

2022-UNAT-1208, Hatim Sobier

UNAT Held or UNDT Pronouncements

UNAT first explained that this is a case where the UNDT should have held a hearing to determine the states of mind of those persons who decided that the Staff Member should not have been placed on the roster. The Tribunal defined bias as follows: (paras. 29 - 32) "29. Bias is an element of natural justice which examines not only the mind of the decision-maker subjectively, but the manifestation of the process of decision-making examined objectively. Put another way, a decision is not only biased if made by a decision-maker deliberately intending to favour or disadvantage the subject of it for improper reasons. Bias can also occur unintentionally on the part of the decision-maker if, considered objectively, a neutral, reasonable and informed bystander would conclude that it is likely to have been made to favour or disadvantage improperly the person affected by the decision. This is sometimes called "a reasonable apprehension of bias". Its ascertainment is an objective exercise, and it arises and is entirely dependent on the circumstances of the case. 30. ... However difficult in practice it may be to make an accurate assessment of the subjective mind of the decision-maker to determine whether a decision was infected by bias, an objective consideration of all other relevant factors may nevertheless bring the tribunal to the decision that bias was established. 31. An ill-motivated decision includes not only one in which the decision-maker is deliberately motivated to maliciously deprive the staff member of what would otherwise have been the staff member's entitlement: an ill-motivated decision can also include one where the decision-maker's reasons are simply wrong in law, for example by taking into account irrelevant, or failing to take into account relevant, considerations. While the word "ill" in the phrase "ill-motivated" can include moral wrongfulness, it can also include what might be called innocent or mistaken or negligent wrongfulness. The important element is wrongfulness, not the subjective attribution to the decision-maker's motive for its occurrence. 32. ... Following the demonstrated procedural irregularities, the onus moved to the Respondent to justify his actions or omissions. However, that burden was not discharged adequately by the Secretary-General." — Therefore, UNAT disagreed and found the UNDT was wrong to have excused the

irregularities in the interview process. UNAT also dismissed the Secretary-General's argument that the UNDT should not have relied on the evidence adduced by the Staff Member on the questions and answers he provided at the interview. UNAT rejected the Secretary-General's submission that the Interview Worksheet was the only reliable evidence of what was said at the interview. The Tribunal explained (para. 35): "Therefore, having recourse solely to those records [Interview Worksheet] to confirm their own accuracy would have been no more than self-serving. Finally in this regard, there is no requirement for the acceptance of evidence such as Mr. Sobier adduced that it be corroborated. While corroboration may reinforce the reliability of evidence, neither its admissibility nor its acceptance requires corroboration. The UNDT accepted Mr. Sobier's evidence in this regard both because of the means of its recording and in the absence of a challenge to it by the Respondent." Additionally, UNAT found by asking the Staff Member questions that were not posed to other candidates and by misreporting significantly his answers, the Respondent may well have exhibited bias in law. As the Secretary-General did not challenge the evidence presented by the Staff Member at the UNDT, the latter may have made a sufficient (*prima facie*) but unanswered case of bias in law. If the UNDT found there was bias against the Staff Member by negligence, then that would nevertheless be bias in law, which should set aside the decision so made. The Tribunal concluded bias is not legitimized by having been applied negligently. By virtue of not being placed on the roster, the Staff Member's career progression has generally been compromised and because the Administration misrepresented information about him at the interview, he was awarded in lieu compensation at USD 3,000.

Decision Contested or Judgment/Order Appealed

Contested Decision A Staff Member applied to a Generic Job Opening as part of a rostering exercise for a P-5 level post. Initially, the Job Opening was opened only to female candidates, but the Administration later rectified this and opened the vacancy to all applicants. The Staff Member passed the written test and was invited to CBI. However, he did not pass the interview and was not recommended to be placed on the roster. The Administration placed 15 candidates on the roster (nine male and six females). The Staff Member challenged the decision of the Administration not to place him on the roster, arguing that he was not treated fairly and that there were multiple errors in the recruitment process. The UNDT found

although there were procedural flaws in the selection process, the Staff Member had nevertheless not substantiated the allegation that the Administration had acted in bad faith or that there was ill-motive against him. The UNDT noted some of the procedural flaws were indeed rectified by the Administration, for example the vacancy was ultimately opened to all candidates. And also the claim regarding irregularities on the written tests were moot, since he did pass that step. Regarding the interview, however, the UNDT did find that the questions posed to the Staff Member on the Leadership competency was markedly different than that notated in the Interview Worksheet. However, the UNDT determined that such error may have been the result of negligence and is not evidence of bias or ill-motive against the Staff Member. As such, it dismissed the Staff Member's application.

Legal Principle(s)

Bias is an element of natural justice which examines not only the mind of the decision-maker subjectively but also examines the manifestation of the process of decision-making objectively. Even if it is difficult to make an accurate assessment of the subjective mind of a decision-maker to determine whether a decision was infected by bias, an objective consideration of all other relevant factors may nevertheless bring the Tribunal to the decision that bias was established. An ill-motivated decision includes not only one in which a decision-maker is deliberately motivated to maliciously deprive a staff member of what would otherwise have been the staff member's entitlement: an ill-motivated decision can also include one where the decision-maker's reasons are simply wrong in law, for example by taking into account irrelevant, or failing to take into account relevant, considerations. A staff member's own account of what was asked and answered at an interview, if unchallenged by the Respondent, can be accepted into evidence. Such evidence need not be corroborated although corroboration may reinforce its reliability. Bias is not legitimized if it was applied negligently. Bias by negligence is bias in law, and a decision infected by negligent bias must be set aside. Loss of opportunity by virtue of not being placed on a roster can be awarded in lieu compensation of USD 3,000.

Outcome

Appeal granted

Outcome Extra Text

The appeal is granted, and Judgment No. UNDT/2020/218 is set aside. The decision not to place the staff member on the roster is rescinded, and alternative compensation is set at USD 3,000.

Full judgment

[Full judgment](#)

Applicants/Appellants

Hatim Sobier

Entity

MINUSMA

Case Number(s)

2021-1527

Tribunal

UNAT

Registry

New York

Date of Judgement

18 Mar 2022

President Judge

Judge Colgan

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Non-disciplinary

Bias/favouritism

Admissibility

Corroboration/hearsay

Sole testimony of complainant

Full and fair consideration

Interview

Burden of proof

Discrimination and other improper motives

Evidence

Staff selection (non-selection/non-promotion)

Applicable Law

Administrative Instructions

- ST/AI/2010/3

Staff Regulations

- Regulation 4.2

Related Judgments and Orders

2016-UNAT-686