

UNDT/2019/041, Wilson

UNAT Held or UNDT Pronouncements

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. 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. 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. 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. The Tribunal observes that other options were available on the possible design of the assessment panel. 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. 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. 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. Taking into account the assessment panel's report and the recommendation letter, the Tribunal finds that a fully documented record was prepared. No 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 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. The Tribunal does not find that it is proved the anonymous emails 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.

Decision Contested or Judgment/Order Appealed

The Applicant's non-selection for a post in the United Nations Staff Pension Fund.

Legal Principle(s)

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 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. The Instruction Manual for the Hiring Manager on the Staff Selection system does not have the legal force attributed to it by the Dispute Tribunal. Rules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative issuances. At most, the Manual 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. Where the law does not distinguish, one should not distinguish. 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". 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. 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 nondiscriminatory manner. The starting point for judicial review is a presumption that official acts have been regularly performed. 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. 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. 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 relevant administrative instruction on the staff selection process, ST/AI/2010/3, is silent on the requirement for such training but such training is mandatory as Chapter 9.3.3 of the Hiring Manager's manual 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. The mere fact that the interview panel did not take into consideration the applicant'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 the applicant's e-PAS reports especially in the context of the disparity between its ratings and those of his reporting officers on the same competencies. 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.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Wilson

Entity

DM

Case Number(s)

UNDT/NY/2017/026

Tribunal

UNDT

Registry

New York

Date of Judgement

18 Mar 2019

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Staff selection (non-selection/non-promotion)

Full and fair consideration

Applicable Law

Administrative Instructions

- ST/AI/2010/3

Other UN issuances (guidelines, policies etc.)

- Manual for the Hiring Manager

Staff Regulations

- Regulation 1.2(m)

UN Charter

- Article 101.3

Related Judgments and Orders

2017-UNAT-765

2015-UNAT-496

2014-UNAT-397

UNDT/2016/213

2011-UNAT-152

2013-UNAT-286

UNDT/2014/058

2015-UNAT-547

2017-UNAT-802

2016-UNAT-686