

Case Nos.: UNDT/GVA/2017/089
Judgment No.: UNDT/2018/104
Date: 17 October 2018

Parties' submissions

8. The Applicant's principal contentions are:

- a. The recruitment process for the job opening was marred by bias and the persistent The ApplOrganizas

Consideration

Was the Applicant's candidature given full and fair consideration?

11. The burden of proof in matters of non-selection rests on the Applicant, who has to show through clear and convincing evidence that he was denied a fair chance of promotion. The Respondent is presumed to have regularly performed official acts. Therefore, if the Respondent can minimally show that the Applicant was given full and fair consideration during a selection exercise, then the presumption of regularity is satisfied (*Rolland* 2011-UNAT-122).

12. In the "Education" section of the PHP that the Applicant submitted for his application to JO 63349, one reads the following in connection with his "University/Tertiary" learning:

- a. "Degree obtained: Certificate/Diploma";
- b. "Main course of Study/Field of Study/Specialization: Business & Administration/Business and Commerce"; and
- c. "Title in English or French": MASTER'S DEGREE, Diploma in Economics".

13. The main issue for decision is whether the Applicant, in responding to the relevant question on his PHP that he had obtained a "Certificate/Diploma" from a University/Tertiary institution with the title "Master's Degree, Diploma in Economics", failed to indicate that he possessed a first level university degree, as required by JO 63349.

14. *Inspira* provides only five options to candidates to vacancy announcements when selecting the "Degree/Diploma" awarded, to wit: Bachelor's Degree, Certificate/Diploma, Doctor's Degree, Master's Degree and Postgraduate Diploma.

15. The Applicant indicated in his PHP that he had a Certificate/Diploma and provided the title thereof in English as "Master's Degree, Diploma in Economics".

20. The Respondent does not dispute the fact that the Applicant had previously applied for a similar position (Russian Reviser P-4) within the United Nations Secretariat, at the United Nations Office at Geneva, where the same *Inspira* system for recruitment is used, and that he had been placed on a roster of pre-approved candidates at the P-4 level in September 2015, i.e., almost a year before applying for JO 63349.

21. The Tribunal notes that the Applicant has for a considerable period of time indicated his educational qualifications in the same way he did when applying to JO 63349 for which he was “screened out” and, as noted above, he had been rostered on several occasions. It is thus surprising, and inconsistent, that the same system now “screened out” the Applicant for failure to meet the first level degree qualification, on the basis of the same information contained in his PHP.

22. The Applicant’s description of his University/Tertiary institution attainment under the heading of “Certificate/Diploma” has been accepted by the Organization for a very long period of time. Therefore, the fact that he is now no longer considered as meeting the educational requirements for the same category of post and on the basis of the same information that he has constantly provided, raises doubts as to what has changed, and makes it more likely than not that a Human Resources Officer erroneously decided to pre-screen the Applicant’s candidature as not meeting the minimum educational requirement.

23. The Tribunal finds that the Respondent’s reliance on *Zillner* is erroneous as, in that case, Mr. Zillner claimed that he had a Graduate Certificate that was equivalent to a master’s degree apparently relying on the reference list issued by the International Association of Universities and the United Nations Educational, Scientific and Cultural Organization on higher education systems and credentials. In that case, the Tribunal found that the Office of Human Resources Management correctly determined that there was no equivalency.

24. The Respondent does not dispute that the Applicant does in fact possess the requisite educational qualification. Rather, according to the Respondent, the alleged “error” consists in how the Applicant referred to his “first level degree” in his PHP, since he called it a Certificate/Diploma and not a “Bachelor’s degree” or “Master’s Degree”.

25. This Tribunal will not attempt to

28. This Tribunal notes that the Applicant joined the United Nations in 1990 and that he currently holds a permanent appointment at the P-3 level, for which a first degree is required. He was furthermore placed on a P-4 roster in 2008 and 2015. For staff members to be rostered, they undergo a full review by the Central Review Body (“CRB”) and part of the functions of the CRB is to confirm that candidates being recommended meet the minimum qualifications for the positions, including educational requirements.

29. In the *Inspira* system, rostered candidates are clearly identified. Furthermore, the fact of being a rostered candidate when applying for a position is a patent and clear indication that the candidate had *inter alia* his educational attainment verified and cleared by the Organization. The Respondent has not offered an explanation as to why the same *Inspira* system had previously accepted the Applicant’s academic qualifications as meeting the same minimum educational requirements, while it was rejected as not meeting them for the purpose of his application to JO 63349. Also, it is accepted that the

Is the Applicant entitled to any remedy?

Rescission of the contested decision

32. Having found that the Applicant's candidature for JO 63349 was unlawfully excluded, the Tribunal rescinds the contested decision and, therefore, will now look at the amount of compensation to be set that the Respondent may elect to pay as an alternative to rescission of the contested decision, pursuant to art. 10(5)(a) of the Tribunal's Statute.

33. Concerning the determination of the amount of compensation in lieu of rescission, the Appeals Tribunal has held that the Dispute Tribunal should be guided by two elements: first, the nature of the irregularity that led to the rescission of the contested administrative decision and, second, an assessment of the chances that the staff member would have had to be selected had those irregularities not been committed (see *Ardisson* 2010-UNAT-052, *Lutta* 2011-UNAT-117, *Muratore* 2012-UNAT-245, *Appleton* 2013-UNAT-347). However, the determination of the "compensation in lieu" must be done on a case-by-case basis (see *Valentine* UNDT/2017/004) and ultimately carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265).

34. In respect of decisions denying promotions, the Appeals Tribunal has held that "there is no set way for a trial court to set damages for loss of chance

35. The Applicant has over 25 years of work experience as a Russian Translator, Reviser and Interpreter with the United Nations; he has worked at three different duty stations, to wit Nairobi, New York and Bangkok; he has continuously received positive performance appraisals, including exceeding performance expectations; has been on the roster of pre-approved candidates for the post of Russian Reviser at the P-4 level since 2008 and was rostered again in September 2015, less than a year before he applied for JO 63349.

36. Furthermore, as per the Respondent's reply, three pre-approved *roster* candidates were released to the hiring manager, and one of them was recommended and selected for the advertised position.

37. From the above, the Tribunal is of the view that the Applicant, as a rostered candidate, would have been released to the hiring manager had his candidature not been unlawfully screened out. The Tribunal finds that, consequently, the Applicant would have had a 25% chance of selection for JO 63349 and finds it appropriate to direct the Respondent to pay the Applicant 25% of the difference in net base salary, over a period of two years, between the Applicant's net base salary at his grade and step at the time of the contested decision and the net base salary that the Applicant would have received had he been selected to the advertised P-4 position.

Compensation for harm

38. In his application, the Applicant requests any "customarily relief" awarded by the Tribunal in view of "[the] irreparable damage to [his] career, a guaranteed lack of career development/promotion/mobility opportunities due to the vicious circle of long-lasting and system-wide practice on P[-]4 0 Td () Nj 2018 006 6s13ystedal

39. Under art. 10.5(b) of its Statute, the Dispute Tribunal may award compensation for the Administration's breaches of an

- b. That should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant an amount equal to 25% of the difference in net base salary, over a period of two years, between the Applicant's net base salary at his grade and step at the time of the contested decision and the net base salary that the Applicant would have received had he been selected to the advertised P-4 position;
- c. That the above compensation shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment; and
- d. That all other claims are rejected.

(Signed)

Judge Rowan Downing

Dated this 17th day of October 2018

Entered in the Register on this 17th day of October 2018

(Signed)

René M. V