
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/062

Judgment No.: UNDT/2013/094

Date: 1 July 2013

Original: English

Before: Judge Nkemdilim Izuako

Introduction

1. On 7 October 2011, the Applicant filed an Application contesting the termination of his fixed-term appointment with the United Nations Mission in Sudan (UNMIS) upon the closure of UNMIS on the grounds that:

- a. the decision was a breach of the process by which staff members of UNMIS were transferred to the United Nations Mission in South Sudan (UNMISS);
- b. the decision was vitiated by improper motives;
- c. he had a legitimate expectation that his fixed-term appointment would not be terminated; and
- d. the decision was taken without proper delegated authority and was *ultra vires*.

2. The Respondent filed a Reply on 3 February 2012 contesting that:

- a. the Applicant was not recommended for reassignment to UNMISS following the completion of a fair, transparent, impartial and objective comparative review process;
- b. following the termination of the mandate of UNMIS, the necessities of service required the abolition of the Applicant's post;
- c. the termination of the Applicant's contract was lawful.

Facts

3. The Applicant was initially appointed for six months on 27 April 2007 as a Public Information Officer (PIO) at the P-3 level with the United Nations Mission in Liberia (UNMIL) under an Appointment of Limited Duration under the former 300-series of the Staff Rules.

4. Following the contractual reforms in July 2009, the Applicant was reappointed under a fixed-term appointment, limited in service to UNMIL, effective from 1 July 2009 to 30 June 2010.

5. On 10 February 2010, the Applicant was reappointed as a Radio Producer at the P-4 level with UNMIS. He was then given a fixed-term appointment for one year from 10 February 2010 to 9 February 2011. His fixed-term appointment was further extended for one year to 9 February 2012.

6. By its Resolution 1978 (2011) of 27 April 2

a system (a comparative review process) to determine those staff members who could be transitioned to the new mission since certain posts would be abolished.

10. One of these Information Circulars No. 327/2011 was issued on 26 June 2011 by the UNMIS Director of Mission Support (“DMS”) announcing the formation of a Comparative Review Panel (CRP) which was to review the transition of international posts in UNMIS to the new mission. The same circular also set out the criteria to be considered during the said review by the CRP.

11. On 30 June 2011, Information Circular No. 334/2011 (Update to UNMIS Staff regarding the UNMIS Draw-down process) was issued. The Information Circular noted that, for those staff members who were not selected or

exercise on the transition of international staff from UNMIS to either UNMISS or UNISFA.

16. Upon receiving the memorandum, the Applicant on 12 August

the application on 25 June 2012. The Tribunal refused the application by oral order issued during the first day of the hearing on 26 June 2012.

21. The Tribunal then heard the case from 26 to 28 June 2012. During the proceedings, live evidence was received from Ms. Sylvia Fletcher who was the Principal Civil Affairs Officer and Chief of Civil Affairs in the Southern Sudan Regional office in UNMIS for the Respondent. Mr. Ashraff Eissa, who was at the times material to this case, Officer-in-Charge/Director, Communications & Public Information, UNMIS, Ms. Nanci Hersh, UNMIS Broadcast Technology Officer (BTO) and the Applicant himself, testified for the Applicant.

22. On 24 July 2012, the Applicant sought leave to tender additional documentary evidence. The evidence that the Applicant wanted admitted included:

- a. an email dated 19 May 2010 from Mr. Eissa to various recipients in Radio Miraya stating approved reporting lines that were to be followed as a result of direct instructions from the then Head of Mission and Special Representative of the Secretary-General (SRSG) in UNMIS;
- b. an email chain during the period 8 June 2010-14 July 2010 between Mr. Eissa and Mr. Claude Cirille, then Chief of Radio at the mission concerning the reporting lines for staff of the radio section.
- c. An email chain beginning on 28 July 2010 from the Applicant to various recipients.

23. On 10 August 2012, the Tribunal informed the parties that the issue of the admissibility of the additional evidence would be dealt with in this Judgment. The parties filed their closing submissions on 31 August 2012.

Applicant's witnesses

24. Mr. Eissa's evidence is summarized below.

- a. He joined UNMIS on 11 May 2009 as Deputy Chief Public Information Officer until October 2010 when he became the

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- m. He had supervised the Applicant for up to eight months. Ms. Herman supervised the Applicant for up to four months. When Ms. Herman joined UNMIS, it was on a Temporary Vacancy Announcement and as she had no previous United Nations experience, he was hesitant about her assessment or appraisal on that basis.
 - n. He did not discuss the Applicant's appraisal with Ms. Herman as he felt that it was not the appropriate thing to do at the time. It is not correct to say that he did not want to hear Ms. Herman's point of view. She went to him and demanded to take control and she did not ask to discuss the Applicant's performance. The only discussions were between him and Ms. Jiang. These discussions took place after the appraisal period.
 - o. Ms. Herman was quite new and for her to appraise senior staff members was not the best thing.
 - p. He had no problems with Ms. Jiang as they worked well together.
 - q. Ms. Jiang did not discuss his appraisal of the Applicant. All that she asked was that the Applicant's rating be downgraded. As Second Reporting Officer (SRO), Ms. Jiang could send her comments on his appraisal and he would respond.
25. Ms. Hersh's evidence is summarized below.
- a. She joined UNMIS on 26 July 2005 as a Broadcast Technology Officer within the Public Information Office at the FS-6 level. She was promoted to the P-4 level on 1 January 2011.
 - b. She got to know the Applicant when he first arrived in February 2010 as the Deputy Chief of Radio and she interacted with him. She was the designated peer helper for the public information/radio staff. It was while performing that role that the Applicant

- i. She felt that Ms. Herman's reaction to the Applicant was related to an incident in 2010 when she and the Applicant had approached the SRSG about the issue of editorial control vis-à-vis FH and UNMIS staff. Mr. Wimhurst, the UNMIS Chief of Staff, seemed to support FH having editorial control and he was responsible for recruiting Ms. Herman. She and the Applicant were opposed to FH having editorial control.
 - j. FH staff were very condescending to the Applicant during senior staff meetings. It was mainly Ms. Herman and Mr. Wimhurst on the United Nations side and one Mr. Darwish and Ms. Bennett of FH who were involved in mistreating the Applicant. She perceived this to be a witch-hunt against the Applicant.
 - k. There was a time when Ms. Herman was insistent on becoming the FRO for senior staff members including the Applicant and herself. She was not comfortable that Ms. Herman who was encumbering a temporary appointment for three months, would be her FRO. In the end, another staff member, Mr. Tobgyal, ended up as her FRO and Mr. Eissa her SRO.
 - l. UNMIS staff was shown an organogram in which United Nations staff members would serve a subordinate role to FH staff. The organogram placed the Applicant in a position where he would be reporting to general service staff.
 - m. The Applicant wrote her an email on 2 January 2011 explaining the harassment he was experiencing from Ms. Herman. She responded to the email on 22 February 2011.
26. Ms. Fletcher's evidence is summarized below.
- a. She is currently the Chief of the Recovery, Reintegration and Peace-

Chief of Civil Affairs in the Southern Sudan Regional office in UNMIS.

- b. She served as the Co-chairperson on the CRP which reviewed international staff of UNMIS as part of the transition process to UNMISS.
- c. At the start of their work, the CRP in a plenary session had agreed on a methodology for rating staff according to the review criteria. They agreed upon the weighting for each criterion and the points to be awarded. A rating table was drawn up to reflect what was agreed. A list of criteria that would add up to 100 points was agreed upon as follows:
 - i. Performance (based on e-PAS).
 - ii. Relevant experience (based on Personal History Profiles (“PHPs”)).
 - iii. Direct relevant experience (based on PHPs).
 - iv. Adherence to core values (based on the core values section of the e-PAS).
 - v. Length of service (based on PHPs).
- d. After the methodology and criteria were agreed upon, the Panel broke up into teams to conduct the reviews. All of the teams worked in one large room /F1 1 0 0 (l)-2Jssq BT 2(r)-8(o)-11(o)-11(/F1 1 0 0 (l)-2Js)5(sq

61 points. The Panel recommended that Ms. Papper be rolled over to the P-4 Radio Producer Post in UNMISS. The Panel recommended that the Applicant and Ms. Msoka be included in the pool of available candidates in ranking order if there were found to be more posts with similar functions in UNMISS.

- g. She neither knew the Applicant nor Ms. Herman before the CRP. She knew Ms. Jiang through official circles and also Mr. Wimhurst as he was the Chief of Staff. The CRP had three team leaders and sometimes broke into three groups. Ms. Herman was one of the three team leaders and they must have talked “generally” during the CRP exercise.
- h. The CRP exercise was guided by the terms of references for the new posts in UNMISS. In assessing the direct relevant experience, the CRP did not take into account the former terms of reference on the basis of which the candidates had been recruited to their posts in UNMIS, instead they considered the new terms of reference set for the job in the new UNMISS mission side by side with the candidates’ PHPs and awarded marks over a maximum of 20.
- i. In assessing candidates against the criteria for length of service in the United Nations, candidates who had served longer in the Organization were awarded higher marks. The maximum marks under this heading were 20. Length of service in UNMIS was not considered.
- j. For the two reporting periods considered, a maximum of 40 marks could be awarded. A rating of “exceeds performance expectations” on an e-PAS would attract the maxe mas performa

marks were given at the discretion of the Panel for positive comments.

Applicant's case

27. The Applicant's case as deduced from his oral testimony and pleadings is summarized below.

28. His separation was a unilateral act, purportedly initiated on behalf of the Secretary-General, that is, it was a termination under staff rule 9.6(a) although there is no unequivocal statement that the appointment had been terminated.

29. Pursuant to staff rule 9.6(c), termination of an appointment falls within the authority of the Secretary-

32. Neither staff rule 9.6 nor ST/AI/234/Rev.1 del

- f. The evidence of Ms. Fletcher showed that there was significant scope for “contamination” between the CRP sub-groups or teams. Ms. Fletcher accepted in cross examination that she may have spoken to Ms. Herman during the review sessions as they were all in the same room.

36. The recruitment of Ms. Herman as Chief of Radio was followed by an increase in his harassment and marginalization. After his transfer to Khartoum from Juba, he met with Ms. Herman who instructed him to vacate his office. He was also assigned an impossible workload without being provided the most basic resources to complete his tasks. Ms. Herman printed reporting lines that showed him reporting to two national staff and an FH staff. When he pointed out the irregularity, the reporting lines were magnified to A3 size and placed on a notice board.

37. It was against this backdrop that he came to be assessed by the CRP. Given the animus directed towards him during this period, the Applicant submits that it is inconceivable that there would not have been an attempt by senior management to ensure that he was not transitioned to UNMISS.

38. The Applicant submitted that the withholding and downgrading of his 2010/2011 e-PAS is linked to the issue of his harassment and marginalization and that the e-PAS process was manipulated so that whatever the outcome, he was bound to be placed at a disadvantage during the CRP. In the end, his 2010/2011 e-PAS was deemed to be missing during the CRP exercise.

following a competitive selection process for that position, he could receive the lowest mark out of 20 for relevant experience in relation to the same job albeit with less responsibility.

41. The Applicant submitted that despite applying for every suitable PIO position with the United Nations since being separated, he has been unsuccessful yet he is on the roster for most of the positions. The Applicant submits that there is an active bar to his gaining employment with the United Nations.

42. Based on the foregoing, the Applicant seeks a declaration that the decision to terminate his contract was unlawful. He further seeks appropriate remedies by way of specific performance and/or damages.

Respondent's case

43. The Respondent's case is summarized below.

44. The decision to terminate the Applicant's appointment was lawful. Following the comparative review, the Panel awarded the Applicant 62 points out of a possible 100 points.

conflict of interest, the Panel agreed that no Panel member would review a staff member in their occupational group or with whom they were close. The review of the P-4 Radio Producers was carried out by two Panel members, the Co-Chairperson of the Panel, Ms. Fletcher, and the Senior Security Sector Reform Officer of UNMIS.

48. In her evidence to the Tribunal, Ms. Fletcher stated that the Panel did not seek or receive any input from anyone regarding the review. She did not recall speaking to Ms. Herman, a fellow Panel member, regarding the review.

49. To carry out the review, the Panel members reviewed the staff members' PHPs and last two e-PASes. After evaluating the Applicant, Ms. Papper, and Ms. Msoka against the review criteria, the Panel awarded the Applicant 62 points, Ms. Papper 66 points, and Ms. Msoka 61 points.

50. As Ms. Papper scored higher than the Applicant and Ms. Msoka, the Panel recommended that Ms. Papper be "rolled over" to the P-4 Radio Producer post in UNMISS. The Panel recommended that the Applicant and Ms. Msoka be pooled in ranking order in the event that there would be surplus posts with similar functions in the new mission.

51. The Administration accepted the Panel's recommendation, and Ms. Papper was provisionally reassigned to UNMISS. As no additional posts were established in UNMISS with similar functions after the comparative review, the Applicant's appointment was terminated. The reason for the termination was the abolition of all UNMIS posts.

52. Contrary to the Applicant's contentions, neither the evaluation of the performance records (e-PAS reports) nor the evaluation of performance based on direct relevant experience was flawed. The evaluation of performance records was based on an agreed methodology. The Applicant has advanced no reasons for asserting that the evaluation of his direct relevant experience was flawed. Further, it is not for the Tribunal to step into the shoes of the Panel and decide upon the methodology that ought to have been applied, or to conduct a fresh evaluation of the staff members under review.

53. Contrary to the Applicant's contentions that there was no basis for the award of 15 points to Ms. Papper for each of her e-PASes, as explained by Ms. Fletcher in her testimony, the Panel had the discretion to award an additional five points to a staff member who received a rating of "fully successful" or "successfully meets" if the e-PAS included positive comments. This issue was debated at length, and the agreed methodology was based on the Panel members' understanding of the strengths and weaknesses of the e-PAS system. The methodology took into consideration the possibility that some supervisors tend to assign higher ratings than others and those supervisors who tend to assign lower ratings may include positive comments, while not assigning a higher rating to a staff member. The Panel agreed that this approach would help address this lack of uniformity in the e-PAS system

54. Ms. Fletcher explained that the Panel was required to make a judgment about whether the comments justified additional points. The Panel looked for comments that indicated that the staff member's per 1 412.co ET Q q erustahiel lom732(e)-3(r)-8(e)l

functions of the post in UNMISS, where necessary. They did not consult the Chief of Radio in order to ensure impartiality. Where candidates received the same or almost the same number of points in the review, the Panel gave particular scrutiny to the candidates' experience, based on their PHPs and the terms of reference (TOR) for the post under consideration. The Applicant's and Ms. Papper's entire work experience, not just their most relevant experience as Radio Producers with UNMIS, were carefully reviewed by the Panel.

57. The Panel concluded that Ms. Papper had more experience as a Radio Producer. In addition to her experience in UNMIS as a Radio Producer for 21 months, she had over nine years of experience as a producer in other media organizations, primarily in radio. She also had considerable amount of journalism experience, both in radio and television. The Applicant's experience was in the field of journalism, public information, and radio production. He was a Radio Producer in UNMIS for only 16 months. He had also worked as a journalist, mainly on a freelance basis, in television and radio for approximately eight years. In addition, he had over four years of experience in public information and media outreach. His previous experience also included two years as a radio producer/editor, and three years as a television producer.

58. The Applicant's contention that the termination decision was simply a ruse to install the preferred candidate in UNMISS is without merit. The Applicant has not discharged his burden of proving that the Chief of Staff, the Chief of the

60. At the hearing, the Tribunal did not permit the Respondent to examine Ms. Jiang regarding her role as the Applicant's SRO on the basis that the Respondent's Reply did not join issue with the Applicant's pleading in this regard. As a consequence, the Tribunal does not have a full account of the circumstances in which the e-PAS was finalized. Accordingly, the Applicant's and Mr. Eissa's testimony regarding Ms. Jiang's role ought to be given no weight, as it is not corroborated by any document or other testimony.

61. With regard to Ms. Jiang, the Respondent submitted that there is no evidence from which to infer that she delayed finalizing the e-PAS or sought to downgrade the performance rating for the purpose of influencing the outcome of the comparative review process. Nor did the Applicant establish that Ms. Jiang held any personal animus against him. The suggestion that Ms. Jiang acted at the behest of the Chief of Staff or Chief of Radio is simply speculation. Further, Ms. Jiang was not on the CRP and there is no evidence that she was aware of the methodology applied during the comparative review. Even if it is assumed for the sake of argument that Ms. Jiang manipulated or delayed the e-PAS, she could not

Eissa admitted in his evidence t

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Considerations

78. Firstly, with respect to the various documentary evidence that the parties sought to tender in support of their cases, the Tribunal is of the considered view that, in accordance with art. 18.1 of its Rules of Procedure, these pieces of evidence are relevant and address some of the legal issues in this case.

79. Having reviewed the entire case record, the Tribunal finds that the following legal questions arise for consideration:

- a. Were the Organization's Rules, the guidelines and criteria in Information Circulars 218/2011 and 327/2011 including the guidelines or methodology said to have been adopted by the Central Review Panel for the transition of staff members from UNMIS to the new UNMISS mission properly followed in respect to the Applicant?
- b. Did evidence before the Tribunal sufficiently establish that there was a poor working relationship between the Chief of Radio, Ms. Herman and the Applicant? Did the said evidence establish the presence of animus, harassment and abuse of authority against the Applicant?
- c. Did Mr. Wimhurst the Chief of Staff (COS) or Ms. Jiang, the Chief of the Public Information Office (CPIO participate in or influence the Comparative Review Process to the detriment of the Applicant?
- d. Was the decision to terminate the Applicant's contract taken with the requisite authority? If indeed delegated authority was retrospectively granted, was it material to the outcomes in this case?
- e. Was the Respondent, in the course of the hearing of this case, entitled to call new witnesses to introduce unpled evidence or to attack the Applicant's pleadings on which he had failed to provide a reply or to join issues?

84. Also for ease of reference, the Respondent's submissions on the issue were that the Applicant was evaluated against a review criteria according to an objective methodology developed by the Panel and that the review was impartial and not flawed. Moreover, the Panel was required to make a judgment about whether the comments on e-PASes justified additional points when a staff member's performance was "excellent" or "outstanding" for the reporting periods.

85. It was with a view to throwing light on the foregoing submissions as to how e-PASes were used and applied in the comparative review exercise that the Tribunal issued, on 18 April 2013, Order No. 086 (NBI/2013) in which the Respondent was required to produce the following documents:

- a. The ePASes that the CRP used to evaluate Ms. Helen Papper for the one available P-4 post of Radio Producer in UNMISS.
- b. The ePASes that the CRP used to evaluate Ms. Valerie Msoka for the one available P-4 post of Radio Producer in UNMISS.

86. The Respondent filed the required documents on 22 and 29 April 2013.

87. The Tribunal's examination of the said e-PASes showed that for the 2009/2010 performance period, Ms. Papper was evaluated as being "fully competent" in the core values, core competencies and managerial competencies. Her overall rating was "successfully meets performance expectations". In the overall comments, Ms. Papper's FRO stated that she had successfully fulfilled her

89. The Tribunal also reviewed the e-PASes for Ms. Msoka and the Applicant which the CRP had used in the comparative review exercise. For the 2008/2009 performance period, Ms. Msoka was evaluated as being “fully competent” in the core values, core competencies and managerial competencies. Her overall rating was “successfully meets performance expectations”. In the overall comments, she was described as “an asset” to the United Nations radio in Sudan. She was said to have worn two hats without a chief of radio.

90. For the 2009/2010 performance period, Ms. Msoka was also evaluated as being “fully competent” in the core values, core competencies and managerial competencies. Her overall rating was again rated as “successfully meets performance expectations” and overall was said to have made “major achievements in radio”.

91. The Applicant’s e-PAS for the 2009/2010 performance period showed that he was evaluated as being “outstanding” in the core value of integrity. He was also listed as “outstanding” in the core competencies of (1) communication, (2) teamwork and additionally found to be “outstanding” still in the two managerial competencies of (1) judgment/decision making and (2) empowering others. He was rated as “fully competent” in all the other core values, core competencies and managerial competencies. His overall rating was “frequently exceeds performance expectations” In making overall comments; the Applicant’s FRO said he had made very strong efforts in the appraisal period.

92. In the second e-PAS used for the Applicant, that is, the one for the 2008/2009 performance period, he was again rated as “outstanding” in five areas. These were the core value of professionalism, two core competencies of planning & organization and creativity and two managerial competencies of vision and empowering others. His overall rating was “fully successful performance”. His FRO’s overall comment was that he had done “a very good job” and was “an asset” to the Organization.

93. The foregoing examination of the e-PASes of the Applicant and the two other colleagues with whom he underwent a comparative review and on the basis of whichfb10 0 0 rg 0.9981 0 nci

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managerial competencies, all together in five areas. Why did the Applicant not get five extra marks for his 2008/2009 e-PAS in spite of outstanding performance in five areas?

100. Ms. Msoka, who had been awarded the same overall rating of “fully successful performance” as Ms. Papper in her e-PASes was not found to have fallen below average in any of the competencies or “requiring development” in any area. In spite of being described as an “excellent” radio producer and one that had made “major achievements”, Ms. Fletcher’s CRP team did not award her any extra marks on any of her e-PASes. Further Ms. Msoka during one of the appraisal periods, like Ms. Papper, had been responsible for fulfilling the duties of her position while also filling the position of OIC for the Chief of Radio position.

101. Rather, it was Ms. Papper; the candidate with the weakest e-PASes out of three candidates considered, that was assisted by the CRP team to end up with the highest scores under the e-PAS criterion on the basis of some non-existent “positive comments”. Where were these positive comments that entitled Ms. Papper to ten gratuitous marks in a marking scale with a ceiling of 40? What magic words in the e-PASes of Ms. Papper informed the exercise of the discretion of Ms. Fletcher’s team in awarding her ten extra marks and withholding the same from the other candidates?

102. In spite of claiming that her CRP team looked for comments that indicated that the staff member’s performances were “excellent” or “outstanding” in order to award an extra five marks, Ms. Fletcher evidently ignored the comments that

reporting period. This is a most scandalous and embarrassing manipulation of the comparative review process which ought not to be condoned.

The CRP's review and award of marks for core values

104. The Tribunal averts its mind at this point to another part of the testimony provided by Ms. Fletcher. At paragraphs 24 and 25 of her witness statement, she testified about her team's review of core values. Her testimony on this score is hereunder reproduced.

24. The core values criterion was rated by reference to a staff member's ratings for integrity, professionalism and respect for diversity/gender, contained in his or her last two e-PASes. The evaluation was a weighted system for the three elements of core values over two years of e-PAS, with one point awarded for a "fully competent" rating and 2 points awarded for an "outstanding" rating on each of the three elements over two years. The maximum number of points was 10 points.

25. Based on their e-PAS reports, Ms. Papper and Mr. Bali were both awarded five points, reflecting that they both had fully competent ratings.

105. Reviewing the foregoing piece of evidence with regard to marks awarded for core values, it-5(i)2 0 0 rg 0.9981 0 0 1 270 374.4 Tm [(p)-11(ie)17(c)-3(e)-1(4 rg 0.9981 0 0 1 270)

Was any clear methodology actually adopted in the CRP exercise?

107. The Applicant had testified that the methodology used by the CRP in the comparative review exercise was never published or made known to staff members and that he did not know what part the e-PASes played in the exercise until the Respondent's Reply in this case. Evidence was led by the Respondent to the effect that the CRP started its work by first holding a plenary session where a methodology was adopted for conducting the performance review exercise. Part of this methodology was discretion on the part of the CRP to award extra marks where it saw positive comments in the e-PAS of a staff member who had been awarded an overall rating of "fully successful performance".

108. Although this Tribunal's examination of the e-PASes of the Applicant and two other candidates against whom he was reviewed has exposed the fraudulent manipulations that occurred in that comparative review exercise, it is yet critical to observe that the methodology that was claimed to have been adopted by the CRP was not properly placed before the Tribunal.

109. There were no minutes of a plenary session of the CRP at which this much-touted methodology was adopted. There was no document showing a methodology prepared and signed by the CRP for the purposes of the comparative review on 26 June 2011 after its purported plenary. Instead, it was the CRP's sketchy two-page report which was written and signed at the end of the comparative review exercise in July 2011, showing an unclear, confused table on a corner of one its pages that was tendered as proof of the adoption of some methodology by the CRP. The unsettling question here is whether any methodology was indeed adopted by the CRP before it commenced its work of comparative review of candidates? The Tribunal finds that no evidence tendered by the Administration's agents on this issue reliably leads to that conclusion.

How the candidates were awarded marks on direct relevant experience

110. Evidence was tendered by the Respondent's witness in an effort to explain why the Applicant was awarded a score of eight out of a maximum of 20 marks for direct relevant experience by the CRP based on his PHP. In his closing

address, the Applicant's counsel submitted that it is inconceivable that someone who was competitively recruited as Deputy Chief of Radio and Senior Radio Producer at the P-4 level would receive the lowest mark for relevant experience in relation to the same job with less responsibility.

111. The Tribunal examined the Applicant's and Ms. Papper's PHPs in the light of the testimony of Ms. Fletcher. According to the witness, her CRP team counted the number of years of direct relevant experience with reference to the TOR for the post. Ms. Papper was awarded 15 points while the Applicant got eight out of the maximum of 20 marks under that heading.

112. Ms. Fletcher told the Tribunal that Ms. Papper had more experience as a radio producer and that in addition to her work in UNMIS as a radio producer for 21 months, she had over nine years' experience as a producer in other media organizations, primarily radio. Mr. Bali, according to the witness, was a radio producer in UNMIS for 16 months.

115. With regard to her experience as a radio producer; before Ms. Papper started her first United Nations appointment in the United Nations Stabilization Mission in Haiti (MINUSTAH) as a Radio/Video Producer for one year, her PHP shows that she worked for eight months as a Radio Journalist/Producer for Radio France International. She had also worked as a Senior Producer for the University of Oklahoma radio station. As an intern, she had worked over a period of three years as a radio reporter/host with WAER, a radio station of the Syracuse University in New York.

116. Clearly, Ms. Papper's experience did not include "over nine years"

119.

breached or if discretion was exercised in an arbitrary, capricious or illegal manner. He submitted also that where a transition process involves a comparative review of staff, the review must be based on objective criteria, and carried out by a process that is impartial and transparent.

123. The foregoing examination of the e-PASes and the PHPs of the candidates against the criteria and methodology said to have been employed by the CRP manifestly shows that the conduct of the comparative review of the Applicant and his peers for the one P-4 Radio Producer post in the new mission was nothing short of an egregious and unacceptable breach and subversion of the applicable procedural rules, criteria and methodology the CRP claimed it adopted. While this Tribunal may not substitute its views for those of the Respondent's senior officers who had responsibility for the transition process, it has a bounden duty to examine the claims of these officers as to how they applied the set criteria and the methodology established by them in the comparative review exercise, in order to determine that the process was indeed transparent, legal and objective and conducted with integrity. This, it has done.

124. While Ms. Papper was the candidate with the weakest e-PASes, she was unbelievably and inexplicably awarded extra marks to surpass her better-qualified colleagues (according to the standards set by the Mission and the CRP) to enable her transition to the new mission. Clearly and truthfully, had the CRP followed its own stated methodology, this should never have been the case. The shoddiness, bias, lack of transparency, lack of integrity and the withholding of damning documentary evidence in this case stand out in bold relief, shaming the highest standards and best practices for which the United Nations ought to be known.

125. The Tribunal finds that, contrary to the Respondent's submission that the

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stated or claimed methodology, the Applicant would have received higher marks in the exercise than Ms. Papper.

126. While it is the submission of the Respondent's Counsel that the Secretary-General enjoys a broad discretion in relation to staffing matters; he acknowledged rightly also that it was the duty of the CRP to be guided by the extant provisions of art. 101.3 of the Charter of the United Nations ("the Charter") that the paramount consideration in employment of staff shall be the necessity for securing the highest standards of efficiency, competence and integrity. These laudable provisions of the Charter were definitely not given effect in this case but were rather unfortunately subverted based on the personal whims of some of those entrusted with the responsibility of overseeing the traec84.88 703.92 Tm [(A)-2(p)-11(p)-32(l)22(i)2

vacate the office occupied by his predecessor for an FH trainer that was yet to arrive. She also denied him the use of an official sim card, internet and broadband used by his predecessor. She asked him to supervise the drivers and made him web editor, requiring him to work during office hours, as

reply dated 22 February 2011. The mails are titled “sharing conversation in meeting with Chief of Radio today – facing harassment.” The email from the Applicant described a 40-minute meeting with Ms. Herman in which he was undermined, talked-down at, accused of lateness to work and humiliated by her.

Indeed where the defendant denies an allegation, he must state his reasons for doing so; and if he intends to put forward a different version of events from that given by the claimant, he must state his own version.

138. Also, Rule 8(b) of the American Federal Rules of Civil Procedure provides that a defendant's answer to a complaint requires a short and plain statement to each claim asserted. The defendant must admit the plaintiff's claims or state that he or she does not have enough information to admit or deny.

139. In the instant case, except for a very general traverse at paragraph 46 of his Reply, the Respondent has neither answered to the allegations of fact pleaded by the Applicant nor addressed the documentary evidence adduced in support of the said facts. He has merely stated: "the Respondent denies all the allegations made by the Applicant." The Respondent's failure to deal with the particular allegations of the Applicant leaves the Tribunal with no other course of action than to accept the Applicant's version of the events.

140. Section 1.2 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) defines "harassment" as

any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

141. The Tribunal, based on pleadings, ample oral and documentary evidence and the fact that these claims are unchallenged, finds that at all times material to this Application; there existed a very poor working relationship between the Applicant and Ms. Herman, the Chief of Radio. The Tribunal finds also that the Applicant was undermined and harassed by Ms. Herman and that she condoned or ignored the harassment and shabby treatment meted out to the said Applicant by FH senior and junior staff under her watch even when these were called to her

- a. The Applicant has not adduced any evidence or demonstrated to the Tribunal that the comparative review process was flawed.
- b. The Applicant was evaluated against the review criteria according to an objective methodology developed by the Panel.
- c. The review of the Applicant was impartial. The Panel did not make any errors in evaluating the candidates according to the agreed methodology.
- d. There is no evidence that factors that were not part of the agreed methodology were taken into account by the Panel.
- e. The Applicant and the two other P-4 Radio Producers were subject to an objective and impartial comparative review process. To avoid any potential conflict of interest.
- f. In her evidence to the Tribunal, Ms. Fletcher stated that the Panel did not seek or receive any input from anyone regarding the review. She did not recall speaking to Ms. Herman, a fellow Panel member, regarding the review.

Mr. Wimhurst

144. The Tribunal has carefully reviewed the entire case record and the Parties' oral submissions and finds as follows:

- a. In an email dated 1 August 2010 to Ms. Bennet, the head of Project at FH, Mr. Wimhurst stated that he had good links with FH and had worked closely with them in the past. He also indicated that he had a lot of respect for their work.
- b. Another email dated 23 August 2010 sent by the Deputy Spokesperson of UNMIS on instructions from Mr. Wimhurst in which editorial control was handed back to FH staff against the instructions of the SRSG shows that, as submitted by the Applicant, there was strong disagreement on the issue of reporting lines between UNMIS and FH staff.
- c. This was corroborated by Ms. Hersh's evidence that when she and the Applicant had approached the SRSG about the issue of editorial

control vis-à-vis FH and UNMIS staff, Mr. Wimhurst, the UNMIS Chief of Staff, contrary to the then SRSG's position supported FH having editorial control.

- d. It was submitted by the Applicant that despite being the Officer-in-Charge of Radio since the resignation of the previous Chief, when a Temporary Vacancy Announcement was issued for the post and he applied, his application was not opened before the recruitment exercise nor was he shortlisted for the position.
- e. The Applicant submitted further that Mr. Wimhurst took personal charge of the recruitment process to install his preferred candidate, Ms. Herman, to the position. This, the Applicant submitted, was as a result of the animus against him for opposing the return of editorial control to FH staff. The Respondent did not attempt to counter this evidence but only offered a blanket denial.
- f. Ms. Hersh in her testimony informed the Tribunal that FH staff was very condescending to the Applicant during senior staff meetings and that it was mainly Ms. Herman and Mr. Wimhurst on the United Nations side and one Mr. Darwish and Ms. Bennett of FH who were invol[(f)13(.)]eu11(i)-20(f)136-P0.9981 00 0 rg (n)-11(5(a)17(t)-241in)9(g)9()-5(t)-20(h)9(e)1-(

- b. The Applicant testified that on 25 July 2011, he went to see Ms. Jiang about his e-PAS but she informed him that she would only sign off on it if his FRO, downgraded his assessment from “exceeds expectations” to “fully satisfactory performance”. This was in the aftermath of the comparative review process where e-PAS ratings, according to what the Tribunal was told, accounted for the highest marks awarded in the comparative review process and therefore largely determined whether staff members subject to the process would be transitioned to the new UNMISS or not.
- c. Mr. Eissa’s uncontested evidence was that he had completed the Applicant’s ePAS in good time at the end of March 2011 and sent it on to Ms. Jiang as SRO. Instead of signing it off or making her own comments on the said e-PAS, Ms. Jiang had asked him on several subsequent occasions to downgrade the said

Was the decision to terminate the Applicant's contract taken with the requisite authority? If indeed delegated authority was retrospectively granted, was it material to the outcomes in this case?

147. The Applicant submitted that the CCPO of UNMIS did not have the authority to take the decision to terminate his appointment. He further submitted that even if notification of the CCPO's decision was issued by the ASG/OHRM, Ms. Catherine Pollard, on 1 August 2011, she did no more than "rubber-stamp" his decision. The ASG's delegated authority to terminate her appointment was therefore sought after the decision had been taken. The Applicant submits that authority cannot be delegated retrospectively and that even for an ASG, there remains no power to terminate in these circumstances and, therefore, the decision was *ultra vires* and unlawful.

careful reading of the Administrative Instruction reveals that the ASG/OHRM has delegated authority to terminate an appointment only for health-related reasons. The Secretary-General retains the authority in all other cases.

Was the Respondent, in the course of the hearing of this case, entitled to call new witnesses and through them to introduce unpled evidence or to attack the Applicant's pleadings in respect of which the Respondent had failed to reply or join issues?

151. On 18 June 2012, the Tribunal held a case management conference in this case

Judgment

158. The Tribunal Case No. UNDT/NBI/2011/062 Judgment No. UNDT/2013/094

