



THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2017-UNAT-747

5. Mr. Ngokeng applied for the position on 16 March 2012. The hiring manager, Mr. Pascal Besnier, rejected his application on grounds that he lacked the required ability to interpret.

6. This job opening for the first vacancy was then cancelled on the ground that none of the candidates met all the eligibility criteria. This resulted in the appointment of the incumbent Chief LSS 7.2(tbein(b)-6(g e(SS 7(x.)-e(SS 7(nd(ed th)-8(eligibe(SS 7(yo22.7432 42

... The Panel was of the opinion that the candidate's responses in all of the above questions demonstrated that he was not familiar with the requirements of the post.

... Based on an overall assessment (48.6%), the Panel does not find Mr. Ngokeng to be suitable for the advertised position.

16. On 5 July 2013, the hiring manager, Mr. Besnier, issued an interoffice memorandum to inform all ICTR staff members of the appointment of Mr. Tanifum as Chief of LSS with effect from 1 August 2013. Mr. Ngokeng was officially notified that he had not been selected on 10 July 2013.

17. After the management evaluation process failed to resolve the matter, Mr. Ngokeng filed his application with the UNDT challenging the decision of the Registrar of ICTR not to select him for the position of Chief of LSS and the selection of Mr. Tanifum for the position.

18. After the filing of a reply to the application by the Secretary-General and a response to the reply (a replication) by Mr. Ngokeng, the UNDT on 9 April 2014 issued Order No. 071 (NBI/2014) directing the parties to jointly submit the agreed and disputed facts and to define the legal issues in contention. The parties were asked also to indicate whether the matter required an oral hearing. On 2 May 2014, the parties filed their submissions as directed and informed the UNDT that this matter could be decided on the basis of the parties' written submissions so that an oral hearing was not necessary. The joint submission sets out in some detail the agreed and disputed facts and the legal issues for determination by the UNDT. The most important factual issues were:

- Did Mr. Ngokeng fail to demonstrate that he met the competencies required for the position?
- Did the Administration ignore or fail to give due weight to Mr. Ngokeng's

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19. In his application to the UNDT, Mr. Ngokeng declined to address or deal with the assessment of his performance in the interview or the findings of the Panel in relation to his interview, as he believed that the results of the interviews were irrelevant.

20. The UNDT issued its Judgment dismissing the application on 22 June 2016. The UNDT reiterated that in matters of selection of staff, the role of the Tribunal is to review the challenged selection process to determine whether a candidate has received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration. Following a review of the facts as they appeared in the pleadings, and the accompanying documentary evidence, the UNDT concluded that the presumption of regularity in the selection process had not been rebutted. It found nothing to suggest that the Panel or Administration had been biased, unreasonable or procedurally unfair in selecting a candidate. It concluded on the evidence that Mr. Ngokeng was not subjected to any discrimination and the selection exercise was not tainted.

Submissions

Mr. Ngokeng s Appeal

21. In his appeal, Mr. Ngokeng challenges the UNDT's method in resolving the factual disputes pleaded in the joint submissions. He submits that the UNDT, by ignoring the pleaded factual disputes, failed to exercise the jurisdiction vested in it and erred in procedure such as to affect the decision in the case on several grounds.

22. Mr. Ngokeng complains that the UNDT: (i) failed to state the factual and evidentiary basis of its decision; (ii) failed to consider his submissions and evidence on the violation of his rights to full and fair consideration, his due process rights, and right to equal treatment; (iii) rendered judgment without considering his submissions and evidence on the selected candidate's ineligibility and unlawful selection and the nexus between his non-selection and Mr. Tanifum's selection; (iv) only selectively addressed his allegation of discrimination and ignored his allegations of arbitrariness, cronyism, favouritism, bias, prejudice, unfairness, improper motives, extraneous factors, mistakes of law and fact and numerous serious substantive and procedural irregularities; (v) failed to give him the opportunity to make submissions on an un-redacted version of the Panel's report, thereby

preventing the UNDT from making an informed and fair decision on the case; and, (vi) had no factual and evidentiary basis to find th

The Secretary-General's Answer

27. The Secretary-General submits that the UNDT correctly concluded that the selection decision was lawful. The selection decision fully complied with Sections 7 to 9 of Administrative Instruction ST/AI/2010/3 (Staff selection system). The candidates were first pre-screened based on their applications to determine whether they met the minimum requirements. The applications of the seven successful pre-screened candidates were then released to the hiring manager who prepared a shortlist of five candidates who were invited to competency-based interviews. Prior to the interviews, the Panel agreed on an evaluation process for the interviews, including a maximum number of 100 points to be awarded and a passing threshold of 60 per cent. The successful candidate was the only candidate who scored over 60 per cent. Mr. Ngokeng scored 48 per cent and was therefore not recommended.

28. Whatever the eligibility of the selected candidate, Mr. Ngokeng's uncontested shortcomings evidenced before the Panel, the Secretary-General submits, excluded him from appointment. The decision of the Panel did not result in any loss of opportunity to a fair chance of promotion.

29. The Secretary-General submits that Mr. Ngokeng failed to establish that the UNDT erred in law by failing to apply the proper standard of review of selection processes. Mr. Ngokeng's argument regarding the qualifications and the experience of the successful candidate is in effect a request for the UNT

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should occur only where clear and convincing evidence establishes that an irregularity was highly probable.

35. The Secretary-General overstates the applicable standard of deference in his assertion that the Tribunals must defer in a manner that precludes a non-selected party from ever challenging the selection of the successful party. While the Secretary-General has a broad discretion, the UNDT nonetheless possesses jurisdiction to rescind a selection or promotion on justifiable grounds. A tribunal however should not substitute its decision on the merits of an appointment and should not elevate an unsuccessful candidate to the position because it thinks that person is the better candidate.⁴

38. Mr. Ngokeng met all the educational, work experience and language requirements of the position. He was shortlisted and interviewed on that basis. However, Mr. Ngokeng opted not to address his performance in the interview or the findings of the Panel in relation to his interview. Instead, he stated that he was contesting the results of the selection process not the results of the interviews. Since the interviews in his view were carried out on the basis of a shortlisting procedure he described as “fatally flawed,” he considered it superfluous or irrelevant to challenge the results of the interview. The stance he has taken means that the evidence of the Panel’s consideration of his application for the position, and its conclusion that he lacked the required competencies, stands unchallenged. We are hence obliged to accept that Mr. Ngokeng’s uncontested shortcomings evidenced before the Panel excluded him from appointment. Consequently, the decision to appoint the selected candidate

Judgment

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