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Introduction

1. The Applicant, a P-5 level section chief in the Field Budget and Finance Division (“FBFD”) in the Department of Field Support (“DFS”) in New York filed an application contesting the decision not to select her for the D-1 level post of Chief in the Budget and Performance Reporting Service (“BPRS”) in FBFD, DFS (“D-1 Post”). The Applicant seeks rescission of the decision or, in the alternative, appropriate compensation for losses incurred and for emotional distress.

Factual background

2. The Applicant, a Ghanaian national, joined the Organization in November 1993 in FBFD where the D-1 Post was located. At the time of the application, she held a permanent appointment with the Organization at the P-5 level, step 10. From December 2007 to December 2009, she exercised functions at the D-1 level in the African Union/United Nations Hybrid Operation in Darfur (“UNAMID”).

The selection for the D-1 Post

3. On 8 July 2009, a temporary vacancy announcement (“TVA”) was published in anticipation of the D-1 Post becoming vacant in September 2009.

4. On 1 September 2009, Mr. M, who was on a two-year fixed-term appointment in DFS at the P-5 level, step 5, was selected against the TVA and assigned to the D-1 Post for a period of six months, until 28 February 2010.

5. On 9 October 2009, a Vacancy Announcement (“VA”) #09-FIN-DFS-422634-R-NEW YORK for the D-1 Post was advertised in Galaxy, the former United Nations job website, with a deadline of 8 December 2009 for applications. Both the Applicant and Mr. M. applied.

6. In January 2010, the Applicant ended her assignment in UNAMID and resumed her duties at the P-5 level at FBFD in New York.

7. Mr. M's initial temporary appointment of six months against the TVA for the D-1 Post was extended for one month to 31 March 2010, and thereafter further extended for six months to 30 September 2010.

8. On 13 August 2010, eight months after the closing date of the VA, short-listed candidates for the D-1 Post took a written test.

9. On 13 and 14 September 2010, candidates for the D-1 Post were interviewed by a panel comprising Ms. Donna-Marie C. Maxfield, Chief of Staff of the USG/DFS, Ms. Elizabeth Morrin, Deputy Director, Peacekeeping Finance Division; Mr. Movses Abelian, then Secretary of the Fifth Committee in the Department of Management ("First panel"). The First Panel was assisted by a note taker, Ms. Hannah Davi

13. On 1 April 2011, Mr. M's assignment to higher level functions as Chief of Section, BPRS, was initially extended for three months, to 30 June 2011. On the same date, his assignment period was modified and extended from 1 July 2011 to 2 September 2011. On 3 September 2011, Mr. M's fixed-term appointment was extended to 2 September 2013. On the same date, his assignment to higher level functions on the D-1 Post on the TVA, was extended to 31 December 2011.

14. No steps on the recruitment on the D-1 were taken until 2 September 2011, a year after the first interview for the D-1 Post, when the Applicant and Mr. M were called to a second round of interviews. The panel comprised Ms. Malcorra, USG/DFS, Mr. Anthony Banbury, Assistant Secretary-General in DFS and Ms. Maxfield as note taker ("Second Panel").

15. On 7 September 2011, the Second Panel sent its selection report to Ms. Malcorra (court bundle, pp. 23-26). The report stated that (emphasis added):

4. ...at the opening of the interview, the [USG/DFS] explained that the delays in finalizing the selection of the Chief, BPRS, FBFD were linked to the repeated, unsuccessful efforts to fill the D-2, Director, FBFD position. ... Both candidates expressed understanding of the reasons for the delay and appreciation for the explanation. ...

b. Mr. M: The candidate demonstrated a keen awareness of the strategic and operational challenges before DFS and its leadership, as well as the ability to articulate viable approaches to address those challenges. He is a strategic thinker, who knows not only his own area of expertise but also the other areas of DFS. He is able to focus on both the big picture and day-to-day management, articulating the need for strong financial governance and management to enable missions to fulfil their mandate while ensuring accountable financial management and addressing Member State concerns about the “affordability” of UN field operations. He has internalized the need to build gender-balanced and geographically diverse teams, demonstrating concern not only for achieving, but also effectively managing, diversity for results. He is deemed highly suitable for the position

6. In that, based on the evaluation of their personal history profiles and competency-based interviews conducted, the [Second panel] found three candidates to fully meet the requirements for the D-1 Post] [...] approval is sought for the recommendation of all three candidates...; with the eventual selection of [Mr. M] as the most suitable candidate for the [D-1 Post]...

16. On 17 October 2011, the Central Review Board (“CRB”) concluded its review of the selection process for the D-1 Post. The CRB noted that the vacancy announcement was posted on 9 October 2009, that the recommendation of the three candidates in the transmittal memorandum was dated 15 September 2010 and that the selection was finalized on 9 September 2011. The CRB requested clarification as to the reasons for the delay in finalizing the recruitment exercise. The CRB returned the case to Ms. Maxfield for further clarification.

17. On 19 October 2011, the DFS Executive Office provided the clarifications requested as follows (emphasis added):

...Based on these interviews, the panel agreed that [redacted], Mrs. Beatrice Kyei-Asare and Mr. M. met all of the requirements and competencies of the VA and are therefore recommended. The delays in finalizing the selection [for the D-1 Post] were linked to the repeated unsuccessful efforts to fill the [D-2 Post]. It had been hoped that D-2 and D-1 leadership positions in FBFD would be filled as a team, with a balance of complementary experience, skills and expertise. The [VA for the D-2 Post] was circulating (sic) unsuccessfully three times and new efforts are again underway. It was

decided to proceed with filling the D-1 post as it was no longer tenable to await completion of the D-2 selection process.

18. On 21 October 2011, the CRB informed Ms. Malcorra that it endorsed the proposal for filling the vacancy.

19. The Applicant was informed via email dated 24 October 2011 that she had not been selected for the D-1 Post but she had been placed on a roster of candidates pre-approved for similar positions at the D-1 level.

20. On 1 November 2011, Mr. M. took up his functions on the D-1 Post.

The selection for the ~~post~~ Director, D-2, FBFD

21. The following is a brief account of the delay experienced in filling the post of Director, D-2, FBFD (“D-2 Post”).

22. On 28 January 2009, a vacancy announcement was issued in relation to the D-2 Post in anticipation of the post becoming vacant in April 2009 due to the departure of its incumbent, Mr. Mutiso.

23. On 28 July 2009, a new job opening was advertised for the D-2 Post, following the withdrawal of the candidate selected initially.

24. In or about September 2009, Mr. M became Officer-in-Charge and performed the duties and functions of the D-2 Post.

25. On 28 September 2010, the D-2 Post was re-advertised for a third time since the second selection process yielded no suitable candidates.

26. On 25 October 2010, following unsuccessful attempts to fill the D-2 Post, Mr. Mutiso, was called back to resume, temporarily, his duties on the D-2 Post until December 2010.

27. In April 2011, the USG/DFS requested that Mr. Mutiso return permanently to the D-2 Post which he continued to encumber until his retirement in 2012.

28. From 22 August 2012 to 1 December 2014, Mr. M was assigned to higher level functions on the D-2 Post, until his promotion to this post on 1 December 2014.

Procedural background

29. On 17 November 2011, the Applicant requested management evaluation and was notified of the Management Evaluation Unit's response on 2 February 2012.

30. On 19 March 2012, the Applicant filed her application. The Respondent's reply, filed on 17 April 2012, contended that the application was filed out of time and, in any event, that the Applicant was accorded full and fair consideration for the D-1 Post and that she failed to demonstrate that the decision was based on the facts of the case.

the fact that she was from a leading troop contributing country when the USG/DFS

submissions. The parties complied with Order No. 324 (NY/2014) on 2 and 8 December 2014.

41. By Order No. 28 (NY/2015) dated 11 February 2015, the Tribunal ordered the Respondent to disclose Mr. M's employment record with the Organization, including any communications between the Office of Human Resources Management ("OHRM") and the Executive Office ("EO") in DFS in relation to the renewal of his contract(s) between 1 January 2010 and 31 December 2012. On 20 February 2015, the Respondent complied with the Order.

42. By Order No. 35 (NY/2015) dated 27 February 2015, the Tribunal ordered the Respondent to state whether, in re

b. Whether the very fact that a second set of interviews was conducted was lawful; and if so, was the composition of the Second Panel procedurally correct?

c. Whether the lengthy delay in the selection procedure infringed the Applicant's right to be fully and fairly considered;

d. Whether the final selection decision failed to take into account important criteria relating to gender balance, geographical distribution and the special consideration to be given to candidates from troop contributing countries.

Considerations

45. No issue of receivability arises since the Respondent abandoned his contention in this regard.

46. Article 101.3 of the United Nations Charter states:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

47. ST/AI/2006/3 (Staff selection system) of 15 November 2006, applicable at the time the VA was published, sets out the mandatory selection requirements and procedures to be followed. On 11 January 2010, a new administrative instruction, ST/AI/2006/3/Rev.1 (Staff selection system) was issued, superseding ST/AI/2006/3. ST/AI/2006/3/Rev.1 did not set forth any transitional measures and was applicable as at 11 January 2010.

48. On 21 April 2010, ST/AI/2010/3 (Staff selection system) was issued. Section 12 (Transitional measures) provides that ST/AI/2006/3/Rev.1 shall continue to

govern recruitment, placement and promotion in respect of applications for job openings advertised before 22 April 2010 through the “Galaxy” system.

49. The D-1 Post was advertised in Galaxy on 9 October 2009. ST/AI/2006/3 was therefore applicable to the early stage of the recruitment process (advertisement of the VA) and ST/AI/2006/3/Rev.1 governed the remaining stage of the recruitment process until the final selection decision (namely, from its entry into force on 11 January 2010 until the date of the final selection in late October 2011).

50. In matters of selection and promotion, the Secretary-General has broad discretion and it is not for the Tribunal to substitute its own decision for that of the Secretary-General. However, the exercise of managerial prerogative is not absolute and the Tribunal may examine whether the selection procedure was carried out in an improper, irregular or otherwise flawed manner, as well as assess whether the Applicant was given full and fair consideration or whether the resulting decision was tainted by undue considerations or was manifestly unreasonable (Abbassi

53. Responsibilities of a programme manager are set out in detail in Annex II of ST/AI/2006/3/Rev.1, which provides that (emphasis added):

2. Programme managers must start the process early for anticipated vacancies, and as soon as an unanticipated vacancy occurs. To expedite the process, they are encouraged to conduct as many steps as possible quickly and simultaneously.

3. For posts up to and including at the D-1 level, programme managers propose, through the head of department/office, one candidate or, preferably, a list of qualified, unranked candidates found suitable for the functions. If a central review body finds that the proposed candidates were evaluated on the basis of the pre-approved evaluation criteria and/or that the applicable procedures were followed, the programme manager recommends to the head of department/office selection of one of these candidates, supporting such recommendation by a documented record. ... Should the recommended candidate be a male candidate where an equally qualified female candidate exists and the gender targets set out in the department action plan have not been met, the documented record must be submitted for approval to OHRM...

54. Ms. Maxfield testified that when the VA for the D-1 Post was advertised in October 2009, Mr. Mutiso had already relinquished the D-2 Post. Ms. Malcorra, USG/DFS, therefore decided to delegate authority to Ms. Maxfield to conduct the recruitment exercise for the D-1 Post. Ms. Maxfield explained that Mr. Mutiso had relinquished his D-2 Post and was not on assignment, hence no longer reporting to Ms. Malcorra. Therefore, Ms. Malcorra could not have asked him to run the recruitment exercise for the D-1 Post.

55. The Tribunal observes that, at the date of Mr. Mutiso's temporary return to DFS on 25 October 2010 (until December 2010), the written test for the D-1 Post had already taken place. The First Panel had also already conducted the interviews of the candidates and a report had been provided to its members and was in the process of being finalised. Further, the First Panel's report, dated 2 February 2011, had already been sent to Ms. Malcorra prior to Mr. Mutiso's permanent return to his position as Director, FBFD. A reasoned and documented record of the evaluation of

the proposed candidates for the D-1 Post was prepared in accordance with ST/AI/2006/Rev.1, to allow a review by the CRB and the Head of the Department.

Finding

56. The Tribunal accepts that in the absence of any incumbent of the D-2 Post, the decision of the USG/DFS, as Head of Department, to assume direct responsibility for the recruitment process through Ms. Maxfield, was not an improper exercise of discretion.

Whether the very fact that a second ~~set of~~ interviews was conducted was lawful and if so, was the composition of the ~~Sub~~ Panel procedurally correct?

57. The Applicant's contentions in respect of the lawfulness of the second interview are twofold. The Applicant submits that there is no legal basis for holding a second round of interviews and she contests the composition of the Panel.

the candidates was best suited to the functions. The Respondent stated that during the tenure of Ms. Malcorra as USG/DFS, there were 13 appointments at either the D-1 or D-2 levels. Four appointments were made at the D-2 level and, in each instance, there was a second set of interviews. Nine appointments were made at the D-1 level. In two cases, a second round of interviews was conducted, in five cases there was no second round of interviews and in the remaining two cases, the Respondent has been unable to determine whether one or two rounds of interviews were conducted.

60. The Second Panel's report emphasized that it was clear from the First Panel's report that the Applicant and Mr. M. had performed more strongly than other candidates during their first interviews and that both had served at the D-1 level on

the very purpose of this second interview was for the USG to satisfy herself as to which of the two appointable candidates best met the particular requirements of the post at that particular point in time. Ms. Maxfield explained in evidence that the hiring manager would, in any event, not have been invited to participate in the second round of interviews which are usually held by the USG and her deputy.

64. The Tribunal held in *Tiwathia* UNDT/2015/021 that:

Having considered the reasons [as stated in paras 50-53 of this judgment] and explanations put forward [by the decision-maker, i.e. Ms. Pollard, Head of Department, who testified before the Tribunal], the Tribunal accepts that, in this case, Ms. Pollard's decision to hold a second interview was a proper exercise of discretion as a hiring manager faced with three equally appointable candidates.

65. The Applicant has not shown that there was a violation of ST/AI/2006/3/Rev.1 in the decision not to involve Mr. Mutiso in the final stage of the recruitment process upon his return in DFS in October 2010 or in April 2011. Further, and in the absence of any evidence of an ulterior motive, Ms. Malcorra's decision to hold a second interview and not to involve Mr. Mutiso at that stage was a proper exercise of her discretion as a head of department faced with two equally appointable candidates.

Finding

66. The Tribunal finds that the decision to hold a second round of interviews, and the composition of the Panel, does not amount to a procedural irregularity in the particular circumstances of this case.

Whether the lengthy delay in the selection procedure infringed the Applicant's right to be fully and fairly considered

Undue delay

67. The Applicant contends that the unacceptably long delay for Management to complete the recruitment process not only contravened the target established in

was re-advertised on 28 July 2009 with a closing date of 26 September 2009. In the meantime, the VA for the D-1 Post was advertised on 9 October 2009 with a closing date for application of December 2009. At this stage, the second attempt at a selection for the D-2 Post had been ongoing for five months. Ms. Maxfield stated that she was not sure as to the timeline of events but she remembered that either the second or third round of selection for the D-2 Post failed because of the absence of a female candidate at the reference check stage. Ms. Maxfield acknowledged that Ms. Malcorra was falling short on the recruitment of female staff members at the director's level who were under-represented both at the D-2 and D-1 levels at that time. Ms. Maxfield explained that this was also the reason why the VA for the D-2 Post had to be re-advertised as there had been no qualified female candidates for the D-2 Post.

71. The Tribunal observes that the overall length of the selection procedure for the D-1 Post, namely over 24 months, is excessively long having regard to the General Assembly's request to "improve the overall response time with a view to achieving the benchmark of 120 days for filling a post", i.e. 4 months. It should have become apparent, at least by September 2010, when the written test and interviews for the D-1 Post took place and a year prio

72. Given the circumstances linked to the absence of a Director at the D-2 level and the difficulties of recruiting against the D-2 Post to achieve a balance of complementary skills between the D-1 and D-2 Posts, the delay was the consequence of a legitimate attempt, albeit unacceptably tardy, to pursue a reasonable organisational objective.

Finding

73. Although unnecessarily excessive the delay in the recruitment for the D-1 Post was not in violation of the Staff Regulations, Staff Rules or administrative issuances applicable at the relevant time.

Allegations of bias

74. The Applicant submits that Ms. Malcorra indicated to her, during a visit in Sudan in October 2010, that she had not been selected against the TVA because UNAMID needed her. She submits that the recruitment process for the D-1 Post under the VA was thereafter deliberately delayed to ensure that the candidate initially selected for the TVA, Mr. M, would gain sufficient experience to be eventually selected against the D-1 Post. The delay in finalizing the selection procedure was designed to give the incumbent of the TVA an opportunity to gain additional experience, through the repetitive extensions of his temporary appointment, and to bolster his credentials given that he had barely two years of experience at the United Nations when he applied to the D-1 Post and no field experience, whilst the Applicant served for 18 years at the United Nations within DFS and had two years' experience in the field.

75. The Applicant further contends that bias against her was evidenced by the fact that, in spite of having been placed on the roster of candidates qualified for the Post, and placed on a D-1 level post in UNAMID, she had not been placed on

filled, resulting in a potential loss of legitimate SPA entitlements for that period. However, given that this contention was not included in the application, the Tribunal will not consider the Applicant's submission in this respect.

76. The Respondent submits that the Applicant has not established the existence of bias against her, or that the selection decision was based on improper motives, was otherwise flawed or that the Applicant suffered any disadvantage from the delay. Candidates for the D-1 Post were assessed against their respective performances and the Applicant simply did not perform well during the second round of interviews, despite being provided opportunities through follow-up probing questions. The Second Panel recognized that the Applicant was a highly-educated, experienced staff member who is devoted to the service but considered that she did not demonstrate the ability to fulfill both the strategic and operational requirements of the post and, therefore, was not the best suited candidate for the position.

77. An allegation of bias or likelihood of bias has to be established on the balance of probability by the person making the allegation. However, whilst a conjecture may be plausible, it is of no legal value, for its essence is that it is a mere guess (Macharia 2011-UNAT-128). The Applicant has the burden of establishing that there was a real likelihood that the delay was designed to favor Mr. M (see Appeals Tribunal Orders No. 100 and No. 103(2012)).

78. As the Tribunal held in Taddonki UNDT/2013/032:

144. The standard of proof required is "a preponderance of the evidence" or on "a balance of probabilities". That degree is well-settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say: "we think it more probable than not," the burden is discharged but, if the probabilities are equal, it is not.

145. In a case where improper motives or extraneous motives are invoked it is very rare that direct evidence is available to prove such assertions. The task of a court of law is to scrutinise and peruse all the evidence presented by the parties both in support and in rebuttal of the assertions. A party making an assertion of extraneous factors or improper motive must establish a *prima facie* case that this is so. This

than twenty-four months at any given time”. This latter provision has been removed from ST/SGB/2010/6, adopted on 2 September 2010.

82. However, ST/AI/2010/4 (Administration of temporary appointments), which entered into force on 27 April 2010, was applicable to Mr. M’s renewed appointment as at this date. It was superseded by ST/AI/2010/4/Rev.1 only on 26 October 2011, which entered into force on its date of issuance. Sections 1.1, 2.1 and 2.2 of ST/AI/2010/4 state that the purpose of a temporary appointment is to enable the Organisation to effectively and expeditiously manage specific short-term staffing needs and to meet seasonal or peak workloads. Section 15.1 sets out the exceptional circumstances under which a temporary appointment may be extended beyond 364 dayk worklo

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Case No. UNDT/NY/2012/020

Judgment No. UNDT/2015/040

the appointment of Mr. M. given that the Applicant was not equally qualified for the position.

89. ST/AI/1999/9 (Special measures for the achievement of gender equality) entered into force on 1 October 1999. It has not been repealed or superseded.

90. In *Tiwathia* UNDT/2015/021, the Tribunal found that:

Section 13.3 of ST/AI/2010/3 (Staff selection system) states that its provisions shall prevail over any inconsistent provisions contained in other administrative instructions in force at the time of issuance. The Tribunal considers that sec. 1.8 of ST/AI/1999/9 (Special measures for the achievement of gender equality) is inconsistent with sec. 9.3 of ST/AI/2010/3, which clearly states that the head of department “shall select the candidate he or she considers to be best suited for the functions”. Consequently, in accordance with sec. 13.3 of ST/AI/2010/3, the Tribunal finds that sec. 9.3 of ST/AI/2010/3 prevails, and the head of department has broad discretion to choose the candidate they consider best suited to the position.

91. However, in the present case, the selection procedure for the D-1 Post was governed by ST/AI/2006/3/Rev.1 which, unlike ST/AI/2010/3, contains the additional requirement for the head of department to give due regard to geography and gender. ST/AI/1999/9 was therefore applicable. Considering that the representation of female staff members at the Director level was at issue (sec. 1.9), secs. 1.8 and 4 of ST/AI/1999/9 were to be complied with.

92. Section 1.8 of ST/AI/1999/9 provides that:

1.8 (a) Vacancies in the Professional category and above shall be filled, when there are one or more women candidates, by one of those candidates provided that:

(i) Her qualifications meet the requirements for the vacant post;

(ii) Her qualifications are substantially equal or superior to those of competing male candidates;

...

(c) In evaluating women candidates, particular emphasis shall be given to potential to perform at the higher level, although women may not have been offered such an opportunity in their prior service;

(d) When the qualifications of one or more women candidates match the requirements for the vacant post and the department or office recommends a male candidate the department or office shall submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation indicating how the qualifications and experience of the recommended candidate, when compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended;

...

93. Section 4 of ST/AI/1999/9 states (emphasis added):

4.1 Heads of departments and offices shall have primary responsibility and shall be accountable for the implementation of the special measures set out in the present instruction.... They shall prepare and submit a department action plan for achievement of the goals set in section 1.1 of the present instruction, including a succession plan, which will be fully synchronized with the revised human resources planning cycle, and shall submit reports on the progress achieved under the plan to the Secretary-General through OHRM and the Special Adviser on Gender Issues and Advancement

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95. With regard to the issue of geographical distribution, at the outset, the Tribunal notes that, pursuant to sec. 9.2 of ST/AI/2006/3/Rev. 1, the head of department/office is only required to have due regard to geography. The importance of having due regard to gender and geography is also set out in sec. 7.7 of ST/AI/2006/3/Rev.1 in the following terms:

The head of department/office shall ensure that, in making the proposal [to the CRB], he or she has taken into account the Organization's human resources planning objectives and targets, especially with regard to geography and gender, and provide a certification to that effect to the central review body.

96. The Tribunal notes that the memorandum provided to the CRB (pp. 27-29 of the court bundle) addresses the issues of geography and gender in the following terms:

I also certify that this proposal is reasoned and objectively justifiable based on the pre-approved evaluation

98. The Tribunal further observes that there are no requirements in ST/AI/2006/3/Rev.1 regarding the consideration at the stage of the final selection of the level of troop contributing countries (unlike ST/AI/2010/3 which imposes such a requirement but which was not applicable to the selection process in the present case). Therefore, the Applicant's contention on this point fails.

Conclusion

99. The application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 22nd day of May 2015

Entered in the Register on this 22nd day of May 2015

(Signed)

Hafida Lahiouel, Registrar, New York