

Introduction

1.

General Assembly and Conference Management. He then worked as Director (D—2), Geneva Branch, United Nations Office for Disarmament Affairs, from 2009 to 2014.

8. In January 2015, the Applicant took up the position of Director (D-2), UNIDIR. On 28 October 2016, he was granted a continuing appointment. The

Case No. UNDT/GVA/2017/050

Order No. 142 (GVA/2017)

ren

- d. The requirement F
 - d. .124907(-)-8846856(- 0884641(0.)10807405 0.15816(6) -0.0650556(0494417

employment and setting the expected date of entry in duty had been sent to the successful candidate, who had signed it and confirmed his or her available date for entry of duty (see, e.g., ~~at~~ Order No. 195 (GVA/2015), ~~ur~~ ne

24. The notification of a selection decision must be distinguished from an offer of appointment. It is clear from sec. 13 of ST/AI/2016/1 that the successful candidate is first notified of the selection decision within 14 calendar days of the decision being made (sec. 13.1) and that the decision is implemented thereafter (sec. 13.3), notably through the sending of a formal offer detailing the terms and conditions of appointment. Contrary to what appears to be the Respondent's assertion, sec. 13.3, which states that "[t]he decision to select a candidate shall be implemented upon its official communication to the individual concerned", cannot be interpreted as meaning that the notification amounts to implementation. The use of the word "shall" indicates that actions must be taken to give effect to the decision and to ensure its implementation, as actually reflected by the practice of the Organization.

25. If selection decisions were considered to have been implemented upon their notification to the selected candidate and his or her confirmed interest and availability for the concerned position, the window of opportunity for unsuccessful candidates to seek suspension of action would be so limited that it would virtually deprive them of this recourse. This is particularly problematic in the context where unsuccessful candidates have a limited possibility to obtain rescission of selection decisions once they have been implemented, given that the Tribunal is bound to set an alternative amount of compensation that the Respondent may elect to pay in lieu of rescission of the decision and that the Respondent's practice is to systematically elect to pay this buy-out.

26. In the instant case, the selected candidate was informed of the following on 1 July 2017 by an email of OHRM:

In reference to your application to the above-mentioned Job Opening, we are pleased to inform you that the United Nations Secretariat has selected you for the position.

Please confirm by return e-mail, within five business days of receipt of this message, your continued interest in and availability for this position.

The Human Resources Management Office will be contacting you shortly with regard to further recruitment or staffing procedures.

Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

32. The Appeals Tribunal further ruled in *d/k n* 2011-UNAT-122 that official acts are presumed to have been regularly performed; accordingly, in a recruitment procedure, if the management is able to even minimally show that the staff member's candidature was given full and fair consideration, the burden of proof shifts to the candidate, who must be able to show through clear and convincing evidence that she or he was denied a fair chance.

33. The Tribunal notes that the Applicant in his application essentially takes issue with the fact that the Secretary-General unlawfully abdicated his decision-making power in favour of the Board of Trustees, on the basis of information that he received in this respect and having no access at the time to the documents concerning the selection process. Upon its request, the Tribunal received from the Respondent a number of these documents which disclose prima facie fundamental procedural flaws in the selection process. The Tribunal will focus its examination of the case on these matters, which could not be known to the Applicant.

34. The Tribunal further notes with concerns that its Order No. 140 (GVA/2017) of 6 July 2017 for the production of evidence has not been fully complied with by the Respondent. Notably, it appears that the Respondent failed to provide a full record of the communications between the Secretary-General and the UNIDIR Board of Trustees in respect of the selection for the contested post, as

acceptable justification (see *Bertu* 2011-UNAT-21; *Lehtinen* UNDT/2017/004).

Legal framework

35. It is not disputed that the selection exercise for the contested position had to be conducted in accordance with ST/AI/2016/1 and the UNIDIR Statute. In this connection, the Tribunal notes that art. IV(1) of the UNIDIR Statute provides that “[t]he Director shall be appointed by the Secretary-General of the United Nations, after consultations with the Board”. This is the only provision of the UNIDIR Statute that deals with the recruitment of its Director and, indeed, the Respondent did not point out any other relevant provision. Art. IV(4) further provides that “[t]he terms and conditions of service of the Director and the staff shall be those provided in the Staff Regulations and Rules of the United Nations, subject to such arrangements for special rules or terms of appointment as may be proposed by the Director and approved by the Secretary-General”.

36. It follows that the recruitment procedure for the Director, UNIDIR, is that set forth in ST/AI/2016/1, subject to the specific provision of art. IV(1). Concretely, this entails that the provisions of ST/AI/2016/1 must be complied with and, at the final stage of the decision-making process, the Secretary-General shall consult the UNIDIR

Composition of the assessment panel

38. Pursuant to sec. 7.1 of ST/AI/2016/1, eligible candidates for a job opening “shall be invited by the Office of Human Resources Management for an assessment to evaluate their knowledge, skills, abilities and competencies in order to determine their suitability for the vacant position”.

39. Sec. 7.3 of said administrative instruction further provides that:

Assessments will be conducted by assessment panels, which will

possible interference from a member state in the recruitment of a key position on disarmament matters. This concern is compounded by the fact that the Principal Deputy Assistant Secretary for Nuclear and Strategic Research Policy, US Department of States, appears to have played a prominent role in this recruitment process, in taking part on both the assessment panel and the “Sub-Committee of the Secretary-General’s Advisory Board on Disarmament” that provided recommendation to the Under-Secretary-General and High Representative for Disarmament Affairs on the selection of the candidate for the contested position, as will be more amply discussed below. She was even the one who conveyed this recommendation, as the “Board Representative for the UNIDIR Director Selection Panel”.

43. The flagrant disregard of the applicable rules governing selection processes to allow participation of a representative of a political organ of a member State raises serious concerns as to compliance with art. 100 of the UN Charter, which is of a constitutional and supra-legal nature and enshrines the fundamental principle of non-interference of member states with the internal affairs of the United Nations. More specifically, art. 100 provides that:

1. In the performance of their duties the Secretary-General and the

candidates including at least one female candidate and at least one male candidate". By email of the same day, the Chief, SRB Secretariat, reiterated that the SRB did not review this case. Finally, the SRB's position that the post related to a distinct entity and fell outside the regular selection process by the Secretary-General is further contradicted by the fact that the selected candidate was advised that he had been selected for the post by "the United Nations Secretariat".

53. The Tribunal finds that the lack of review by the SRB constitutes, on a prima facie basis, a procedural flaw in the selection process but also removed an important safeguard to ensure compliance with the rules. This procedural error affects the whole selection process, as it appears that the selected candidate was not endorsed by the SRB prior to his selection, as required by the rules. It also deprived the Applicant of the possibility to be placed on the roster under sec. 14.1 of ST/AI/2016/1, causing him further prejudice in addition to not being selected for the position.

Decision-making process

54. The Tribunal notes that the decision-making process in this case, which led to the selection of the successful candidate among the three recommended ones, remains entirely obscure at this stage, despite the Tribunal's order for the Respondent to submit evidence in this respect.

55. Most certainly, it appears that a "Sub-Committee of the Secretary-General's Advisory Board on Disarmament" played a prominent role in the process. In an email of 12 October 2016 to the Under-Secretary-General and High

cymq"(7IIDymcq("0(lphcy"m(7)Iljm("M[Rppym))q"("I Dymcq("0(ljcy""lquiphcymqqyclrpymcq("0(lepepcym"q"0lcpymy))q"("lft

candidates reviewed by this Sub-Committee. This is the only document that was provided by the Respondent in respect of the involvement of the Board of Trustees or a part thereof in the selection process.

56. The exact process that was followed by the Sub-Committee to make its

58. This early “consultation” with the Sub-Committee appears to be in violation of the applicable rules. Whilst the UNIDIR Board of Trustees may be consulted by the Secretary-General when making the selection decision, this consultation

“partially meets the requirements” for the “overall rating for the interview” in the comparative analysis report. There is no explanation for this overall rating, which appears to be in contradiction with the actual assessment of his competencies. It is further noted that with similar ratings for each of the competencies assessed at the interview and an overall score equal to that of the Applicant, the successful candidate received an overall rating for the interview as “fully meets the requirements”. These discrepancies in the Applicant’s overall interview ranking and with that of the successful candidate is particularly concerning in light of the fact that it appears from an email of 19 October 2016 from the representative of

Conclusion on the prima facie unlawfulness

65. In view of the above, the Tribunal finds that the documents disclosed thus far raise serious and reasonable doubts as to the compliance of the selection

71. Article 19 (Case management) further states:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

72. Regarding the principle governing the confidentiality of evidence, the Appeals Tribunal held in *Bertu* 2011-UNAT-121 that:

In principle, when the Administration relies on the right to confidentiality in order to oppose disclosure of information, it may request the Tribunal to verify the confidentiality of the document whose production may be relevant for the settlement of the case.

The document may not be transmitted to the other party before such verification has been completed. If the Tribunal considers that the claim of confidentiality is justified, it must remove the document, or the confidential part of the document, from the case file. In any event, the Tribunal may not use a document against a party unless the said party has first had an opportunity to examine it.

73. Having reviewed Annex 4 to the Respondent's reply and all the documents submitted in response to Order No. 140 (GVA/2017), the Tribunal notes that most of these contain confidential information and are relevant for the Applicant's case. As these documents were not previously available to the Applicant and were used for the purpose of the present order, the Tribunal finds it appropriate that he be given access to them.

74. The Tribunal is mindful that the aforementioned documents contain sensitive information that requires protection. Accordingly, the Tribunal's Registry will duly redact them—to protect all information concerning individuals other than the Applicant and the seheore

