

UNDT/2018/033, Fernandez Arocena

UNAT Held or UNDT Pronouncements

In circumstances where an applicant is not provided with the whole of the documentation involved in a matter sought to be brought before the Tribunal, it is essential that as material is provided to an applicant there be a right to amend an application. To not allow the amendment of the application would not “do justice to the parties” or “lead to the fair disposal of the case”. Clearly, not permitting an amendment of the application when the true state of affairs is revealed for the first time by the Respondent would offend the inherent obligations of the Tribunal consistent with the principles of the rule of law and due process. The Tribunal was of the view that in the amended application, the Applicant did not contest another decision as argued by the Respondent. Rather, the amended application confirmed that what the Applicant is contesting is the decision to exclude him from recruitment against GJO-426110 for FS-5 Telecommunications Assistant. That is an administrative decision, and the application was therefore considered receivable *ratione materiae*. ST/AI/2010/3 (Staff Selection System) does not provide for the possibility for the Organization to outsource the design and administration of a test for the purpose of a recruitment or roster exercise to an external contractor. Rather, the definitions provided by the administrative instruction with respect to “assessment” (sec. 1 (b)) and of an “expert panel” (sec. 1(g)) leave no doubt that under the current legal regime within the United Nations, recruitment tests have to be conducted by an assessment panel, or, in the case at hand, an expert panel. Consequently, the mere fact for the Organization to have used the services of “The test factory” for the design and administration of the test, by way of outsourcing, makes the whole process procedurally flawed and must lead to the illegality of the contested decision. Without actually making a finding of unreasonableness of the questions asked, the Tribunal finds that the questions submitted by the Respondent appear to not have been developed with the necessary and proper care. The Tribunal notes that there is no evidence of an actual OHRM review and approval of the questions prepared by “The test factory”, and finds that the Respondent did not make a minimal showing that OHRM, or anyone else within the Organization,

actually complied with all the legal obligations set forth in sec. 7 of ST/AI/2010/3. The failure to provide the documented record clearly resulted in a serious procedural flaw, which leads to a further finding of illegality of the contested decision. The central review body cannot exercise the control in accordance with sec. 4.6(c) of ST/SGB/2011/7 when it is not provided with the relevant record. Thus, the first safeguard in the procedure to ensure its regularity could not be exercised in any meaningful manner, or at all. It is not possible for the Tribunal to exercise its judicial control or review if the Respondent is not in a position to provide it with the relevant documentation as a result of an inappropriate outsourcing exercise. The Tribunal thus draws negative inferences as to the procedural regularity of the selection exercise. The decision to exclude the Applicant from recruitment against GJO No. 426110 was found to be illegal and was rescinded. As a consequence, the Applicant had to be placed in the same position he would have been in if the illegality had not occurred, that is, he has to be granted an opportunity to be fairly considered for rostering. While the Tribunal cannot order the Respondent to place the Applicant on the roster, and it would not be appropriate to do so, it falls within its competence to order the Administration to allow the Applicant to sit on a new test, without delay, and thus to give him the opportunity to be fairly considered for rostering (cf. Farr 2013-UNAT-350, para. 28).

Decision Contested or Judgment/Order Appealed

The result of an online test (2014 Field Service Campaign), arranged by the Department of Field Support/Field Personnel Division and carried out by a private company, for Generic Job Opening 426110-FS-5 of Telecommunications Assistant.

Legal Principle(s)

In El-Komy UNAT-2013-324, at para. 21, the Appeals Tribunal referred to “the inherent jurisdiction of any Tribunal adjudicating cases in a system of administration of justice consistent with the principles of rule of law and due process”. The Secretary-General has broad discretion in matters of appointment and promotions. Accordingly, the scope of the Tribunal’s judicial review in these matters is limited as set forth in Abbassi 2011-UNAT-110) and there is a presumption of regularity pursuant to Rolland 2011-UNAT-122. The Tribunal’s judicial review of an administrative decision may result in the affirmation of the contested decision or its

rescission, and in the latter case, Article 10 of the UNDT Statute allows to order both the rescission and the performance needed to bring the administrative situation in compliance with the law (Nwuke 2010-UNAT-099).

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Contested decision rescinded and the Administration ordered to set a new written assessment to be taken by the Applicant, without undue delay.

Full judgment

[Full judgment](#)

Applicants/Appellants

Fernandez Arocena

Entity

MINURSO

Case Number(s)

UNDT/GVA/2016/022

Tribunal

UNDT

Registry

Geneva

Date of Judgement

6 Mar 2018

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Staff selection (non-selection/non-promotion)

Applicable Law

Administrative Instructions

- ST/AI/2010/3

GA Resolutions

- A/RES/69/203

Secretary-General's bulletins

- ST/SGB/2002/6
- ST/SGB/2011/7

UNDT RoP

- Article 19

UNDT Statute

- Article 10.5

UNAT Statute

- Article 2.1(a)

Related Judgments and Orders

2010-UNAT-099

2011-UNAT-110

2011-UNAT-122

2012-UNAT-238

2013-UNAT-324

2013-UNAT-350