

UNDT/2019/069, Tarr

UNAT Held or UNDT Pronouncements

Merits: The evaluation criteria in the comparative review matrix on record, against which the suitability of job candidates was appraised, did not correspond to the mandatory and desirable/advantageous qualifications, and in light of these anomalies alone, the Respondent failed to minimally demonstrate that the Applicant received full and fair consideration. Considering that the documents on record do not include any specific analysis with supporting documentation as to how the selected male candidate's qualifications were clearly superior vis-à-vis the Applicant, the Applicant has proved through clear and convincing evidence that the selection decision violated ST/AI/1999/9 and rendered the selection process flawed. The Applicant's claim that geographical representation was not considered was rejected. The hiring manager's recommendation indicated that the Applicant was from an underrepresented country and the selected candidate was from an overrepresented country, and the head of entity, being so aware, gave due regard to geographical representation in her selection decision. The Applicant's claim that her status as a qualified candidate serving in a secretariat entity undergoing downsizing was not considered was accepted. Considering that there is no evidence on record that this factor was considered for the contested decision either at the assessment stage or at the selection stage, the Applicant has proved through clear and convincing evidence that the Administration failed to consider her status as a staff member from a downsizing entity, as required by ST/AI/2010/3. The Applicant claimed that the panel was biased, but she failed to make any specific allegation or averment which could be tested on the facts before the Tribunal, and thus this claim is rejected. The Applicant claimed that the contested decision was tainted by retaliation as a result of her protected activity. There being a substantial dispute of fact which has not been reconciled, the Applicant failed to prove through clear and convincing evidence that her protected activity was considered in the contested selection decision. The Tribunal therefore concluded that the selection decision was flawed and that the Applicant did not receive a full and fair consideration. **Remedies:** While various irregularities rendered the selection process flawed and deprived the Applicant of full and fair consideration, the Applicant did not have language skills, which were listed as a desirable qualification for the contested post. Thus, the Applicant did not have a significant or strong chance for selection and thus rescission cannot be ordered. Further, specific performance would be unfeasible as the contested position has long been filled and thus the Applicant's request for transfer to the contested post is rejected. Even if the Applicant had a significant or strong chance for selection, since the contested decision concerns "appointment, promotion or termination", under art. 10.5(a) of the Statute, in ordering specific performance, the Tribunal must set an amount of compensation in lieu of rescission or specific performance, which needs to be supported by evidence. Considering that the Applicant applied for the contested post at the same level and has not provided any evidence that she suffered any economic loss otherwise, no amount of in lieu compensation can be ordered. Regarding moral damages, while the Applicant claims psychological and other harm she suffered, she has failed to provide any evidence.

Decision Contested or Judgment/Order Appealed

Non-selection decision

Legal Principle(s)

If management is able to minimally show that an applicant's candidature was given full and fair consideration, the evidentiary burden of proof shifts to the applicant who must show through clear and convincing evidence that he or she was denied a fair chance of selection. For example, an applicant may allege and must prove through clear and convincing evidence that procedures were violated, that the members of the panel exhibited bias, or that irrelevant material was considered and/or relevant material ignored. Section 1.8(d) of ST/AI/1999/9

requires that “when the qualifications of one or more women candidates match the requirements for the vacant post and the department or office recommends a male candidate, the department or office shall submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation, indicating how the qualifications and experience of the recommended candidate, when compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended”, and this written analysis is mandatory and to do anything to the contrary renders a selection process flawed. The burden of establishing bias or the perception of bias in a recruitment process lies on the applicant through clear and convincing evidence. It is the candidate challenging the selection decision who must prove through clear and convincing evidence that procedure was violated, that the members of the panel exhibited bias, that irrelevant material was considered or relevant material ignored. Under art. 10.5(a) of the Statute, the Tribunal has the statutory discretion to rescind the contested decision or order specific performance, but the rescission can be ordered only when a staff member would have had a significant or strong chance for selection. In lieu compensation shall be the economic equivalent for the loss of a favourable administrative decision. Under art. 10.5(b) of the Dispute Tribunal’s Statute, compensation for harm should be supported by evidence, and the testimony of the complainant is not sufficient without corroboration by independent evidence.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Tarr

Entity

OIOS

Case Number(s)

UNDT/NY/2016/061

Tribunal

UNDT

Registry

New York

Date of Judgement

29 Apr 2019

Duty Judge

Judge Carstens

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Staff selection (non-selection/non-promotion)

Full and fair consideration

Sexual harassment

Disciplinary matters / misconduct

Applicable Law

Administrative Instructions

- ST/AI/1999/9
- ST/AI/2010/3

Staff Regulations

- Regulation 4.2

UN Charter

- Article 101

UNDT Statute

- Article 10.5

Related Judgments and Orders

2017-UNAT-762

UNDT/2012/200

2014-UNAT-397

2017-UNAT-747

2011-UNAT-122

2016-UNAT-616

2015-UNAT-536

2015-UNAT-533

2010-UNAT-088

UNDT/2012/108

2011-UNAT-175

2017-UNAT-724

2018-UNAT-858

2017-UNAT-742