



UNITED NATIONS DISPUTE TRIBUNAL

Original: English

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### **Background and Procedural History**

1. The Applicant commenced employment with the United Nations Human Settlements Programme (UN-HABITAT) as a P3 Programme Management Officer on 23 March 1994. In 2002, she was made a Senior Programme Management Officer in the Global Division of UN Habitat at the P4 level.
2. On 2 August 2007, Vacancy Announcement (VA) 07-PGM-UN-HABITAT-

Case No. UNDT/NBI/2009/05

Judgme



16. She is convinced that the decision to reassign her while the selection process was on-going showed that it had been determined beforehand that she would not get the position she had competed for.

### **The Respondent's Case**

17. The Respondent's contention is that the application is flawed and devoid of merit, and ought to be dismissed for failure to prove violation in any form or substance of any of the applicable Rules.

18. He submits that the Applicant's performance when interviewed was poor and that she could not expect to be recommended or appointed on the basis of such poor performance.

19. He takes the position that the Applicant's procedural rights were duly observed and that the Applicant has not produced evidence of prejudice or extraneous factors which would vitiate the ED's decision not to include her on the list of recommended candidates.

20. He contends too that no evidence was provided by the Applicant to establish that the cancellation of the first VA was done *mala fides* and that it is within the discretionary authority of the head of office or the PCO to cancel a vacancy announcement.

21. It is his case that the Respondent has authority to assign staff members to any activities and UN-Habitat acted in compliance with the Rules and the terms of the Applicant's appointment in reassigning her to another unit of the Agency.

## CONSIDERATIONS

*Where a panel is raised to evaluate through oral interviews and recommend candidates in the process of selection to an advertised post, is such a panel independent in carrying out its functions? If it is independent, are there limits to this independence?*

22. It is in evidence that the Programme Manager who was also the Programme Case Officer (PCO) prepared a short-list of six qualified candidates from the applications received. He then set up a panel of three officers to interview the said candidates for the advertised position of Chief, Management Support Section. The interview panel proceeded to conduct the interviews of the short-listed candidates by telephone using a set of pre-approved criteria as required, to assess them. At the end of its assignment, the panel recommended five out of the six candidates for the position.

23. The Administrative Instruction on Staff selection usually cited as ST/AI/2006/3 of 15 November 2006 was promulgated to establish a new staff selection system dealing with matters of recruitment, placement, promotion and mobility of staff. Section 7 of this Administrative Instruction provides for the consideration and selection of staff. Under S.7.5, it is provided that competency-based interviews must be conducted in all cases of recruitment or promotion. Both S.7.4 and S.7.5 make it clear that Programme Managers are responsible for the evaluation of candidates.

24. Since the evaluation of candidates for appointment or promotion requires that the said candidates be interviewed, it is the responsibility of the Programme Manager to set up an interview panel. He could be a member of the interview panel if he chooses or opt not to be. In the instant case, it was a panel of three members and the Programme Manager or PCO was not part of it. He told the Tribunal in his

testimony that the panel he set up in this case was independent and that he did not influence it in any way.

25. I am of the view that bearing in mind the responsibility of a Programme Manager, the interview panel which he sets up is to all intents and purposes his agent. He sets up the panel to evaluate candidates through competency-based interviews for appointments or promotions in compliance with the Rules. He also provides the panel with a set of pre-approved criteria to be used in making its evaluation. In other words, he delegates to the panel the authority to conduct interviews and gives it the tools in the form of criteria with which to evaluate the candidates.

26. Like a principal, the Programme Manager must be bound by the evaluation and recommendations of the interview panel he has set up as long as that panel has acted within its terms of reference. He has no authority to ask the panel to change its report or any part of it except where he is satisfied that the panel had gone outside its mandate. A situation in which the panel exceeds its mandate would arise for instance, where in conducting the said interview; it considered other competencies which were not in the vacancy announcement or in the pre-approved criteria with which it was provided. In such a situation, the Programme Manager, in the light of the need for accountability on his part would have a duty to properly redirect the panel or even reconstitute it.

27. Much as the Rules do not provide for the composition of an interview panel, as a matter of established practice and in line with the United Nations core values of integrity and professionalism and the core and managerial competencies of accountability and building trust, such a panel is usually made up of a minimum of three persons. It is not only desirable but absolutely mandatory that there is integrity in any selection process in the Organisation. Such integrity must be manifest, not guessed.

28. In the instant case, the Programme Manager or PCO told the Tribunal in his testimony that he did not interfere with or influence the interview panel in any way in its conduct of the interviews. This testimony was corroborated by the panel chair. The independence enjoyed by the interview panel appeared to last only up and until the ED got its report and instructed it as to the kind of recommendations she expected. The panel could not withstand the intervention of the ED.

***Did the intervention of the Executive Director amount to an irregular interference with the selection process? Was it erosion on the independence of the interview panel and by implication of the Programme Manager? Did it amount to abuse of authority? Was her decision to reduce the number of recommended candidates a valid exercise of her discretionary authority?***

29. Evidence tendered by the Respondent is that a written report of the interviews was made by the interview panel showing the questions asked and evaluating the answers given by each candidate. The report also showed the scores that were awarded to each of the candidates. In the case of two of the recommended candidates, the panel recorded them as “strongly recommended” in its report while the other three candidates were recorded as “recommended” only.

30. When a memo and the said report were submitted to the ED by the PCO for transmission to the CRB as required by the Rules, she was of the view that there were too many recommended candidates and told the PCO that she did not want more than three recommended candidates. The PCO relayed this to the Chair of the interview panel (CIP) and later took him to see the ED on the matter.

31. In his oral testimony before the Tribunal, the CIP said that when he and the PCO met with the ED, she told him that she was surprised that the panel had recommended five candidates and that she would rather expect three. She said



also that she wanted a list of candidates of appointable calibre pointing out that the report showed that some were very good while others were average candidates. She asked that the panel look at their report again and decide whether the recommendation of the five candidates was what the panel actually wanted to say.

32. The CIP later reconvened the interview panel and reported the concern of the ED to the other members. The panel deliberated on this development and agreed that it ought to have been more discriminating in its recommendation and then went on to change its report slightly to reflect the concern raised by the ED. As a

35. The fore-going provision makes it clear that the duty of the head of department, which in this case is the ED, is to transmit the proposal submitted to him or her by the Programme Manager to the CRB. The head of department may however transmit the said proposal only after being satisfied that the Organisation's human resources planning objectives and targets particularly as they concern gender and geographical distribution have been met in the said proposal. Once satisfied about these, the head of office transmits the proposal with a certification to that effect to the CRB.
36. I am of the view also that the head of department may refrain from transmitting the proposal to the CRB if there are reasonable grounds for believing that the evaluation process lacked integrity or was conducted with a different set of criteria to those that were pre-approved for the purpose or some similar such ground. In such a circumstance, the ED would have a duty to see that the evaluation process is properly and fairly done before transmitting the proposal to the CRB.
37. Section 9.2 provides that the Programme Manager has the duty to recommend candidates to the head of department who under the provisions of S.9.1 has the sole authority to make a selection decision after taking into account some departmental and organisational objectives and targets.
38. Under cross-examination, the CIP told the Tribunal that he knew that the panel's job was to evaluate the candidates and filter out those who were not qualified for the post. He also believed that the panel conducted the interview on behalf of the ED and did not think it was wrong to discuss it with her. He added that if the ED wanted the panel to recommend a candidate who was outside its report then it would be her wish but if the person she wanted recommended was in its report, there was nothing wrong with it.

39. Still in answer to a question in cross-examination, the CIP said that the panel believed that each of the three persons whose names they had had to remove from the list of recommended candidates could do the job. Taken to the logical implications and arising conclusions of his answers, the CIP believed that if the ED wanted the interview panel to reduce the number of candidates it found eligible for appointment, it was perfectly within her rights and competence to demand it and proper for the panel to do as asked. In other words, he believed that the interview panel was not meant to be independent of the ED.
40. It is either that the interview panel was not sure about the job it was given to do or that it was not willing to do its job independently. The panel had no business or power to send a recommended list that ranked the candidates contrary to the Rules. It was clearly required to send a list of recommended, unranked, candidates. Instead, it had failed in one of its duties when it “recommended” some and “strongly recommended” others.
41. On his part, the Programme Manager told the Tribunal in cross-examination that the role of the interview panel is only advisory. He then stated in reply to a question that the panel is meant to bring some independence into the selection. I do not agree that the role of an interview panel which has been properly set up to interview candidates is only advisory.
42. As I have stated earlier in this judgment, the interview panel is the agent of the PCO who is bound by its evaluation and recommendations as long as the panel has not acted outside its mandate. The panel does not just bring some independence into the selection; it ensures that there is independence in the process.
43. I have previously observed that integrity is a core value of the Organisation and any appointments or promotions processes within it must not only have integrity but must be seen to have it. “Integrity refers to ‘honesty’ or ‘trustworthiness’ in

the discharge of official duties, serving as an antithesis to ‘corruption’ or the ‘abuse of office.’”

44. Any interview process which is conducted for the purpose of evaluating candidates for promotion or appointment must be both independent of any influences and above board. While an interview panel may have been set up by a Programme Manager, the panel is not only independent of the said Programme Manager in doing its job and for as long as it acts within its mandate; it is also equally independent of the head of department.

45.

48. It is my finding of facts that the Executive Director of UN-Habitat did in fact interfere with and manipulate the selection process by influencing the interview panel to drop the names of the Applicant and two others from the recommendations list. This resulted in the name of the Applicant not being sent to the CRB for clearance and therefore the non-rostering of the Applicant. This kind of situation has no place within the UN Organisation due to its capacity to destroy rather than build trust - a required managerial competency; and the denial of due process which is its by-product.

49. Beyond the prejudice to the Applicant's candidacy which resulted in her not being rostered; the Executive Director as head of office, did a disservice to the Organisation in ensuring that some names of those who were recommended were dropped. This is because the rostering of candidates, quite apart from enhancing promotion and mobility of staff members, is cost-effective for the Organisation as it provides a ready pool of eligible candidates to select from when necessary,

52. In his testimony, the Programme Case Officer told the Tribunal that he had cancelled the vacancy announcement due to lapse of time. According to him, a long period had elapsed since the vacancy announcement was issued due to the fact that his assistant had taken a sabbatical and he had no staff to assist him with processing the applications released.
53. Under cross-examination, the witness was shown a memorandum which he had sent to the Executive Director dated 4 April 2008 in which he stated that the cancellation and re-issue of the said vacancy announcement were done because no suitable candidates were identified. The witness in another answer reiterated that lapse of time was the reason for the cancellation and added that it was possible that no suitable candidates had applied also.
54. He however conceded that the Applicant who had applied before the cancellation was a suitable candidate. He continued that when his assistant took a sabbatical, it was difficult to find someone to replace her and do her work. He said that six months had passed since the vacancy was placed and that there is an understanding with the Human Resources department that any vacancy announcements that remained in the system without action for 180 days should be cancelled and re-advertised.
55. The witness further said that although no Rule requires that there must be more than one suitable candidate before a selection process can proceed, as a matter of practice, he would review and shortlist more than four or five candidates. He added that it was up to him as the PCO to decide that there were sufficient candidates for consideration and when to stop the release of candidates.
56. It was his testimony that although the Applicant was a suitable candidate in the cancelled vacancy announcement, all it meant was that she could be short-listed. He continued that what he actually meant to say in his memorandum of 4 April 2008 was that there were not sufficient suitable candidates.

57. It is evident that the cancelled vacancy announcement had not been out for up to six months or 180 days to warrant its cancellation going by the practice the Programme Manager claimed he was relying on. Clearly the Programme Manager was not stating the true position either when he attributed the cancellation of the VA to lapse of time or when he communicated in his 4 August 2008 memo that it was because there were no suitable candidates, knowing as he did, that there were at least two suitable 30-day candidates as at the time of the cancellation.

58. I find the Programme Manager's explanation, about the cancellation being due to lapse of time or dearth of eligible candidates, to be an after-thought meant to cover up his lack of compliance with Administrative Instructions and practices. His testimony that he had the prerogative to decide when there were sufficient candidates and when to stop the release of candidates in clear contravention of section 7.1 of ST/AI/2006/3 is unfortunate. He had no such prerogative, power or discretion. He had a bounden duty to consider and evaluate the eligible candidates at the 30-day mark in the VA he had cancelled but did not do so.

59. While I hesitate to make a finding as to whether the Applicant's candidature was the target of the December 2007 cancellation even in the face of an unrefuted allegation that the same Programme Manager had asked that the Applicant's EPAS rating be lowered in the past, the signals are nevertheless most disturbing. Managers must diligently acquaint themselves with all the relevant Rules that govern the actions they take in the spirit of the core competency of accountability.





candidates are therefore not designed to afford unqualified candidates an unfair advantage in the process; it is rather designed *inter alia* to expedite the recruitment to vacant positions by providing candidates within the system who *are* qualified with an advantage in the process which recognises their service to and within the Organisation. By opening the process up to include external candidates *before* those internal to the system were considered was obviously going to result in any internal advantage being removed.

64. The Respondent's submissions, both in its language, tenor and substance, show a disregard to the principles and purposes espoused in the Rules which I find most surprising and unfortunate.

***The exercise and limits of discretionary authority.***

65. The Respondent's case has been strewn with assertions of discretionary authority that may be exercised by both the Programme Manager and the Head of Office.

66. For instance, the Respondent refers to the discretionary authority of the Head of Office or Programme Manager, to cancel a vacancy announcement after eligible candidates had applied. In the same vein it was submitted, that the decision to interfere with the recommendations of the interview panel which resulted in removing the Applicant's name from a list that was sent to the CRB to be approved for rostering, was based on the proper exercise of the ED's discretionary authority.

67. The Respondent in his response to the JAB, referred at paragraph 27 of the said document to the discretionary decision of the ED not to include the Applicant on the list of recommended candidates.

68. In his testimony, the Programme Manager in answering a question stated that his understanding of the Rules is that he sends the list of recommended candidates to

the ED who decides whether she would send it to the CRB. In other words, the Head of Office has discretion to decide not to send on the list.

69. He also told the Tribunal that although two eligible, internal candidates which included the Applicant had applied to the initial VA of August 2007, he felt it was not enough and had the discretion to cancel and reissue the VA. The same Programme Manager was convinced of his prerogative and discretion to mix and evaluate together all candidates whether at the 15-day, 30-day or 60-day mark.

70. In the case of the ED, I am of the view that on being sent an unranked list of recommended candidates, she only had the discretion to examine it against the Organisation's human resources planning objectives and targets, especially with regard to geography and gender and send it on with a certification to that effect to the CRB.

71. She had no discretion to exercise in order to exclude a recommended candidate from the list. There is no doubt that she recognised the limits of her discretion which is why when she interfered to change the initial recommendations of the interview panel, she requested the said panel to effect the change and had the proposal re-submitted to her as if it was the panel's decision. Essentially, while it was the hand of Esau, it was in reality the voice and wish of Jacob.

72. As to the Programme Manager, he cannot cancel a vacancy announcement to which applications had been received on a mere whim and without good reason. The Rules do not give him any discretion as to how many applications he wanted to receive before he would proceed to the evaluation of candidates.

73. During the course of the hearing, the Respondent and his witnesses made much use of the words 'discretion' and 'prerogative.' While it may well be a matter of choice of words, or words used loosely

prerogative carry specific meaning in law. It is important therefore that Parties and Counsel be sufficiently apprised of the import of these terms when choosing to use them in their submissions to the Tribunal.

74. It is important to note that the word “discretion” is not synonymous with “power” as these assertions tend to suggest. Discretion while being the power or right to act according to one’s judgment, by its nature involves the ability to decide responsibly. It is about being wise and careful in exercising a power. In public administration, both power and discretion must be used judiciously. The Administrator does not exercise power for its sake or other extraneous reasons but only in furtherance of the institution’s interest.

### ***Findings***

75. In view of the foregoing, the Tribunal reiterates its findings that:

- (i) The interview Panel constituted by the Administration failed to independently discharge its mandate under the applicable Rules, and in issuing the second interview report did not submit an independent evaluation, contrary to the letter and spirit of the applicable Rules.
- (ii) The Administration, acting through the Executive-Director, UN-Habitat unduly interfered with and manipulated the selection process by influencing the final outcome of the second report issued by the interview Panel.
- (iii)



(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

78. In legal terms, the Applicant is essentially asking the Tribunal to both rescind the decision not to roster her, *and* compensate her for the injuries she has suffered during the course of the selection process.

79. Dealing first with her request for rescission of the impugned decision. An order for rescission, although technically conceivable within the provisions of the Statute, cannot be made without proper consideration of its effect. In practical terms, the result of such an order would be nothing short of an upheaval in the staffing arrangements of the Organisation which would in turn injure the rights of other staff members. It is perhaps in recognition of the potential effect of such an order that Article 10(5) (a) makes it *mandatory* for me to also set a monetary amount which the Respondent may elect to pay as an alternative to rescission or specific performance.

80. While the Tribunal cannot substitute a selection panel's views on the suitability of particular candidate with that of its own, it is on record that the instant Applicant was both properly considered and recommended, and that the impugned decision was made to the detriment of the Applicant's career progression within the Organisation. In compliance with the stipulation in Article 10(5) (a), I am placing a monetary value on the wrong that she has asked to be corrected and hereby order the payment of six (6) months' net base salary as compensation for that injury.

81. Based on my findings above, and pursuant to the provisions of Article 10 (b) above, the Respondent is also ordered to pay the Applicant the requested token sum of US\$1.

