UNDT/2017/004, Valentine

UNAT Held or UNDT Pronouncements

Disclosure: The Respondent's disclosure obligation in proceedings concerning appointment and promotion is twofold. Firstly, the Respondent shall produce evidence to satisfy his own burden to minimally show that the staff member's candidature was given full and fair consideration. Secondly, the Respondent shall disclose any document in his possession that is relevant to the determination of the Applicant's case, as presented in his or her application. This duty of candour that falls on the Respondent is necessary to ensure that staff members have access to justice. When the Respondent fails to abide by orders to disclose documents or information requested by the Tribunal or fails to ensure the appearance of witnesses, the Tribunal is entitled to draw the appropriate inferences as necessary.

Bias: The Applicant does not have to prove an appearance of bias in a selection process through direct evidence. The Tribunal may infer from an accumulation of facts that a selection process was not conducted with the required level of impartiality.In this case, an appearance of bias was established on the basis that (i) the first and second job opening were drafted, without legitimate justification being provided, to fit the profile of the selected candidate; (ii) the selection process was considered and stated to be "a special case" and additional efforts were made to ensure that the selected candidate, who had not been screened as eligible for the first job opening, would be notified of its cancellation;(iii) the language of the (modified) second job opening better matched the skills of the selected candidate, notwithstanding that the de facto hiring manager admitted in cross-examination that the required experience reflected in the first job opening better suited the position; and (iv) the de facto hiring manager placed himself in a position to identify the candidates and to oversee the whole testing exercise, such that the scores he gave to the candidates cannot be considered the result of an anonymous assessment.

Authority of the hiring manager: The current rules, including ST/AI/2010/3/Amend. 1 (Staff selection system), do not allow the designated hiring manager to delegate his or her authority to conduct a selection process. A selection process which is de facto

conducted by someone else than the designated hiring manager is unlawful.

Eligibility of candidates for a post: A candidate who does not submit an application within the deadline set forth in the job opening is not eligible to be considered for the post. After the deadline to submit an application for a job opening has elapsed, Human Resources has no authority to link in Inspira a candidate's application for this vacancy announcement to a previous application for a different job opening that had been cancelled. Furthermore, such action lacks transparency if not brought to the attention of the Central Review Board.The selection of a candidate who did not submit an application for the post within the mandatory deadline constitutes a serious procedural flaw in the selection process. It renders unlawful the decision to appoint the selected candidate.

Anonymity of a written test: There is no rule mandating that written tests be conducted anonymously, although this is clearly a desirable practice to ensure objectivity in the assessment process. However, once the hiring manager elects to conduct a written test anonymously, the assessment methodology and the procedure to administer the test shall be carefully crafted to ensure respect of this principle. Although it cannot be totally excluded that assessors may recognise candidates they know when evaluating written tests, reasonable efforts should be made to limit this possibility.When the type of questions asked allows the panel members, or some of them, to identify a/the candidate(s) and the procedure for administering the test allows the de facto hiring manager to identify the candidates with some degree of certainty, the presumption of regularity in respect of the written test is rebutted.

Composition of an assessment panel: The requirement that an assessment panel be composed of at least three members necessarily implies that each of them participate in each step of the evaluation process, unless they are replaced, as permitted under sec. 9.3.2 and 9.3.3 of the Hiring Manager Manual. Concluding otherwise would possibly allow assessment exercises to be de facto conducted by only two, or even one, assessor putting in jeopardy the principle of objective and independent assessment of candidates.The composition of an assessment panel does not comply with sec. 1(c) of ST/AI/2010/3/Amend. 1 when one of the three members does not assess all the questions of the written test and is not replaced. This is particularly concerning when this panel member is the only external member, the two others know most of the candidates and the question not assessed by the external member represents 40% of the final grade. Furthermore, such situations

shall be disclosed to the Central Review Board.

Methodology to mark a written test: The application of different marking methodologies by the three-panel members, the non-availability of the marking sheets of two-panel members and discrepancies identified in the marking sheets of a third panel member raise doubts about the reliability of the scores reported on the collated scoring sheet and display a lack of transparency and rigour in the marking process.

Rescission and alternative compensation: The Tribunal is obliged by its Statute to set an amount that the Organization may elect to pay in lieu of rescinding the decision. However, when it is demonstrated that the selected candidate was not eligible for the contested post, the selection decision must be rescinded, as his/her remaining on the post without a new selection process being conducted would perpetuate the illegality of said appointment.The irregularities and bias in the selection process, together with the fact that the selected candidate ought not to have been considered among the pool of eligible candidates, renders it extremely difficult for the Tribunal to assess the Applicant’s actual chances to be appointed to the contested post. Following a previous determination by the Appeals Tribunal, the Tribunal set the amount of compensation in lieu of rescission to USD10,000, taking into account the difficulties in ascertaining the Applicant’s chances for promotion, and the fact that he had filled the post as Officer in Charge for four years.

Material damages: The Applicant would not be fully compensated by the rescission of the contested decision as even if a new selection procedure is conducted, any appointment would not be retroactive and, as a consequence, he would still have lost an opportunity to earn a salary at the P-5 level for the period between the appointment of the selected candidate and the conclusion of an eventual new selection procedure. The Applicant is entitled to compensation for this loss of opportunity.The Tribunal awarded compensation equivalent to the difference in the net base salary the Applicant would have received at the P-5 level and his current salary at the P-4 level, from the time of the implementation of the contested decision until issuance of its judgment, based on the fact that the Applicant had significant chances to be selected for the post, and that the Respondent’s reprehensible conduct in the selection process made it impossible to fully ponder these chances. Moral damages: The Tribunal awarded the Applicant USD6,000 as moral damages to compensate the stress and anxiety he suffered as a result of the unfair treatment he was subject to in relation to the contested selection process and

the challenges he made to seek redress.

Costs: Costs may only be awarded when a party “manifestly abused the proceedings” (Bi Bea 2013-UNAT-370).

Accountability referral: The Tribunal referred the case to the Secretary-General under art. 10.8 of its Statute as it considered that the facts concerning the unlawful inclusion of the selected candidate as an eligible candidate for the contested post raise legitimate concerns as to the professional and ethical behaviour of the individuals involved in the process. It will be up to the Secretary-General to determine what action, if any, is taken in respect of the conduct disclosed by the evidence in this matter, the motivation for it and the fact that a clearly ineligible candidate was appointed to a position based upon an improper act leading to her inclusion in the pool of eligible candidates.

Decision Contested or Judgment/Order Appealed

The Applicant challenged the decision not to select him for the position of Chief of Transport Section (P-5), United Nations Conference on Trade and Development. The UNDT found that the selection decision was unlawful as it was tainted by bias and vitiated by several procedural flaws. The UNDT rescinded the decision, set the compensation in lieu of rescission to USD10,000, awarded the Applicant material damages equivalent to the difference of the net base salary he would have received at the P-5 level and his current salary at the P-4 level from the time of the implementation of the contested decision until issuance of the present judgment and awarded him moral damages in the amount of USD6,000. The Tribunal also referred the case to the Secretary-General for possible action to enforce accountability.

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Both financial comp. and specific performance

Full judgment

Full judgment

Applicants/Appellants

Valentine

Entity

UNCTAD

Case Number(s)

UNDT/GVA/2015/105

Tribunal

UNDT

Registry

Geneva

Date of Judgement

27 Jan 2017

Duty Judge

Judge Downing

Language of Judgment

English
French

Issuance Type

Judgment

Categories/Subcategories

Staff selection (non-selection/non-promotion)
Full and fair consideration
Referral for accountability

Applicable Law

Administrative Instructions

- ST/AI/2010/3/Amend.1

Other UN issuances (guidelines, policies etc.)

- Manual for the Hiring Manager on the Staff Selection System (Inspira) (2012)

Secretary-General's bulletins

- ST/SGB/2011/7
- ST/SGB/2015/1

UNDT Statute

- Article 10.5

UNRWA DT Statute

- Article 10.8

Related Judgments and Orders

UNDT/2013/050
UNDT/2014/069
2011-UNAT-110
2012-UNAT-200
2012-UNAT-265
2011-UNAT-122

2015-UNAT-503
2014-UNAT-435
2014-UNAT-397
2013-UNAT-286
2015-UNAT-496
2013-UNAT-347
2012-UNAT-219
2015-UNAT-603
2011-UNAT-109
2013-UNAT-370
UNDT/2016/030