treated in good faith. Regarding compensation, the Tribunal found that the chances of the Applicant being selected for the Post were very high had the selection exercise been done without the errors of the SRG that led to the decision to cancel the vacancy announcements. The Applicant failed to mitigate his income loss by applying for other similar positions, but was awarded USD30,000 in compensation for stress and anxiety.

#### Legal Principle(s)

A list of candidates in a selection process: There is no absolute requirement in ST/AI/2006/3 about the number or type of candidates to be recommended, only that a list of qualified candidates is preferable. The Secretary-General's April 2008 memorandum on gender balance: Although the Secretary-General clearly intended that the statements of policy in this memorandum should be taken seriously and that managers should be proactive in addressing the gender gap in senior appointment to the Secretariat staff, he did not impose an absolute requirement that the numbers of candidates and gender and geographical diversity criteria must be met on all occasions. Preferential treatment of women: The mandatory rules in ST/AI/1999/9 concerning preferential treatment of women in selection processes only applies if the female candidate in question is found suitable for the job and her qualifications are substantially equal or superior to that of the male competitors. The principal responsibility for identifying qualified female candidates falls on ORHM and not on the programme manager. The role of the central review body: To ensure fairness and avoid favoritism, a central part of the selection system set out in ST/AI/2006/3 is that the selection process is to be approved by a central review body before a final selection decision is made. It is within the purview of a central review body to review whether gender policies have been complied with. A decision to remand case to the programme manager must be based on proper facts and a correct application of relevant human resources policies. Personnel responsibilities in OIOS: As the areas of authority relating to OIOS retained by the Secretary-General were specifically defined by ST/AI/401, it follows that all other personnel responsibilities not so retained, including both the selection and the final appointment of staff up to the D-2 level, were deliberately and specifically transferred by ST/SGB/273 from the Secretary-General to the USG of OIOS. However, in accordance with sec. 3.3 of ST/AI/2006/3, if a head of department/office, who otherwise has authority to appoint staff limited to the entity, submits the selection recommendation to a central review body outside his or her department, the selection decision must be referred to the Secretary-General. Notification of candidates: Under ST/AI/2006/3, the programme manager is to notify a candidate if s/he was interviewed for the relevant post, but not selected or placed on a roster. ST/AI/2006/3 is silent about any obligation to notify candidates in circumstances where no selection has been made. Compensation, mitigation: The Applicant has a duty to mitigate his loss of income. He must demonstrate that he tried to seek alternative suitable work to avoid unemployment and, if he cannot, the Tribunal shall assess how this should impact his compensation award.

#### Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Appleton

Entity

OIOS

Case Number(s)

UNDT/NY/2010/085

Tribunal

UNDT

Registry

New York

Date of Judgement

14 Aug 2012

Duty Judge

Judge Shaw

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Compensation

In-lieu compensation

Non-renewal

Separation from service

Staff selection (non-selection/non-promotion)

Central Review Body

Termination (of appointment)

Applicable Law

Secretary-General's bulletins

- ST/SGB/2002/6
- ST/SGB/2009/2
- ST/SGB/273

Staff Rules

- Rule 4.15

UNDT Statute

- Article 10.5(b)

UNAT Statute

- Article 2.1(a)