



## Introduction

1. By application filed on 6 May 2011, the Applicant challenges the decision not to select her for a post of Judges' Assistant, at level G-5, in the Chambers of the International Criminal Tribunal for the former Yugoslavia ("ICTY").

2. She claims compensation in the amount of two years' salary and benefits at the G-5 level for the material and moral injury she suffered, the violation of her due process rights, and the Administration's bad faith.

## Facts

3. In August 2007, the Applicant joined the ICTY, as a Computer Information Systems Clerk, at level G-4, in the Information Support Unit ("ISU") of the Office of the Prosecutor ("OTP"). She then worked in the Information Dissemination and Electronic Disclosure Unit ("IDED") of the OTP from April 2009 until June 2010, when she started working part-time for the ISU and part-time for the IDED.

4. On 1 March 2010, job opening No. VA 2010/REG/CHA/012-GS ("job

that “many of the candidates in fact met the criteria set out in [job opening No. 012]” and it accordingly decided not to endorse the findings of the interview panel.

7. A newly-constituted CRP later reviewed the matter and concluded, in a memorandum dated 12 August 2010, that “[a] perceived conflict of interests [wa]s not part of the pre-approved evaluation criteria” and that the reasons provided in the reports of the interview panel were insufficient to explain the rejection of all seven candidates. Consequently, it requested the panel to reconsider its reports of 8 June 2010.

8. In its revised reports transmitted to the Head of Recruitment and Training Unit under cover of a memorandum dated 23 September 2010, the interview panel found that five candidates, including the Applicant, were qualified for the advertised posts.

9. On 28 September 2010, the CRP endorsed the revised reports of the interview panel.

10. By a memorandum dated 7 October 2010, the Acting Head of the ICTY Chambers wrote to the Human Resources Section (“HRS”) in her capacity as hiring manager, explaining that, in her view, none of the five qualified candidates were suitable for the posts of Judges’ Assistant and she requested that HRS inquire

HRS responded on 21 October, explaining that, although she had been found to be qualified for the posts, she had been perceived as having a conflict of interest because she worked in OTP and she had been involved on behalf of one of the

Parties' submissions

22. The Applicant's principal contentions are:

a. According to the case law of the Tribunal, particularly Abu-Hawaila UNDT/2010/102, the application must be considered as receivable. Although the deadline for the outcome of the management evaluation lapsed on 15 January 2011, the Management Evaluation Unit ultimately issued its response on 17 February 2011 and the application was filed within 90 days of this date;

b. The decision not to select the Applicant and the decision to re-advertise the posts of Judges' Assistant are tainted by procedural and substantive irregularities, misuse of power and improper motives, and they constitute an abuse of discretion;

c. The Applicant's candidature was not given full and fair consideration. The ICTY Judge who was sitting on the interview panel in an observer's capacity exercised improper control over and actively participated in the selection process. He had a personal interest in the outcome of that process as he wanted to retain his then Assistant beyond retirement age. During the interview, the Judge asked questions and asserted that the Applicant had a conflict of interest due to her work with OTP. He also tried to interfere with the review undertaken by the CRP as shown by his email exchange with the Chairperson of the CRP;

d. The criterion of appearance of a conflict of interest was not indicated in job opening No. 012 and it was therefore irregular to assess the Applicant's candidature on the basis of this criterion;

e. The Administration did not provide the reasons why it asserted that the Applicant had a conflict of interest; she was therefore not permitted to rebut or address this assertion. Further, while the Administration asserted that her functions with OTP could raise damaging perceptions about the



2011, the Administration sent offers of appointment to the candidates who were ultimately selected for the posts of Judges' Assistant advertised through job opening No. 46. Two days thereafter, it objected that the application for suspension of action was moot since the posts had already been filled. These actions show the Administration's bad faith.

23. The Respondent's principal contentions are:

a. The Applicant acknowledges that she did not file her application within the 90 days of the expiry of the time limit for the response to her request for management evaluation. In Abu-Hawaila UNDT/2010/102, the Tribunal noted an apparent inconsistency between staff rule 11.4(a) and article 8.1(d) of the Tribunal's Statute but it also made it clear that its remarks were to be understood as observations and not as a determination of the matter. These two provisions are not inconsistent and it may be inferred from article 8.1(d) that the time limit to file an application starts to run from the expiry of the time limit for the Administration's response to the request for management evaluation, regardless of whether a response is later received. The Application is therefore time-barred;

b. In her application, the Applicant challenges the basis for the second selection process. However, she never raised that issue in her request for management evaluation. Her claim in this respect must accordingly be dismissed;

c. The Tribunal has recognized that the Secretary-General enjoys broad discretion in selection decisions and that those alleging a fact bear the burden of proving that fact;

d. Administrative instruction ST/AI/2006/3/Rev.1 (Staff selection system) does not exclude that negative criteria be taken into consideration when a selection decision is made. The appearance of a conflict of interest is a relevant consideration when determining the suitability of a candidate for a post in any legal environment and particularly at the ICTY; it is thus an inherent selection criterion which is well-known to all ICTY staff;

e. The ICTY Judge did not overstep his position in the interview process; his questions intended to clarify responses from the Applicant and other candidates. That Judge's subsequent exchange with the Administration is irrelevant to the issue of whether there were any procedural irregularities in the selection process;

f. There was no requirement to seek comments from the Applicant prior to determining whether or not there was a potential or actual conflict of interest and, in any event, the interview panel asked her about the



actual conflict of interest in the Applicant's case. For instance, there was a real potential that a Judge to whom the Applicant was assigned would be involved in assessing the disclosure process that she had been involved in while working in the OTP. Further, the non-existence of a conflict of interest in relation to one candidate is irrelevant to the determination of whether such a conflict exists in the case of another candidate;

i. The Applicant has not provided evidence to support her allegations concerning the Acting Head of the ICTY Chambers;

j. There is no evidence of bad faith. The decision to send offers of appointment to the selected candidates was not connected to the Applicant's application for suspension for action.

Consideration







must be objective and related to the functions of the post and must reflect the relevant competencies.

...

7.5 For candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment

38. It follows from the above that the criteria to be used in evaluating

which are currently before the Judges of the ICTY ... For these reasons I find none of the five qualified candidates to be suitable for the position.

10. I should add that my conclusion should not be regarded as in any way reflecting negatively on the professionalism, integrity or any of the competencies of the candidates. I would agree fully that they have the qualifications to be appointed to a position at the G-5 level in the Tribunal.

41. The wording and content of the memorandum leaves no doubt that the Acting Head of the ICTY Chambers based her decision not to find any candidate suitable for the advertised posts solely on the appearance of a conflict of interest arising from the candidates' past or current associ

conflict of interest would be among the evaluation criteria. The selection process and resulting non-selection decision are accordingly flawed, without it being



Conclusion

48. In view of the foregoing, the Tribunal DECIDES:

- a. The Respondent is ordered to pay the Applicant the amount of EUR2,000;
- b. The compensation set above shall bear interest at the US prime rate with effect from the date this Judgment becomes executable until payment of the said compensation. An additional five per cent interest shall be added to the US prime rate 60 days from the date this Judgment becomes executable;
- c. The Applicant's other requests are rejected.

(Signed)

Judge Thomas Laker

Dated this 10<sup>th</sup> day of August 2012

Entered in the Register on this 10<sup>th</sup> day of August 2012

(Signed)

René M. Vargas M., Registrar, Geneva