



IN THE MATTER OF:

*H.S., Applicant*

v.

*Chairperson of the African Union Commission, Respondent*

FOR APPLICANT: Alex P. Haines, Esq.

FOR RESPONDENT: Mohamed Salem Khalil BOUKHARI, Legal Counsel *a.i.*, African Union Commission

BEFORE: S. MAINGA, President, J. SEDQI, and P. COMOANE

HEARD ON: 16 – 17 November 2023

## JUDGMENT

### *Introduction*

1. This application is premised on the allegations of bias and discrimination against the Applicant (Mr H S) by the Deputy Chairperson (DCP) of the African Union Commission (AUC) (Ms M N) during the recruitment process of the Director, Human Resources and Management (DHRM) in favour of the current Director, Human Resources and Management (Ms N T).

### *The Background*

2. Applicant joined the African Union (AU) in February 2014 as a Human Resource Officer P2 step 1. On 18 August 2017, Applicant was upgraded on personal to holder basis as P3 step 1.
3. On 21 September 2017 Applicant received a very favourable recommendation from the then Head Human Resources who was exiting the AU. In paragraph 1 of the recommendation letter to the then DCP, the author wrote, ‘. . . I am writing to recommend Mr H S as my successor, in an acting capacity, until the post is substantively filled.’ In the penultimate paragraph of the letter, which tends to show that Applicant was not the most senior staff member in Human Resources, he wrote: ‘therefore it is in view of the above that I humbly seek exception to the AU staff Rule 35. 1(b) which states that unless where justified by exceptional circumstances, the most senior staff of the Department, Division or Unit shall be eligible to act and request the approval of his acting appointment and payment of acting allowance.
4. The tone of the whole letter was that Applicant was the person to lead the Department. That recommendation culminated, on 01 October 2017, the then DCP appointed Applicant as Acting Head of Human Resources, P5 position.
5. On 09 December 2019, Applicant filed a case against the Respondent with this Tribunal seeking to be confirmed as substantive Head of Human Resources. That case was settled between the parties and on 31 January 2020, contrary to Rule 35. 1(d), the Chairperson of the AUC (the Commission) confirmed the Applicant as the substantive Head of Human Resources P5.
6. Shortly thereafter on 16 April 2021, the position of the DHRM was advertised and Applicant applied and was assessed.

7. In May 2021, Applicant was appointed as Acting Director of HRM by the current DCP, pending the recruitment of the substantive Director.
8. In July 2021 the assessment of short-listed candidates was done. According to the R10 Merit Based Recruitment System (MBRS) Validation Report<sup>1</sup> which Applicant had attached to his application the initial shortlisting produced only three candidates, but on consensus, two other candidates who had above 60 but less than 70 were included for the next phase. Applicant was one of the two included by consensus. He was not shortlisted initially as he did not meet a requirement of the terms of reference (TOR) i.e. fifteen years Post Master's Degree but contrary to Rule 35.1(d)<sup>2</sup> he was nevertheless, as the R10 would have it, by consensus included for the next phase (interview) but the R10 comment on the contravention of the predetermined objective criteria of short listing is that 'R10 was part of the process but we think this should never happen again<sup>3</sup>.'
9. On 9 August 2021, the Recruitment and Selection Process Committee (RSC) submitted the final report on the recruitment process of the DHRM to the Chairperson for appointment. Applicant ranked third.
10. The Chairperson selected Ms N T and she was made the offer of the post in a letter of 9 September 2021. On the same day Applicant and three other candidates were forwarded regret automated messages.
11. Ms N T accepted the offer and on 6 November 2021 she was appointed as the DHRM, and she assumed duty on that day.
12. On 3 January 2022, Applicant addressed a letter through the DCP to the Chairperson of the AUC requesting a disclosure of the outcome and the results of the recruitment process of the DHRM.
13. On 01 February 2022, Applicant received a letter from the Deputy Chief of Staff, Bureau of the DCP which did not really respond to what Applicant sought in his letter of 3 January 2022.
14. On 4 February 2022, Applicant addressed the same letter to the Chairperson, except that this time he specified the information which he sought, which for the purposes of this judgment the Tribunal need not repeat here.
15. When there was no answer forthcoming from the Chairperson, he filed this application with the Tribunal on 3 April 2022. That is almost seven months since 7 September 2021 and five months since Ms N T assumed duty on 6 November 2021.

*Applicant's case*

16. Applicant did not file an affidavit stating his case but instead his lawyer filed an Appeal Brief. Law Dictionary defines a Brief as a written argument concentrating upon legal points and authorities, which is used by the lawyer

<sup>1</sup> On the Recruitments of Director General and Director, Human Resources (updated 21/9/21).

<sup>2</sup>

**Rule 35**

**Acting Appointment and Officer-In-Charge**

**35.1 Acting Appointment:**

- a) The Chairperson or the competent authority of any other organ may issue an acting appointment to a staff member with the requisite qualifications to assume duties relating to a vacant position provided that the acting period is not less than thirty (30) days.
- b) Unless where justified by exceptional circumstances, the most senior staff of the Department, Division or Unit shall be eligible to act.
- c) The acting period shall not exceed one (1) year, except under exceptional circumstances (e.g. training) which shall be specified in these rules.
- d) Upon the expiration of the one year acting period, the post shall be declared vacant and the staff member who has held the post in an acting capacity shall be allowed to compete with any other eligible candidate and be confirmed if the evaluation shows that he/she has the requisite qualifications and skills and has satisfactorily performed his or her acting duties.

<sup>3</sup> Page 3 para 3(4) column 'observation' and 'R10 comments'.

to convey to the court . . . the essential facts of his client's case. . . it is submitted in connection with an application, motion, trial or appeal.<sup>4</sup> Strictly speaking the Brief prepared and signed by Applicant's counsel does not comply with Article 11 of the Rules of Procedure for the OAU Ad Hoc Administrative Tribunal, 1967.

17. Be that as it may, given the importance of this case, the Tribunal condones the non-compliance. The introductory part of the brief states that Applicant appeals against an implied rejection by the Chairperson of the AUC dated 4 March 2022 (the decision) which failed to respond to the Applicant's 4 February 2022 request to be provided with information as of right in terms of Rule 62.1.1 of the AU Staff Regulation and Rules, 2010. Further that the central issue in Applicant's case relates to two interrelated issues, namely, (a) the AU's failure to provide the information sought by Applicant relating to the recruitment process which led to, in 2021, the appointment of the DHRM, (b) the apparent acts of bias exhibited in the course of that recruitment process both against the Applicant's application but also in favour of Ms N T, an indication that the AU has failed to oversee the recruitment process in accordance with the AU SRR.

18. Therefore, the Applicant seeks to:

- (i) Have the process by which Ms N T was appointed annulled; and, to the extent that bias is found to have existed in the application process.
- (ii) To have his application reconsidered.

*Acts of Bias*

19. In the Brief and in Applicant's oral evidence, it is alleged that the acts of bias and/or discrimination manifested themselves in one or more of the themes below.

(1) The meeting of May 2021 with the DCP

The brief states and in oral evidence, Applicant who testified stated that during May 2021, Applicant was asked to attend a meeting with the DCP. At that meeting Applicant was informed that he was a 'political liability' and that the DCP intended to take the Applicant out of the running for the full-time position of DHRM. He was a liability because his prior successful appeal to the Tribunal in 2019 had put a cloud over his name within the AU; and that Applicant should within seven days identify a P5 position outside of DHRM that he would like to be transferred to; failing which she would instruct his transfer.

While Applicant does not recall the date of the meeting with the DCP, he recalls that on 11 May 2021 he felt sufficiently discriminated by the DCP's utterances. He also felt that she was retaliatory against Applicant's decision to have brought a successful case to the Tribunal in 2019. He contacted the Sudanese authorities and that country's Foreign Affairs Ministry wrote to the Sudanese Ambassador in Addis Ababa, Ethiopia, asking him to take all the necessary actions to ensure that Applicant kept his position within the AUC, which evidence is confirmed by Ambassador Gamal Elsheikh.

(2) The Terms of Reference (TOR) and Shortlisting

On 16 April 2021 the TOR for the DHRM position were published. Applicant applied and submitted his application for the post on 31 May 2021. He testified that the TOR have always been designed in this form: when the years of experience were required, this referred to the applicant's entire career experience. However, for the first and only time, suddenly required 15 years of experience post Master's Degree for the DHRM position. Applicant obtained his Master's Degree in 2017 and the 15 years post Master's Degree was clearly included in order to ensure he was disqualified from the competition. The Brief states that in the initial shortlisting led by the DCP and her Deputy Chief of Staff, the Applicant was not shortlisted. In his oral evidence he testified that the DCP removed him from the shortlisting. He further states that but when the report of the shortlisting panel was submitted to the Appointment, Promotion and Recruitment Board (APROB) the members of that Board did not accept that the TOR be amended simply for the position of DHRM, and they ordered that the Applicant's name be added to the shortlist of candidates to be interviewed. It is contended, that that development alone highlights the biased approach adopted at the early stage of the process.

On 24 July 2021 Applicant received an invitation letter for an interview for the position of DHRM. On 4 and 5 August 2021 he participated in an interview and assessment process. In November 2021, Ms N T assumed duty as Director, Human Resources Management. The Applicant was not informed about that fact or that he had been unsuccessful in his application, so the argument went.

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<sup>4</sup> Gifis, Steven H: Law Dictionary, 3<sup>rd</sup> edition, Barron's Educational Series, Inc. 1991, page 56.

(3) The Artificial Low Score

In vague terms Applicant states that subsequently, he received part of the information relating to the application and interviewing process. The information included the internal interviewer scoring records of the APROB which reveals as follows:

- a) The Applicant had, *prima facie*, received the joint third-highest mark during the interview scoring an average of 3.46/5 scoring categories.
- b) The Applicant's average mark was considerably lower by reason of the impact of markedly lower scoring received from the DCP, whose collective average scoring for the Applicant was 2.83 (the 'Artificially Low Score'). But for the Artificially Low Score, the Applicant's average score amongst the remaining members of the APROB was in fact 3.64, a score that would have put the Applicant's score within 0.01 of the highest scoring Applicant (which was not Ms N T).
- c) The evidence suggests that DCP also favourably scored her preferred candidate, Ms N T.

(4) Facebook pronouncement by Ms N T

Later in December 2021, Applicant learnt of a public announcement made by Ms N T on Facebook in which she stated, *inter alia*, that:

'During the recruitment process, the competition was rough and God, with me bothered to contact any network but having firm faith in him, mobilized the authorities of my country, up to the President of the Republic @ [100069231938829: 2048: The Presidency of the DRC], that I thank, personally took it involved without me knowing him, simply, so that my candidacy goes to the last straight line.' (Emphasis added by Applicant)

In his oral testimony he reminded the Tribunal that in 2021 when Ms N T was appointed DHRM the President of the Democratic Republic of Congo (DRC) was also the President of the Executive Council of the AU.

On 3 January 2022, the Applicant, having not been informed of the outcome of the recruitment process, wrote to the Chairperson requesting disclosure of the outcome of the recruitment process. On 1 February 2022 he was informed of the unsuccessfulness of his application for the DHRM position. On 4 February 2022, the Applicant repeated his letter of 3 January 2022 to the Chairperson but seeking specific information. A month later without hearing from the Chairperson, Applicant filed the Brief in April 2022.

(5) Foreign Passport

In his oral testimony Applicant raised the issue of the passport for the first time – that Ms N T used a foreign passport in her application for the post of DHRM. I must pause here to mention that a one page of Ms N T's French passport is copied at the back of Ms N T's Facebook publication as Annex 7 of Applicant's annexures.

(6) Failure to Calibrate the Score Results

Applicant also in his oral evidence raised the issue of calibration of the scores for the first time and testified that the DCP refused to do calibration and he referred to paragraph 38 of the Respondent's answer to Applicant's application, the relevant part of which reads as follows:

'38 . . . The rating as done by the APROB was fair to all candidates because when there is a gap in scoring the candidates, the panelists would request the fellow member who scored abnormally high or lower to review his/her scoring. As such, the rating of all candidates were (*sic*) validated by APROB in case there was any irregularity APROB would have raised it as it was the case for the Applicant who was not on the initial list of the short listed candidates but was included on the list based on the comments of the APROB. Therefore, the Respondent contends this claim of the Applicant to be unfounded and request the Applicant to provide better and further particulars on the alleged discrimination and bias of the Deputy Chairperson against him.'

(7) The Validation Report on the Recruitments of Director General and Director HR (updated 21 September 2021)

Applicant further testified and relies on the MBRS Validation Report, the comment made by the R10 on the recruitment of Director General and Director, Human Resource as an act of bias against him, when they commented as follows:

' . . . We are therefore urging the Member States to dispassionately review the process to ensure that whatever might have prompted the Chairperson to pick the number 2 (for both the DG and HR Director positions) should not become the norm.'

(8) Audit Report

He further testified and relied on the Audit Report that some of Ms N T's previous records of employment were not verified.

*Staff Regulations and Rules of the AU*

20. In the Brief he relies on the following Regulations and Rules of the AU SRR.

1. Regulation 3.2(a) which obliges the AU to protect fundamental human rights of all its staff members and it prohibits discrimination against a staff member in pursuit of his or her career with the Union, Regulation 3.4(f) which obliges the AU to afford its staff members, every assistance, protection and security against threats, abuse, violence discrimination, assault, insults or defamation to which they may be subjected in the performance of their official duties, Regulation 6.4(a) which provides for a competitive recruitment process, conducted transparently without any form of discrimination, not limited to race, sex, nationality, political affiliation, religion and gender, Regulation 6.4(b) which provides for preference to be given to persons with the highest standards of efficiency, competence and integrity in any recruitment, appointment, transfer and promotion, Regulation 6.4(d) which provides for due consideration be given to persons already in the service of the Union with competent qualification and experience, Regulation 6.6(a) which entitles staff members to advance within their grade and promotion of higher grades as specified in Rule 34, and Regulation 10(a) which obliges the Chairperson or the competent authority of any other organ to take appropriate steps to establish and maintain a continuous channel of communication with staff members, a means among others of promoting harmonious management of staff relations.
2. Applicant further relies on Rules 27 and 28. Rule 27 provides for conditions of Appointment. 27.1 Mandates APROB to deal with all matters relating to recruitment, appointment, promotion, review, re-employment, staff development, unsatisfactory performance and make appropriate recommendations to the Chairperson or the competent authorities of any other organ. 27.2 Provides and regulates the Union quota system, 27.3 provides for elected officials, political and special appointees, as well as staff members in Group IV, who are not included in the quota of Member States. 27.5 Provides for priority to be given to the nationals of the Member State which is least represented as per the quota system and/or the gender less represented where candidates hold equal qualifications.
3. Rule 28 provides for Internal and External Recruitments, particularly conditions attached to filling a vacancy.

21. *Articles of the Statutes of the Commission of the AU (SCAU)*

Applicant further relies on Articles 4 and 18 of the Statutes of the Commission of the AU.

Article 4.1 prohibits the members of the Commission and the other staff, in the performance of their duties from seeking or receiving instructions from any government or from any other authority external to the Union. Article 4.2 provides for each Member State to undertake, to respect the exclusive character of the responsibilities of the members of the Commission and the other staff and shall not influence or seek to influence them in the discharge of their responsibilities.

Article 18 provides for Appointment of other staff of the Commission relevant for the purposes of this judgment are sub-articles 5, 6, 7 and 10. Sub-Article 5 provides for the recruitment process to be conducted in accordance with elaborate recruitment procedures calculated to ensure the utmost transparency and objectivity. Sub-Article 6 provides for the criteria APROB should take into consideration when recruiting senior administrative, professional and technical staff; namely, equitable geographical representation and quota system. Sub-Article 7 provides for the need to guarantee the highest standards of competence, efficiency and integrity and 10 provides that promotion and advancement of staff members as in sub-article 6 shall be carried out by APROB based on annual performance evaluation reports and result of competitive examination and interviews to be conducted by a Board.

22. *Timeliness of the Application*

Applicant in the Brief argues that the application is timely, in that on 4 February 2021 he wrote requesting information from the Chairperson on the recruitment process, which he impliedly rejected by 4 March 2021.

Applicant then filed by 3 April 2021. It is contended that if the Respondent should argue that the Brief includes grounds of appeal to which the Implied Rejection did not apply, Applicant then points to the circumstances of the Implied Rejection as itself constituting a component of Ground 2 *infra*. It is further contended that it is proportionate and logical to join the grounds of appeal in a single appeal so that they can be heard together proportionately. Should the above proposal be rejected, the Applicant asks that the Brief be considered the necessary request in relation to grounds 1-3.

*The four grounds of appeal*

1. *Implied Rejection of Applicant's Information request.* (Breach of AU SRR Regulation 6.4(b) and/or 10(b)) above.
23. It is contended that the Implied Rejection by the Chairperson dated 4 March 2021 when he failed to respond to Applicant's information request constitutes a breach of the AU's obligations under AU SRR Regulation 6.4(b) and 10(a).
  2. *Failure to follow due process in respect of the Applicant.*

Further or alternatively, the Applicant also appeals the failure of the AU to inform him of the outcome of the recruitment process despite the post of DHRM having been filled in November 2021. It is contended that such failure amounts to a further and/or standalone breach of the AU's obligations to oversee a transparent recruitment process under Regulation 6.4(b) and 10(a) and SCAU Articles 4 and 19.
  3. *Failure to execute process competitively and transparently and/or without any form of discrimination.*

Further or alternatively, the Applicant also appeals the outcome of the recruitment process leading to the appointment, which it is averred, amounts to a breach of at least Regulations 6.4(a), 6.4(b), 6.4(d) and 6.6(a), Rules 27-28 and SCAU Articles 4 and 18. In this regard Applicant relies on:

    - (a) The meeting of May 2021 with the DCP.
    - (b) The Artificial Low score from the DCP.
    - (c) Lack of communication received by the AU and APROB in relation to the Applicant's application and the implied rejection.
    - (d) Ms N T's public pronouncement that her appointment in whole or in part owed to the intervention of the President of the DRC. The Applicant further notes the content of the Validation report of 22 September 2021 on the recruitment of DHRM which supports his contention that a number of irregularities occurred during the process, including the last sentence of the report, starting with, 'We are therefore urging . . . '.
  4. *Inappropriate bias/discrimination against the Applicant and/or toward Ms N T.*
    - (a) Bias and/or discrimination against the Applicant based on his nationality and/or gender and/or some other reason given the DCP's conduct.
    - (b) Bias and/or discrimination in favour of Ms N T, based on her nationality and/or gender, which has had the effect of prejudicing the Applicant.
24. It is contended that the decision appointing Ms N T as DHRM constitutes a breach of Regulation 3.2(a), 3.4(f), 6.4(d) and SCAU Articles 4 and 19.
25. *Relief Sought*
  - (a) Quashing of the decision (i.e. the Implied Rejection of 4 March 2021).
  - (b) Annul the process leading to Ms N T's appointment.
  - (c) Applicant further seeks the following orders:
    - (i) Applicant be awarded D1 grade retroactive from the date of the appointment;
    - (ii) The Chairperson's decision to appoint Ms N T DHRM be quashed;

- (iii) That the APROB established for the purpose of the appointment of the DHRM be reconstituted excluding the DCP and the interview of Applicants be re-held in accordance with the criteria in the TOR and according to all Regulations and Rules.
- (iv) That the Applicant receive two years' compensation for moral damages for breaching the AU SRR, for treating the Applicant unfairly, for ignoring his very reasonable requests and for forcing him to bring a case before the Tribunal (or, as the Tribunal thinks fit); and
- (v) That the Applicant be awarded reasonable legal costs for bringing this appeal.

*Respondent's answer to Applicant's case and/or Respondent's case*

26. At the outset Respondent raises a preliminary objection to the Application on the ground that Applicant failed to appeal his case to an appropriate authority of the Respondent in terms of Rule 62.1.1 of the Staff Regulation and Rules of the African Union. He failed to appeal the decision appointing Ms N T as Director HR – after all Ms N T accepted the appointment in good faith and refers to Case Number AUAT/2019/001.
27. Respondent contends for the dismissal of Applicant's prayers for being unfounded and without legal basis.
28. Respondent makes reference to the decision of the International Administrative Tribunal Judgement No 3350 (2014) where it held that organizations should be given degree of discretion and further that it should be noted that in the area of post classification the Tribunal leaves a considerable degree of discretion to organizations. It cannot simply substitute its own assessment for theirs. Decisions taken in this area are subject to only limited review and can be set aside only if they were taken without authority, show some formal or procedural flaw or a mistake of fact or of law, overlook some material fact, draw clearly mistaken conclusions from the facts or involve an abuse of authority.
29. Respondent contends that Applicant did not produce any evidence that the impugned decision should be set aside on one of the grounds articulated in the International Administrative Tribunal. Further that Applicant merely listed a number of provisions in the Staff Regulations and Rules without demonstrating how they were breached.
30. Respondent further contends that the Assembly Decision 687 (XXX) on women quota requested the Commission to take specific measures to fully achieve the equal representation of women and men (50/50) in all senior level positions including Political and Special Appointees, Directors and Heads of Divisions by 2025 in the Organs and Institutions of the Union.
31. On the meeting of May 2021, Respondent sought further particulars in the form of either minutes of the said meeting or any other documentary evidence otherwise those allegations are considered as breach of Staff Regulations and Rules for misrepresentation of facts in connection with unwarranted claims.
32. It is further contended that Applicant misled the Tribunal when he stated that the DCP assumed her duties on 14 January 2021 when she in fact started on 14 March 2021. Respondent finds that embarrassing for the Head of Human Resources whose department is the one in charge of preparing contracts of all AU employees including that of elected officials and receives the assumptions of duties.
33. On the allegation of Applicant feeling sufficiently discriminated on 11 May 2021 and that he contacted the Sudanese authorities the respondent states that he should prove the acts of discrimination. Respondent contends that by contacting the Sudanese Authorities he violated Regulation 3.3(a), (b), (c) which obliges staff members in discharge of their duties to conduct themselves in the best interest of the Union, among other things be guided by confidentiality and prohibited to neither seek nor accept instructions from the government of any Member State or from any other authority or source external to the Union. Respondent further maintains that Applicant failed to report the meeting and the alleged utterances by the DCP to the Chairperson who is the competent authority on the matter. Respondent further contends that Applicant violated Regulation 6.1(b) which among other things provides for transfer being vested on the Chairperson or any competent authority of any other organ but not to the authorities of any member state. Respondent maintains that the Sudanese authorities have no power to instruct the Commission that Applicant should maintain his position and that the Chairperson has authority to transfer Applicant in a different position if it is in the best interest of the Union.
34. On the alleged retaliatory conduct of the DCP against Applicant's decision to exercise his rights in 2019 by bringing a (successful) case to the Tribunal, the DCP has no stake in the Tribunal case of the Applicant filed in 2019.

35. On the job description for the position of DHRM which required 15 years of relevant professional experience post a Master's Degree, which allegedly was prepared with the intention to exclude the Applicant, Respondent contends that, that is unfounded as job descriptions are not prepared to target individuals' profiles. Notwithstanding, Respondent contends that Applicant's application was given due consideration as an internal candidate and was allowed to compete while many other external candidates were not given such an opportunity. When APROB ordered Applicant to be added to the shortlist of candidates to be interviewed, that alone was special consideration given to Applicant at the early stage of the recruitment process. When Applicant was initially not shortlisted, the DCP was simply complying with the TOR and she did not oppose APROB when it decided to add Applicant on the list of candidates to be interviewed, which she could have done if she was against the Applicant.
36. On the allegation that Applicant was not informed of the outcome of his application, Respondent contends that Applicant being the head of HR has the primary responsibility to set a communication mechanism for all candidates (internal and external) to receive the outcome of their recruitment process.
37. On the assertion of the Artificial Low score – the Respondent contends that Applicant should provide better further particulars that the DCP favoured the current DHRM. Respondent accuses Applicant for having obtained the results of the interview process unlawfully and sharing same with the Tribunal – without the authorization of the Chairperson – misused his position as Head of HR. Respondent contends that the rating as done by APROB was fair to all candidates because when there is a gap in scoring the candidates, the panelists would request the fellow member who scored abnormally high or lower to review his/her scoring. As such, the ratings of all candidates were validated by APROB in case there was any irregularity APROB would have raised it as they did when Applicant was not shortlisted. Therefore, the assertion is unfounded.
38. On the Facebook pronouncement by Ms N T, Respondent contends that it does not entail any violation of the recruitment process and it is hearsay unless Applicant provides better and further particulars on how the involvement of the President of DRC has affected the recruitment process of the DHRM.
39. Applicant relied on the MBRS Validation Report of R10 in support of his case. The Respondent contends that the Report or the sentence relied on does not have any legal standing in Applicant's application because Applicant ranked third, and the sentence relied on does not mean that the process was not fair. Further the appointment process takes into consideration various other factors such as quota, gender and regional representation, not only the candidate that ranked first.
40. Respondent concludes by stating that Applicant listed a number of Staff Regulations and Rules without showing how Respondent breached the provisions during the Recruitment of the DHRM. Respondent contends that all the Regulations and Rules relied on by Applicant were complied with. The application should be dismissed for non-compliance with Rule 62.1.1 and in the event the Tribunal considers the merits, the application should equally be dismissed as the claims are unfounded.
41. I must mention that the Respondent attached the Report of the recruitment process for the position for DHRM to its answer.
42. Additional to the Report of the position for DHRM which Respondent filed with his answer to Applicant's Brief, Respondent complying with the case management order of 19 April 2023, filed the following reports and other correspondences:
  - (a) Report of the Recruitment and Selection Committee.
  - (b) Correspondences initiating the members of the panel to participate in the recruitment process of the Director, Human Resources.
  - (c) Correspondences inviting the candidates to attend the assessment on the recruitment processes of the Director, Human Resources.
  - (d) Report on the ratings of candidates.
  - (e) Report of the ad-hoc panel on the interviews and assessments of candidates for Director General and Director, Human Resources positions 2-6 August 2021.
  - (f) Report of the shortlisting Committee of August 2021.
  - (g) Memo of recommendations to the appointment of the Director, Human Resources.
  - (h) Appointment letter sent to the Director, Human Resources.
  - (i) Regret automatic messages sent to the Applicant and the other three candidates.



43. The reports speak for themselves – they record in detail what transpired during the recruitment process. As a result, Respondent in its reply to the Case Management order states that ‘there was no need for persuasive argument to oppose the production of evidence pertaining to the recruitment process of the DHRM by the Respondent because the entire process was conducted in the most transparent manner and there is nothing the Respondent wishes to conceal.’
44. Respondent opposed the Tribunal order to subpoena any official of the Respondent to testify orally for the reason that the documented evidence submitted to the Tribunal is sufficient to make an informed judgment on this case.
45. Perhaps very striking in this recruitment process two R10 members were present at the shortlisting and interview stages as observers as can be seen in their MBRS Validation Report attached to the Applicant’s application.
46. As the DCP and the Director, HR could not appear in person before the Tribunal to testify, Respondent filed their statements.
47. The DCP states that due to other prior engagements she could not attend the hearing of this case scheduled then on 09-10 August 2023. She acknowledges for having had a meeting (which is dubbed May 2021 meeting) with Applicant, but she would not recall making the statement alleged by Applicant and categorically denies any bias or discrimination against Applicant in the recruitment process for the position of the DHRM.
48. As an official charged with the Administration of the Commission and elected to lead institutional reform process of the AU, she consistently acted in a manner that upholds principles of transparency, fairness and justice in all recruitment processes in order to maintain and attract the best African talent both internal and external candidates. It was that professional conviction and her responsibility as Chair of the Recruitment and Selection Committee (RSC) that guided her participation in the recruitment process of the Director, Human Resources.
49. When she assumed duty as the DCP, one of the first issues brought to her attention both by staff members and Member States was the alleged irregular appointment of Applicant as the Head of Human Resources. She attached two letters by the President of the AU Staff Association to the Chairperson (dated 06 March 2020 and 24 July 2020). Despite the allegations she remained impartial and professional towards the Applicant.
50. On the so-called successful case to the Tribunal of 2019 which Applicant refers to in his Brief and/ or evidence, she states that she was not an official of the Union at the time, she can only wish the case reached the Tribunal for adjudication, as that would save the Union from the subsequent issues relating to the recruitment process of the Union. The case was settled in favour of Applicant in a way she cannot explain to the Tribunal. That decision to settle the case caused and continues to cause mistrust among staff members and in the overall recruitment process within the Union.
51. She makes reference to Rule 35.1 and further states that when Applicant was appointed Acting Head of Human Resources, as it was stated in the letter of the President of the Staff Association to the Chairperson of the Commission, it was allegedly done in violation of Rule 35.1 as he was not the most senior staff of the division.
52. On the allegation that the DCP discriminated and retaliated against Applicant in his decision to exercise his rights in 2019 by bringing a successful case to the Tribunal she states that there was no successful case brought to the Tribunal by the Applicant, the case was settled and he was confirmed in the post as the Head of the Division. The settlement raised serious concerns among staff members and a subject of forensic audit, which identified the settlement decision as a likely breach of the Organization’s established rules.
53. She weighs in on the Applicant’s violation of Regulation 3.3 when he after the meeting of May 2021, contacted the Sudanese authorities and she reiterates that she never exercised an act of discrimination against Applicant. She states that in line with the power delegated to her by the Chairperson, in the best interest of the Organization, she can transfer a staff member to any office of the Union following the established due process.
54. On the allegation on the terms of reference (TOR) allegedly an act of bias/discrimination against Applicant she states that, the objective of the TOR that required 15 years of work experience following a post graduate degree is a standard requirement for all director positions. The requirement aims to get the most suitable candidate but not to discriminate against the Applicant, he may not be the only one that did not fulfill that requirement.

55. She further states that Applicant was initially not shortlisted because he did not fulfill the requirement of the TOR particularly 15 years' experience after postgraduate. However, the post had to be advertised and Applicant acting in the post had to compete with other candidates based on Applicant's acting capacity, his application was considered in the list of the top twenty (20) Applicants. She states that if she was against him, she would have opposed his addition.
56. On the allegation that she scored Applicant lower in favour of Ms N T, the allegation is unfounded at best, defamatory at worst, the exam that was given to the candidates was not a numerical exam where one expects equal scores. She states that her scores were supported with comments and where Applicant answered satisfactory she scored him higher. She denies biasness and avers that she scored candidates transparently and objectively and that panelists may appreciate candidates' answers differently. Applicant was ranked third and she still does not understand his claim.
57. Ms N T also filed an affidavit refuting the allegations made by Applicant particularly on the Facebook words Applicant puts emphasis on.
58. She states that what she meant with the words Applicant puts emphasis on was a heartfelt expression of gratitude, an expression of pride for the support received from the President of DRC – it is not indicative of undue influence or interference in the recruitment process.
59. On the country quota she states, 'positions in the AU are given based on country quota as one of the criteria. Therefore, to be recruited on a quota of a country, particularly at such a high grade, requires the support of your country. In my case, the support allowed for the swift renewal of my Congolese passport, essential for the application and to assume duties as a national of DRC.
60. She further states that the 'Applicant's interpretation of the Facebook post is a subjective analysis that disregards the cultural, personal and context – specific nature of the statement. It fails to recognize the personal expression of gratitude and pride that shaped the post, instead choosing to view it through a lens that misconstrues the true meaning. The statement was intended to thank the President of the Democratic Republic of Congo (DRC) for his encouragement as I pursued a significant role within the African Union Commission. The interpretation by the Applicant overlooks these nuances and incorrectly assigns a malicious intent to the words.'
61. She further states that 'it is vital to distinguish between moral support provided by the President of DRC and any undue influence over the selection process. The President's involvement was solely in the form of encouragement, reflecting a national endorsement of efforts to represent our country at the African Union Commission.'
62. She further states that the evidence presented (on the Facebook pronouncement) is speculative and insufficient.

*Applicant's Observations on Respondent's answer*

63. On the contention by the Respondent that Applicant failed to submit an appeal to the relevant authority pursuant to Rule 62.1.1 of the AU SRR, Applicant refers the Tribunal to paragraphs 18-19, 23-26 (information request and the Implied Rejection dated 4 March 2022) and Annex 1 of the application where it is explained that the AU refused to provide the Applicant with the information initially felt needed to bring an appeal under 62.1.1. It is contended that that decision constituted the Implied Rejection of any appeal that the Applicant could have brought, and the argument is denied and without merit.
64. Applicant denies that the recruitment process was conducted in accordance with the Regulations and Rules for the reasons he provided in his application.
65. On the vehement opposition by Respondent to the annulment of the process leading up to the appointment of the Director, HR, the Applicant notes that the Tribunal has an unfettered discretion as to remedies it believes appropriate in the circumstances. Applicant further notes that from Ms N T's Facebook post, Ms N T was plainly aware that the Congolese authorities (it is said impermissibly) had 'mobilized' to ensure that her candidacy 'goes to the last straight line.'
66. On the Respondent's time limit and admissibility and its reliance on Article 62.1.1 of the Staff Regulations and Rules, Applicant *ad neuseum* repeats what he did when he saw a Facebook public announcement made by Ms N T and points to the failure of the Respondent to notify him of the outcome of his application until impelled as, *prima*

*facie*, strong evidence that the appointment process was conducted with manifest bias and animus against the Applicant. Further that he followed the correct process and is in time.

67. Applicant's observations on the Respondent's statement of facts is that Applicant was placed third in circumstances where he received the artificially low score and Ms N T received an artificially high score from the DCP.
68. Applicant's observations on the Respondent's arguments of note are that, at all stages of the application/recruitment process the DCP chaired both the Recruitment and Selection Committee and the shortlisting and interview panels, contrary to principles of good governance and segregation of duties. The Applicant was an internal candidate for the role, a fact which ought to have weighed in his favour pursuant to SRR. The Human Resources department was at the time of the application process comprised of 31 women and 19 men.
69. Applicant highlights that, the scores presented to the Recruitment and Selection Committee were reliant on the biased scorings of the DCP that were unfavourably biased against the Applicant and favourably biased towards Ms N T. Upon those scores (DCP) being removed:
  - (a) The Applicant would have scored 72.8% (placing him overall 2<sup>nd</sup> within 0.1% of leading candidate);  
and
  - (b) Ms N T would have scored 66.6% (placing her overall 4<sup>th</sup>).
70. The Applicant notes that, throughout the application period and at all material times the Chairperson of the African Union was His Excellency President of Democratic Republic of Congo.
71. On Respondent's reliance on the ILOAT case, the Applicant does not dispute the principles it lays out, instead, those principles actively assist the Applicant's case. Applicant gives three examples.
  - (a) The hostility and bias shown by the DCP against the Applicant resulted in the DCP giving the Applicant the artificially low score of the application. That conduct, Applicant maintains that it amounts to a breach of Regulations 3.2(a), 3.4(f), 6.4(a) and various provisions of Articles 4 and 9 of the Statutes of Commission of the AU.
  - (b) The influence apparently exerted by the President of the DRC on the recruitment process is conduct violating the Regulations and Articles in (a) above.
  - (c) Failure to inform Applicant of the outcome of the recruitment process and refusal to provide information requested are acts of non-transparency and breaches Regulation 10(a).
72. As to the reliance by Respondent on the Assembly Decision 687 and reference to maintaining gender equality in all senior level positions, Applicant's observations that the reliance is both artificial and misplaced in circumstances where the report of the recruitment process of the position of Director, HR, does not mention this consideration as a factor against the Applicant, and in fact, suggests that the HR department amounted to 31 females and 19 males. Therefore, the Assembly's decision 687 suggests it would have been more appropriate to give the role to a male applicant.
73. On the Respondent's argument that Applicant should provide written evidence of the meeting of May 2021 with the DCP, otherwise it is false and amounts to a breach of Staff Regulations and Rules, Applicant notes:
  - (a) The Applicant has provided particulars of express words used by the DCP during the conversation of the May 21 meeting. He has also provided circumstantial evidence that these events happened because he contacted the Sudanese authorities to specifically notify them of concerns arising from his interactions with the DCP.
  - (b) Applicant notes that, by contrast, Respondent has produced no evidence rebutting the allegation, nor does the Respondent expressly deny the Applicant's claims.
  - (c) Whether the Applicant breached rules is irrelevant to the application.
74. I pause here to note that Applicant testified and called a witness. The DCP chose to file an affidavit.
75. Applicant admits that the DCP assumed duty in March and not January 2021 but denies having misled the Tribunal and that the date on which the DCP assumed duty is materially relevant to the application.

76. Applicant denies that his decision to discuss an act of workplace discrimination with a national authority can amount to a breach of the SRR or any other Rules to which he was subject. If such disclosure would amount to a breach (which is denied) such breaches are irrelevant to the grounds of appeal in the application.
77. Applicant does not admit that the Sudanese authorities sought to give such instructions to the Commission as alleged. It is averred that Applicant contacted the Sudanese authorities to relay his concerns at the express words of the DCP at the meeting of May 2021. Applicant admits that the Sudanese Ambassador in Addis Ababa spoke to the DCP regarding her comments to the Applicant. (We may add that in the Ambassador's oral testimony he must have told the DCP that if the matter is not resolved, it would not end there. A week later the DCP called the Ambassador and told him she had changed her mind, she was not going to transfer Mr H S – he should continue in his position). Applicant further avers that the Ambassador's conversation with the DCP was not conducted with the view to influencing the process by which the DHRM would be appointed but to ensure that the Applicant was not treated unfairly as threatened by the DCP.
78. Where Respondent suggests that job descriptions 'cannot [be] prepared to fit someone's profile' but in paragraph 34 of its answer, suggests that the APROB 'did not accept that the conditions of the job description be amended' as proposed by DCP, Applicant avers that they are inconsistent and suggest that, as the Applicant alleges, DCP did try to amend the job description in such a way to exclude the Applicant. The APROB decision to reinstate Applicant to the shortlist of candidates suggests they disagreed with the decision of DCP to not include the Applicant which supports Applicant's case that DCP was exhibiting bias against the Applicant.
79. As to Respondent's contention that APROB members would have recorded concerns as to DCP scorings, the Applicant observes.
- (a) The *prima facie* case of bias is established by the significant disparity in the DCP's scores as against the other APROB members.
  - (b) There is no basis for suggesting that APROB members would choose to record concerns in written form, particularly when considering the seniority of DCP; and
  - (c) The Respondent's case could be easily established by adducing evidence from other APROB members. Tellingly it has chosen not to do so.
80. I pause here to note that, but the APROB opposed the DCP in shortlisting the Applicant for interview.
81. On Respondent's contention on Ms N T's public pronouncement:
- (a) Applicant relies on the plain and ordinary meaning of Ms N T's words as evidence that the authorities of her country were 'mobilized . . . up to the President of the Republic (of Congo)' in aide of application for the position and that the Respondent has chosen not to adduce the evidence of Ms N T to clarify the meaning, to the contrary (Ms N T filed an affidavit wherein she explains what she meant in her Facebook announcement. The affidavit must have been served on the Applicant).
  - (b) The fact that the President of DRC was Chairperson of the AU is repeated here.
  - (c) The Respondent has not cited any Regulations or Rules that permit a national government to become involved in a recruitment process.
82. Applicant relies on two recent World Bank Administrative Tribunal (the WBAT decisions)

**'Decision No. 659 GH v IFC, 8<sup>th</sup> November 2021, and Decision No. 660 GI v IFC, 8<sup>th</sup> November 2021). Specifically, the WBAT held that:**

- (i) 'The tribunal recognizes that, while management is not expected to produce overly exhausted criteria and that staffing decisions will always import judgment by the individual decision-maker involved, the criteria and decisions must be fair and transparent, and the decisions based thereon amenable to judicial review' (emphasis added); and
- (ii) 'A decision to use overly broad selection criteria for the purpose of shortening the management decision-making process or shielding management from having to deal with staff competition for positions, coupled with a decision to not keep records that show how the selection criteria were applied, demonstrates a regrettable want of procedural fairness. Attempting to insulate managerial decisions from review is unacceptable. [ . . . ]. In addition judicial review is a fundamental right of staff who wish to challenge managerial decisions that have an impact upon their legitimate interests' (emphasis added).

### 83. Recruitment Process Score Results

Table 1: INDIVIDUAL SCORING PER COMPETENCY

Sarah Abi Anyag Epse gbor						External Panel Member 5					DCP Monique Nsanzabaganwa					Bankole Adeoye				
Competencies	H. Sahal	N. Tandou	J-B Masiala	M.A.H. Ahmed	R. Mufaya	H. Sahal	N. Tandou	J-B Masiala	M.A.H. Ahmed	R. Mufaya	H. Sahal	N. Tandou	J-B Masiala	M.A.H. Ahmed	R. Mufaya	H. Sahal	N. Tandou	J-B Masiala	M.A.H. Ahmed	R. Mufaya
Self-Presentation and Communication	3	5	3	4	4	3	3	2	3	3	3	5	4	4	3	4	3	2	5	3
Building Relationships (Partnership and Collaboration DHR)	4	4	3	4	4	3	3	2	2	4	2	5	3	3	4	4	3	2	4	3
Drive for Results DHR	4	3	5	5	4	3	3	3	3	4	2	5	3	3	5	4	3	3	4	3
Developing Others DHR	4	3	3	4	4	2	3	2	2	4	2	4	3	2	4	4	2	2	4	3
Driving Change DHR	4	4	3	5	4	4	4	2	3	4	3	5	3	3	4	4	2	2	5	3
Leadership Group Study DHR: Change Leadership	4	3	3	4	3	3	4	2	3	3	3	4	2	3	3	3	3	2	4	3
Leadership Group Study DHR: Communicating with Impact	5	3	2	5	3	2	4	2	3	3	4	4	3	4	3	4	4	3	4	3
Leadership Group Study DHR: Innovation and Taking Initiative	5	3	2	4	3	4	4	2	3	3	3	4	3	3	3	4	4	3	3	3
Leadership Group Study DHR: Learning Orientation	4	4	3	5	3	3	4	2	4	3	3	3	3	2	3	3	3	3	3	3
Individual Presentation DHR: Conceptual Thinking and Problem Solving	5	4	4	5	4	4	4	3	3	4	3	4	3	4	4	4	4	4	4	4
Individual Presentation DHR: Job Knowledge and Information Sharing	4	3	4	4	3	3	4	4	3	3	3	4	4	4	4	3	3	4	5	4
DHR: Managing Risk	4	3	3	4	4	3	3	3	3	3	3	4	3	3	4	4	3	3	4	3
<b>Total (of 60)</b>	50	42	38	53	43	37	43	29	35	41	34	51	37	38	44	45	37	33	49	38
<b>Average</b>	4.17	3.50	3.17	4.42	3.58	3.08	3.58	2.42	2.92	3.42	2.83	4.25	3.08	3.17	3.67	3.75	3.08	2.75	4.08	3.17
<b>%</b>	83%	70%	63%	88%	72%	62%	72%	48%	58%	68%	57%	85%	62%	63%	73%	75%	62%	55%	82%	63%

*Filing after the Hearing of the case on 23 November 2023*

84. After the hearing the Tribunal received two filings from the Applicant and two attachments. The filing headed ‘Internal perception of allegations made against the Applicant’ ventilates two issues, namely, (1) the Staff Association letters attached to the affidavit of DCP, on which counsel for Respondent relied on in the presentation of Respondent’s case. Applicant state that it came to their attention that Ms N T wrote to Mr S M on 23 July 2023 notifying him of the Chairperson’s decision to initiate disciplinary proceedings against Mr S M for making the allegations and that it is remarkable that the Respondent would rely on the unproven Staff Association allegations against Applicant when it knew all along that the person who made those accusations were considered inaccurate and being investigated for misconduct. They attach two attachments, on ‘Inter Office Memorandum’, headed, ‘Notification on the Chairperson’s Decision on the Recommendation of the Disciplinary Board on your case’ dated 31 July 2023, where Mr S M was found guilty of two charges, unfounded allegation Rule 58.1 (xxii) and serious verbal assault (Rule 85.1(iii)). Second attachment is the Chairperson’s letter answering to the first letter of Mr S M dated 23 March 2020, in which under the heading, ‘Acting arrangement of heads of division and their confirmation’ wherein allegedly the Chairperson rejects the allegations against Applicant and confirms that the Applicant’s appointment went through all the possible legal channels.

85. In the same filing Applicant addressed/responded to what counsel for Respondent submitted on the obligation to Calibrate / Effect of Unsigned TOR. Counsel for the Applicant argued at the hearing Counsel for Respondent

suggested that (i) the practice of calibration did not need to be applied in the context of the application in question; and (ii) that, because the TOR was only signed in 2022, there was not calibration requirement when conducting the interviews in 2021. As to these contentions the Applicant notes:

- a. At paragraph 38 of the Respondent's answer at p. 83 of the Hearing Bundle, the Respondent expressly alludes to the need for a calibration process to be undertaken; and
- b. further, it is noted that the DCP in her statement acknowledges that the Applicant was included in the interview by reference to the TOR as at 2021. That admission, it is submitted indicates, that the unsigned TOR was guiding the application process at the relevant time (contrary to the suggestion made at today's hearing).

86. The second filing is a statement by Applicant following upon the question that was posed to his counsel during his closing argument by the Tribunal which counsel could not answer. The question, when did Applicant acquire the results of the interviews which he attached to his application. In his statement he explains that he acquired the data late February 2022, on or about the 25<sup>th</sup>.

#### *Submissions*

Counsel for the Applicant

87. Counsel addressed the Tribunal on mainly four subjects, namely:

- a) Admissibility
- b) Merits
- c) Remedy
- d) Costs.

88. As already stated, Applicant did not file a statement of his case but a Brief or heads of argument, repeated in his closing argument.

#### *Admissibility*

89. On admissibility, the submission is that Applicant's application is admissible given the chronology of events since the first red flag (the Facebook pronouncement by Ms N T) during December 2021. It is argued that the trigger of Applicant's grievance is not the knowledge he acquired of the recruitment process but the breaches of internal Regulations and Rules as well as the bias. Applicant could not initiate his grievance before the knowledge of breaches and the bias.

90. The disclosure of the material (the recruitment process results) which highlighted the breaches was not known or available to the Applicant by December 2021. When the material was made available it was drip fed, *albeit* Respondent disclosing them kicking and screaming. The Respondent did not confirm the outcome of the recruitment process until 1 February 2021.

91. It is further argued that the chronology is absolutely key in understanding how admissibility works in this case. It is submitted that it would be incorrect to make the starting point in October 2021 when he found out about Ms N T's success, because it is not that he grieves.

#### *Merits*

92. It was argued that Applicant, in his oral evidence helpfully listed the evidence of bias, which some of them individually, perhaps might not be enough to get the Applicant home, but together the evidence is overwhelming.

93. Again, here counsel repeated what Applicant termed acts of bias by the DCP, commencing with the meeting of May 2021. It is argued that the first attempt by the DCP was to prevent Applicant from applying, he must be moved and labelled a political liability. It is further argued that the DCP admitted the meeting but that she cannot recall making the statement.

94. On the TOR of the recruitment and selection committee counsel pointed out that had it not been for the Tribunal's management order the document would not have been disclosed. Paragraph 36 of the TOR for Interim Recruitment

and Selection Committee and Ad-Hoc Panel to advise on the New Recruitment System (MBRS), headed 'Pre-Selection Procedure' provides among other things that:

'36 The Merit Based Recruitment System (MBRS) will generate the list of the top twenty (20) applicants, screened base on the following criteria:

....

(g) Current official appointed Acting Staff that apply shall be included in the top twenty and scored.'

It is argued that Applicant should never have been disqualified – a breach of the AUC of internal procedure.

95. Still on the terms of reference, reliance is placed on paragraph 44 which states, 'In adhering to paragraph 43 of the same terms, 'will ensure that the principle of appointing at least one (1) Director from each member state is achieved,' and in so doing, fair and equitable representation at Director level. It is argued that this again is irrefutable proof that Applicant's nationality should have assisted him. It did not, another breach and another rule conveniently ignored.
96. The other irregularity, 'so it was argued, for the first time fifteen (15) years, post qualification experience was required. Applicant who obtained his Master's Degree in 2017, meant he could not fit that criteria. The DCP who led the shortlisting disqualified him unlawfully. APROB ordered Applicant to be readded.
97. It is argued that the three examples alone prove bias.
98. The MBRS Validation Report on the recruitment of Director General and Director HR, was argued that the process is ripe for abuse and it was abused in this case, and the report urges a review.
99. It is further argued that things got worse – when the DCP did not even try to hide her bias when she gave Applicant artificially low score. The disparities between her score and other assessors is remarkable. When one removes the DCP scores from the other assessors, the Applicant has the greatest increase in scoring and Ms N T has the greatest decrease in scoring.
100. It does not end on the above, so it was argued, there is still calibration which was not done. The scores are so far apart, in scoring the Applicant and Ms N T, calibration comes into play, it is a standard HR Procedure. For recruitment, it acts as a safety net when something goes wrong. Sadly, for the Applicant again, it was not done. When it was pointed to counsel that Applicant testified that the DCP refused to do calibration, when there is no such evidence except for the say so of Applicant, counsel retorted 'Calibration was not done that that's perhaps the more important point and that the fault of it not being done is that of AUC – the calibration point is even referred to in the Respondent's answer to Applicant's case)'.
101. Lastly on the Merits is the Audit Report. Counsel stated that Respondent refused to disclose the Audit Report when Applicant asked for it – but Applicant eventually got hold of it in August 2023. It is an Independent Report, so it was argued, voicing its concern with how, things are done.
102. Counsel made observations on the affidavit of the DCP particularly the Staff Association letters to the Chairperson, letters counsel termed rhetoric and that none of the letters goes to the heart of this case. He argues that the affidavit should be struck out, if not the weight attributed to them should be minimal and that even if the Tribunal attributes certain weight to what the DCP says, counsel submits, that the Tribunal cannot attribute any weight to what the DCP quotes the Staff Association for having said so.
103. On remedy, counsel referred the Tribunal to paragraph 33 of the application and sought reasonable costs incurred in bringing the case, including to having to fight for basic disclosure.
104. When asked whether Applicant was not appointed because of artificially low score when he was one of the persons (third) recommended for appointment, when there is no evidence why he was not appointed, counsel conceded that these sorts of cases traditionally are not easy to prove, as the Tribunal does not sit in the place of the assessing committee, all that the Tribunal has is the record. He further argued that this case was unusual and different, for the reason that Applicant proved his case on a balance of probabilities, the plethora of irregularities and the number of red flags. Counsel further contended that Applicant would likely have been picked for the job because of his position had it not been for ranking him fifth and because of the Egyptian Director issue and because of the calibration, those factors would more than likely have made him come out top and submitted that Applicant demonstrated not only a

breach but several breaches. The many pieces of this case including background check that was done after the event, the foreign passport when put together point a rather damning picture.

*Counsel for the Respondent*

105. Counsel from the start also addressed admissibility of Applicant's application. She argued that Applicant aggrieved by the recruitment system which was unfair and not transparent after the Facebook pronouncement by Ms N T, but failed to comply with the dictates of Rule 62.1.1, when he failed to seek a review of the contested decision. She argued that Applicant should have sought a review of the contested decision within 30 days of that decision. Therefore, so the argument went, the Applicant cannot confer jurisdiction on the Tribunal to consider his claims. Consequently, the Tribunal cannot receive or deliberate on the application, neither does the Tribunal have the power to waive the time limits. She referred to four decisions of the AUAT on the same issue.
106. Counsel informed the Tribunal that Applicant received an automated notification of regret on his application for the post of DHRM on 7 September 2021 and further that Ms N T was appointed on 6 November 2021. She argued that the Applicant's letter of 4 February 2022 is outside the permissible period in terms of Rule 62.1.1.
107. When she turned onto the meeting of 20 May 2022, Counsel suggested that the meeting of May 2021, the DCP made a proposal of transfer to Applicant, not a decision, with the purpose of saving the Organization and the Applicant. Applicant's confirmation in a P5 position from a P2 without competition was splashed all over the news. The DCP had just been appointed by May 2021, at the critical moment of reforms when she met the Applicant. He was not harassed nor discriminated.
108. Counsel pointed out that Applicant was shortlisted at the first exercise but scored 65%, short of 70% threshold which was required for the next stage. Applicant did not meet the requirement of 15 years postgraduate.
109. Counsel took a swipe at Applicant's academic qualification (Law Degree and Master's Degree in the rule of law and development), his claim that throughout his career he was engaged in human resources and he has 13 years' work experience as a senior human resources manager. She states that that experience is not paired or commensurate with the requisite qualification. She states that given applicant's date of birth and the probability of the age when he completed his law degree, he joined the AU at the age of 34, his assertion of 13 years as a Senior Human Resources Manager is improbable, unless from day one at the attainment of his first degree, he was employed as a Senior Manager, which is unlikely. She referred to the documents submitted by Ms N T and remarks that she has 10 years of Human Resources Director prior to joining AUC and the experience is compatible with the requisite qualifications.
110. When she turned to calibration, she submitted that calibration was not deserving for this particular position. She further stated that the TOR for the position of Director General and Director, HR did not require the panelists to calibrate.
111. Counsel disputed acts of bias/discrimination or harassment against Applicant. Neither could the DCP retaliate against Applicant because of the successful case he brought to the Tribunal in 2019. She was not a member of the AUC at the time. Nothing prevented the DCP from refusing to add on Applicant for interview. The DCP accused of bias, is the same person who appointed Applicant to act in the position of DHRM.
112. Counsel argued that the DCP did not exhibit bias during the assessment. She reminded the Tribunal that while the DCP was a panelist, she was the hiring manager, she knew better what was required more than any other panelist. The panelists would perceive the candidates' answers differently. She further said one cannot say because Commissioner Bankole scored Applicant higher he favoured him – that is how he perceived Applicant's answers.
113. She dismissed the claim that the TOR were engineered to exclude the Applicant. TOR are not prepared to suit the profile of any individual. The TOR were proposed by the R10 for the Director's position. The TOR for the position of Legal Counsel were the same.
114. Counsel further disputed the violation of the Staff Regulations and Rules. Except for listing the provisions, he did not show how the Respondent violated the alleged provisions. That he failed to do even in his oral evidence. She explained that the Regulations and Rules mandate that in the recruitment process preference shall be given to persons with the highest standard of efficiency, competence and integrity alongside the need to promote gender balance and equity. Due consideration shall also be given to the principle of regional distribution and country quota. Due consideration may be given to persons already in service of the Union with competent qualification and experience.



115. On paragraph 36(g) of the TOR of the Interim RSC and the Ad-Hoc Panel she argued that, that para 36 is not automatic, the acting appointee should possess the requisite qualification and experience.
116. On the Audit Report she argued that the auditors exceeded their mandate – the audit was for the year 2022 and not before that. She questions as to what pushed the Auditors to exceed their mandate. She argued that there is nothing that prevented Ernest & Young to obtain the previous work experience of Ms N T which she shared with them. Nevertheless, the Audit Report cannot stand legal scrutiny.
117. Counsel rubbished the Facebook pronouncement as not constituting evidence. The statement was an expression of gratitude to the President of the DRC for his support.
118. Counsel concluded by arguing that there is no persuasive evidence of bias, discrimination, harassment and retaliation and urged the Tribunal to dismiss the claim.

*Counsel for Applicant in Reply*

119. Counsel addressed the Tribunal on admissibility arguing that the automated notification emails of 7 September 2021 are not relevant because Applicant is not challenging the fact that Ms N T got the post. He submitted that his knowledge that he was not successful is not enough and not the trigger of the grievance, but the Facebook message. Further that the administrative decision Applicant is grieving is the refusal of the Organization to give him the information he requested. Counsel gave an example of a staff member who stumbles on a breach of the Rules six months after the contested decision. He contends that it cannot be right that that staff member is out of time because his/her grievance did not start at the time it should have – the time limit cannot start to run before the staff member knows he or she even has a case.

*Question for Determination*

120. Whether the recruitment of the DHRM was done in accordance with the AU Staff Regulations and Rules.

*The Analysis of the evidence*

*Admissibility*

121. This application should fail for Applicant's failure to comply with Rule 62.1.1 – That Rule provides as follows:

**'Rule 62**

**Appeals**

**62.1 Administrative and Disciplinary Decisions**

**62.1.1 Administrative Decision**

Any staff member wishing to appeal against an administrative decision against him or her, pursuant to Regulation 12 (a), shall, as a first step, address a letter to the Chairperson or the competent authority of any other organ requesting that the administrative decision in question be reviewed; such a letter must be sent by courier service if the staff member is serving outside the Headquarters, within thirty days from the date of receipt of the contested decision. If upon review, the Chairperson or the competent authority of any other organ confirms the original decision or if no reply is received by the staff member within thirty (30) days, the staff member shall be entitled to file, within a further thirty (30) days, an appeal with the Administrative Tribunal in the form prescribed in the tribunal's rules of procedure.'

122. What is the contested decision in this case? The contested decision in this case is not the one Applicant drums on, i.e. failure to provide information of the recruitment process Applicant had requested, but the decision appointing Ms N T as the DHRM. The information requested was needed to contest the decision appointing Ms N T – once provided it was the end of that appeal. Applicant on his own admission obtained the requested information in the system late February 2022. The Respondent in its answer to Applicant's application filed the same document with its answer on 6 June 2022. In Respondent's answer to the case management order of 19 April 2023, on 3 May 2023 Respondent filed further documents on the recruitment process of the DHRM. That filing dubbed drip-fed completed Applicant's request and killed that appeal – and nothing further need be said on that subject. In fact, the information request should have been a separate file, brought to the Tribunal on an urgent basis to seek an order compelling Respondent to provide the information.

123. I digress here to mention that Applicant without the Tribunal's permission on 15 May 2023 filed observations on Respondent's 3 May 2023 Response: Re: 19 April 2023 case management order. The document complained that the latest disclosure was wholly limited and plainly insufficient and that evidently cannot satisfy the terms of the case management order. Particularly the document noted that: (1) Recordings or transcripts were not provided, (2) communications or electronic messages relating to the recruitment of the DHRM were not provided, (3) The memo of the recommendation for the appointment of the DHRM appears to have excluded attachments.
124. It is not clear what recordings were required or the electronic messages or the attachments that appear to have been excluded. To the extent that the recordings that were required are deliberations of the RSC and the Ad-Hoc Panel, paragraph 73 of the TOR of the two bodies provides for the deliberations strictly confidential. All members and resource persons, in peremptory terms are required to respect the confidential character of the RSC and the Ad-Hoc Panel, before, during and after their deliberations.
125. To the extent that the complaint on disclosure is limited to the three items above, the Tribunal opines that the Respondent sufficiently complied with the case management order and Applicant ably prosecuted his application, more so that the complaint of bias revolved around the scores and calibration that was not done and nothing else.
126. The information requested once obtained, it enabled the Applicant to contest the decision appointing Ms N T or the information confirmed the suspicion of bias as it was argued. It is that decision Applicant, failed to seek review for, which renders his application unreceivable. The Applicant in his observations admits same but blames his inaction on the AU's refusal to provide him with the information initially felt needed to bring an appeal under Rule 62.1.1. He continued to state that, 'that decision constituted the Implied Rejection of any appeal that the Applicant could have brought'. But Rule 62.1.1 is very clear – before anything else, the Applicant must seek a review of the decision with the Chairperson.
127. After all the majority of the acts of bias he is complaining about, he had them at his disposal, i.e. the meeting of May 2021, the DCP allegedly removing him from the shortlisting, the DCP attempting to change the TOR for the post of DHRM, probably the foreign passport, the Facebook message the trigger of his grievance, paragraph 36(g) and 44 of the TOR for Interim RSC and Ad-Hoc Panel and the MBRS Validation Report.
128. The decision appointing Ms N T came on or Ms N T assumed duty on 6 November 2021. The request for review should have been filed on 5 December 2021. Thirty days thereafter would have been 4 January 2022. Another 30 days would have been 3 February 2022, the date Applicant should have filed with the Tribunal. If the Tribunal were to take 7 September 2021 the date on which Applicant was first notified of the unsuccessfulness of his application, he should have filed with the Tribunal by 4 December 2021.
129. In all fairness to the Applicant and generously so, the Tribunal cannot ignore the date of 6 November 2021 which is the date of appointment of the DHRM. In terms of Rule 62.1.1 the time to seek review started running. The contention that the time limit cannot start to run before the staff member knows he/she even has a case is at odds with Rule 62.1.1. Counsel for Applicant even gave an example of a staff member who stumbles on a breach of Rules after six months and contended that it cannot be right that, that staff member is out of time. Appeals in civil, criminal and labour matters have time limits, ranging from 14 to 21 days. Thirty days in the case of the AU SRR is very generous.
130. The argument, given the dictates of Rule 62.1.1 is untenable and meritless. So is the argument that he did not appeal because he was denied the information to do so. Once he obtained the information, the first call was to appeal the decision of the Chairperson, he did not do that, therefore his application is unreceivable. The argument that he was not informed of the outcome of the recruitment process, is baseless and without merit. He was informed by 7 September 2021 and admits same.
131. This application fails on admissibility alone.

*Rule 35 – Acting Appointment*

132. At the pain of repetition, Rule 35(1)(d) provides:

- '(d) Upon the expiration of the one year acting period, the post shall be declared vacant and the staff member who has held the post in an acting capacity shall be allowed to compete with any other eligible candidate and be confirmed if the evaluation shows that he/she has the requisite qualifications and skills and has satisfactorily performed his or her acting duties.'

133. The Rule speaks for itself. The words ‘if the evaluation shows that he/she has the requisite qualifications and skills’ should be interpreted to mean the terms of reference of the post declared vacant and advertised. That is so because a staff member at the level of P2 or 3 may act in a D1 post, but when the D1 post is advertised he/she may not meet the requirements of the post. Under those circumstances he/she cannot compete. Acting does not automatically render a staff member to compete, he/she should first meet the TOR of the post advertised.
134. It is common cause between the parties that Applicant did not meet the TOR of the DHRM post, i.e. 15 years of work experience after a post master’s degree. Initially he was not shortlisted, which was correct in terms of Rule 35(1)(d). In his application, Applicant states that but when the report of the shortlisting panel was submitted to the APROB, the members of the APROB ordered that the Applicant’s name be added to the shortlist of candidates to be interviewed. The correct version is and is contained in the DCP’s affidavit that initially he was not shortlisted, but thereafter pursuant to paragraph 36(g) of the current terms of reference for Interim RSC, the Applicant’s application was considered in the list of the top twenty (20) applicants based on his then acting capacity. Meaning he was included in the top twenty solely on his acting capacity. That is a clear violation of Rule 35(1)(d). Rule 35 is superior to the TOR and where there is a conflict the Rule prevails. He did not meet the TOR of the DHRM post and he should not have been included in the top twenty applicants. He was assessed but he did not meet the 70% threshold required to advance to the next stage (interviews). But on consensus as the R10 would have it in their MBRS Validation Report, Appellant was invited for interviews.
135. The R10 or two of its members were present during the shortlisting as observers and they observed that the initial shortlisting had produced only three candidates, based on consensus two other candidates (one being Applicant) who had above 60 but less than 70 were included for the next phase. They comment that, they ‘think that should not happen again.’ I agree. That would be consistent with Rule 35.
136. The above is a clear demonstration that despite the tireless efforts to curtail the unending complaints in the recruitment process by the introduction of the MBRS, the very first such system to be applied to the positions of Director General and HR Director, the old order still reared its ugly face in the recruitment of the HR Director when Applicant who failed to meet the TOR for the post of DHRM was allowed by human intervention to participate to the very end which marks a mockery of the laws of the African Union.
137. The failure by the AUC to comply with the *patere legem quam ipse fecisti* principle, according to which an authority is bound by its own rules for so long as such rules have not been amended or abrogated is worrisome. The TOR or practice of the AUC cannot be elevated to the status of law in order to override written rules. Paragraph 36(g) cannot override Rule 35(1)(d). Applicant should not have been shortlisted and his application fails on this score as well.

#### *Merits*

138. The Tribunal now turn to consider whether on merits Applicant has a case. It was contended that the acts of bias individually might not be enough to get the Applicant home but taken together the evidence is overwhelming.

#### *The May 2021 Meeting*

139. On the testimony of Applicant himself, the DCP called him. He went to see her. When he arrived, she welcomed and greeted him. In the words of Applicant she said, ‘Listen Hamza. I want to tell you something. I have decided to transfer you.’ Applicant asked why. She said ‘there are problems in HR and we need to solve them . . . I want to bring somebody else that will bring new energy . . .’ She said further she wanted to take him to the migration office in Khartoum on the same level P5. Applicant asked her whether that was an honest and transparent meeting. She answered in the affirmative. He asked her the reason why she wants him out of HR. She said the confirmation of Applicant as Head of HR, the letters from the Staff Association and pressure from Member States has put a cloud over him that is why she believed the best way was to remove him from HR and bring somebody else. Applicant said she was not present when the case took place – what more if he was a victim of a mob, defamation and was it not her responsibility to protect him. She said ‘Hamza, this is a decision that I have made, I am expecting you to comply with it.’ Applicant told her of the loss of his mother and that he brought his family from Khartoum, how transfer would have a cut on his salary. He asked her to give him a while to think about it. She even offered him the head of Ethics position and she gave him seven days to revert to her. This is where the meeting ended. He further added that at the time she said there was a cloud hanging over him, she must have said the cloud over him has made him a political liability.
140. What followed thereafter is when he contacted the Ambassador in Addis Ababa and the Foreign Ministry in Sudan to seek their intervention and that he felt abused by the DCP.

141. When one reads the narration of evidence by Applicant, it is very clear that she wanted to transfer Applicant for the reasons she gave. It appears it was a genuine conversation, but Applicant blew it out of context. The context was transfer and seems nothing else. She gave the reason of the letters of the Staff Association and complaints from Member States for his confirmation in the P5 post without competition. It was argued that the Tribunal should strike the DCP's affidavit or attach little or no weight to it at all. It is further contended that the Staff Association's rhetoric is hearsay, Mr S M, was investigated for misconduct, prosecuted and found guilty and that the DCP knew all along that the person who made those accusations against Applicant the accusations were considered inaccurate and being investigated for misconduct, Further the Chairperson rejected the allegations against the Applicant and confirmed that the Applicant's appointment (as part of the 2019 case) went through all the possible legal channels.
142. Mr S M could have said other inaccuracies in his letters, but what is a fact in his letters is that Applicant was confirmed in the P5 position without competition a violation of Rule 35(1)(d). The DCP for the reason of wanting to transfer the Applicant referred to that confirmation. The Tribunal finds no fault in the meeting, after all she has a right to transfer any staff member in the interest of the Union. After the first meeting with the Ambassador, she invited the Ambassador back to her office and informed him that she had changed her mind, he can tell the Applicant to remain in his position. Until now Applicant has not been transferred. He applied for the position of DHRM and his application went to the last stretch of the recruitment process after being favoured twice between. It must be remembered that during that period in May, the DCP appointed the Applicant as Acting Director, HR. The Tribunal was not given the dates of the May meeting and the date Applicant was appointed Acting Director, but it is possible that the DCP appointed him after the May 2021 meeting. Consequently, the Tribunal cannot find that the meeting of May 2021 was an act of bias against Applicant.
143. The Staff Association letters cannot be hearsay. The DCP did not only refer to extracts from the letters but attached the letters to her affidavit. Whether the Chairperson rejected Mr S M's allegations and confirmed that the Applicant's appointment went through all the possible legal channels or not, the fact remains that the confirmation of Applicant in the P5 post without competition was illegal and remains illegal. As already stated, the confirmation violated Rule 35(1)(d). The Chairperson is bound by the laws of the Union. He cannot rewrite them with policies, practices or wrong precedents.

#### *The Terms of Reference*

144. Applicant testified that he is a HR Practitioner for over 17 years or maybe 18 years but has never seen practices that happened in this case. The bias he is complaining about started from day one even before he applied for the position. He went on to say he applied for the position, 'they put the 15 years condition that it should be postgraduate'. He said he got his Masters in 2017 which meant he could not make the requirement. Further he said, 'and I have strong feeling that this has been put to eliminate me.' There is no evidence that the terms of reference were altered to eliminate Applicant. The TOR for the position of Legal Counsel in 2022 were exactly the same. To prove his contention, at most he should have done a comparison of TOR of other positions at the same level, find the person who prepared the TOR in the DHRM post. As it were, there is no evidence that the DCP changed the TOR to eliminate the Applicant. In her affidavit the DCP stated that the TOR that required 15 years of work experience following a postgraduate Degree is a standard requirement for all Director positions. There is no evidence to the contrary. Applicant's evidence is his baseless opinion and the point is meritless. At most his feelings remain a suspicion.

#### *Shortlisting*

145. Applicant states that he was removed from the shortlisting and that the DCP confirms that and indeed she does. She states that 'the Applicant was not initially shortlisted because he did not fulfill the requirement of the TOR particularly 15 years' experience after postgraduate. Subsequent, in terms of paragraph 36 of the TOR for Interim RSC, the Applicant's application was considered in the list of the top twenty applicants based on his then acting capacity. He argues that paragraph 36(g) provides that 'current official appointed acting staff that apply shall be included in the top twenty and scored.' Further that it was only APROB that saved the day – he was included. He argues that that is biasness, Why was he not shortlisted when the DCP knew the existing rules – she knew that the Applicant was acting and has to be automatically shortlisted.
146. As I have already stated the DCP was correct in not shortlisting the Applicant – because he did not meet the TOR of the post. What the DCP did is consistent with Rule 35(1)(d). When APROB ordered Applicant's name to be included violated Rule 35(1)(d). Paragraph 36(g) is just a term of reference and inferior to Rule 35(1)(d). This argument too is baseless and has no merit.

*The MBRS Validation Report on the Recruitments of Director General and Director, Human Resource*

147. Applicant is relying on paragraph 5 of the Validation Report to claim bias against him. He states that that group of experts R10 found issues with the appointments of the DG and Director, HR. He says that this group of HR experts '[recommended] to review the process to ensure that the appointment of this person had to be reviewed.'
148. The evidence on the Validation Report is a total misunderstanding of that Report. In paragraph 3 they outlined step by step report on the process for the recruitment of the DG and HRD highlighting their observations and comments. In sub paragraph 7, they observe that the appointing authority's decision was 'done by the Chairperson (appointed candidates were ranked second in both occupational groups) within the SRR this is a valid decision'. Under the comments they say, 'official report for variation yet to be shared with the R10, not consistent with the spirit of the MBRS.'
149. In paragraph 4 bullet 3 they state that the Director General and HR Director were the very first positions where MBRS has been applied and adhering to the principles of transparency and merit at the final stages would have sent the right message to Member States, staff and other stake holders. In paragraph 5 which Applicant relies on, they appreciate the discretionary powers of the Chairperson in the appointment process, but they would have wished that the merit principle of the MBRS would have been given priority in the two appointments. They further acknowledge that the negotiated framework guiding the ongoing recruitment process did not clearly state that the Chairperson shall appoint the first candidate. But in the discussions on the review of the 2019/2020 recruitment processes had emphasized the merit principle. They conclude to say, 'We are therefore urging the Member States to dispassionately review the process to ensure that whatever might have prompted the Chairperson to pick the number 2 (for both the DG and HR Director positions) should not become the norm.'
150. Clearly the R10 are concerned with the application of the MBRS and nothing else. They crafted the MBRS and want the system to be applied. It is for the reason that the Chairperson picked the number 2 instead of number 1 that they are calling on Member States to review the process to ensure that the MBRS is adhered to. The Tribunal do not see how paragraph 5 assists Applicant's case. To the contrary it supports Respondent's case. If the MBRS was applied in this case as was expected, Ms N T would not have been appointed, it would have gone to number 1. The allegation that she was the preferred candidate of the DCP holds no merit – and the reliance on the Validation Report is misplaced and stands to be refused.

*The Artificial Low Score*

151. It was contended that the DCP did not hide her bias. Applicant testified that the DCP failed him in most of the questions. Where Commissioners Sarah and Bankole rated him 4 out of 5, the DCP would rate 2 and that she never gave Applicant better than anybody else. Applicant was always at the lowest in ratings. But Ms N T she gave her 5 out of 5 when the other panelists would give 2 or 3.
152. It was further argued that when one removes the DCP's scores Applicant has the greatest increase in scoring and Ms N T has the greatest decrease in scoring placing her in the 4<sup>th</sup> place and Applicant 2<sup>nd</sup>.
153. The argument on the scores ignores the fact that evidence is not viewed in isolation but holistically. A look at Table 1, paragraph 83 above which Applicant provided, the DCP failed Applicant in three competencies only, i.e. Building Relationships, Drive for Results and developing others. The external panel member failed him in two, namely, developing others and leadership group study. In other words, Applicant was failed competency Developing others by two panelists. The DCP failed Mr Ahmed in two competencies, Developing others and Leadership Group study. She also failed Mr Masiala in Leadership Group Study. Commissioner Bankole failed Ms N T in two competencies, namely, Developing others and Driving Change. He failed Mr Masiala in five competencies. Commissioner Sarah failed Mr Masiala in two competencies. External member failed Masiala in eight competencies.
154. Applicant received 5 out of 5 in three competencies from Commissioner Sarah and she gave Ms N T 5 in one, she gave Mr Ahmed 5 in five competencies and Masiala 5 in one. The DCP gave Ms N T 5 in four competencies and Mr Mufaya 5 in one competency and Commissioner Bankole gave Mr Ahmed 5 in three competencies.
155. When the scores are viewed from the picture painted above, the scores become average for the candidates and the argument that the DCP's scores are dislocated from the rest has no merit. It is very clear the panelists scored how they perceived the answers from candidates. To compare the scores of two candidates only by one panelist distorts the whole picture. The most generous panelist was Commissioner Sarah, then Commissioner Bankole, the DCP and the External Member. It must be remembered that DCP was the hiring Manager she would understand the application

of the competencies more than any of the panelists. In fact, the fallacy of Applicant's argument lies in the fact that Commissioners Sara and Bankole scored the Applicant very favourably. It would be a misplaced argument to think that the two were biased against the other candidates. To use the Applicant's argument, if Commissioner Sarah's scores were to be removed, Applicant's individual scores would be worse. Therefore, the argument that the DCP was biased against Applicant is baseless and without merit.

#### *Calibration*

156. The argument made was that no calibration was done and that the DCP refused to do calibration. As Sedqi J correctly remarked, the Tribunal has no information on calibration. From Table 1 made available by Applicant, what is said under Artificial Low score applies here. As the Respondent correctly explains in paragraph 38 of his answer to Applicant's case – this case did not deserve a calibration given the scores as per attached Table 1. There is no evidence that the DCP refused to do calibration, nothing and the point stands to be rejected. After all calibration was not pleaded. It is not a point of law that it could be raised at any time. It is a matter of fact it should have been pleaded.

#### *Passport*

157. The only argument here is that Ms N T submitted her application with a foreign passport. The TOR did not require a passport. The Tribunal does not know whether she was required to submit her application with the member state (DRC) passport but in her affidavit she among other things, states that, 'In my case, the support allowed for the swift renewal of my Congolese passport, essential for the application and to assume duties as a national of DRC. The Tribunal accepts that she must have submitted her DRC passport at one point. Ms N T would not have been appointed if she was not a national of DRC. Regulation 6.3. provides:

#### **'Regulation 6.3**

#### **Requirements for Appointment**

Any person may be appointed to work in the Union upon fulfilling the following conditions that he or she:

- (a) Is a national and a citizen of a Member State of the Union not under Union sanctions as provided for in the Rules;
- (b) Possesses the highest standard of moral conduct and integrity;
- (c) Has not been convicted of any serious criminal offence excluding minor traffic offences;
- (d) Has been declared medically fit to hold the post applied for;
- (e) Is between the ages of 21 and 55, except for Elected Officials, Political and Special Appointees to whom the higher age limit is not applicable;
- (f) Meets the skills and other job requirements specified in the Rules, Administrative Notices and job descriptions; and;
- (g) Goes through the laid-down recruitment procedure.'

158. It is unthinkable that she would have been appointed without having met all the laid down requirements. The point is without merit. In an event it has not been shown how the DCP was biased or discriminated against Applicant by Ms N T's failure to submit her application with the DRC passport. The argument is clutching at straws and stands to be rejected and is. After all, like the case for calibration, the foreign passport was not pleaded and for that reason alone, stands to be rejected.

#### *The Facebook pronouncement by Ms N T*

159. The emphasis on the Facebook message on the words, '. . . mobilized the authorities of my country, up to the President of the Republic . . . simply so that my candidacy goes to the last straight line.'

160. It is argued that the President of the Democratic Republic of Congo interfered in the recruitment process. Except for relying on the words above, there is no evidence, even remotely how the President could have interfered in the recruitment process. The Applicant by his own words, has no issues with the ratings of the three Panelists but the DCP only. That is why it is argued that upon removing the DCP's scores, Applicant is elevated to the 2<sup>nd</sup> position and Ms N T to the 4<sup>th</sup>. That alone validates the process, placing it at 3 out of 4 which is 75%. That would mean even if the President interfered which is denied, the recruitment system remained transparent; and cannot be vitiated by an insignificant margin.

161. There is absolutely no evidence, that the President interfered in the recruitment process. If he did, which is denied, the Tribunal does not know to what extent. As already stated, if the MBRS was followed to its letter, Ms N T would not have been appointed, the post would have gone to Mr Ahmed. The reliance on the Facebook message is not evidence and does not assist the Applicant's case. In any event she explains what she meant in the message, 'a heartfelt expression of gratitude.' She further stated that in the D1 post, she occupies a quota of the DRC and she needed the country's support up to the President who gave her all the moral support to represent the DRC at the AU. There is no evidence to gainsay hers. The Facebook message is not evidence and does not assist Applicant's claims. Applicant when asked why he approached the Sudanese authority, his reply was that the AU is a political organ. In that sense there would be nothing wrong for Ms N T to seek moral support from anyone in the DRC, especially for the post she had applied for.

The Audit Report – The Audit of the AUC for the year ended 31 December 2022

162. The Audit report records that the report of the check reference of Ms N T mentions the incomplete nature of the verifications carried out in relation to her professional career. The Report further records that 'Indeed, her professional experience from 30/01/2015 – 01/09/2021 was not confirmed by her previous employers in its entirety. A duration of 4 years of her professional experience was not confirmed and the report concludes that, 'which calls into question the fulfilment of the conditions required by the job description in recruitment.'

163. But in Respondent's further evidence on 1 November 2023, Respondent states that Ernest and Young (EY) the company that did the background check has already cleared Ms N T. The information missing during the background check of Ms N T was filed. Respondent states that some of the previous employers were not available during the background check.

164. There is no evidence to the contrary that she was not cleared.

*Paragraph 44 of the TOR for the Interim RSC and Ad-Hoc*

165. It was argued that paragraph 44 is again irrefutable proof that Applicant's nationality should have assisted him, but it did not which is a breach and another rule conveniently ignored. Paragraph 44 reads as follows:

'44. The adherence to paragraph 43 above will ensure that the principle of appointing at least one (1) Director from each member state is achieved and in so doing, fair and equitable representation at Directors level.'

166. This paragraph should be read with paragraph 43 which provides:

'43 In line with the new AU wide quota system, which requires respect for the principle of fair and equitable representation of all member states, the Ad-hoc Panel shall prioritise applicants from member states that do not have a Director in the quota system.'

167. The two paragraphs should further be read with paragraph 69 and 70. Paragraph 69 in terms of Regulation 6.1(b) of the SRR vests the power for appointment in the Chairperson. Paragraph 70 provides for the criteria for appointment by the Chairperson which are:

- (a) Merit (Regulation 6.4 (b) and Rule 27.5 of the SRR)
- (b) Priority shall be given to Least representative countries (Rule 27.5 of the SRR);
- (c) Gender (Regulation 6.4(b) and Rule 28.8 of the SRR)
- (d) Quota consumption (the percentage of Quota consumption of the member states from across the Union (Regulation 6.4(c). Rule 27.5 and Rule 28.6 of the SRR);
- (e) Internal Candidate (Rule 28.5 of the SRR);
- (f) Diversity of the Demography within the hiring department per Country and per region, including female and male representation (Regulation 6.4(c),);

- (g) Managerial quota consumption; and
- (h) Applicants from Member States that do not have any Director or HoD shall be given priority in order to address the imbalance in the Quota system.

168. The argument that Applicant's nationality did not assist him is misplaced. The competition in the AUC positions is for candidates from all member states according to the established criteria. Regard had to Applicant's career progression since he joined the AU and was confirmed in a P5 position as Head of HR in 2020, in follows necessarily that the D1 post had to be given to another Member State and that's what the rule provides.
169. We now turn to the question to be determined, whether the recruitment of the DHRM was done in accordance with the Staff Regulations and Rules of the African Union. The question should be answered in the affirmative. In the tenure of this Tribunal, perhaps this was the most transparent recruitment process ever. The only conspicuous irregularity was the shortlisting of the Applicant without meeting the terms of reference. The R10 observers conceded that to have allowed Applicant and one other candidate on consensus to advance to the next stage should not happen again. Applicant referred to various provisions of the SRR allegedly violated by the DCP or the AUC which provisions were never proved. There is no evidence that Applicant was discriminated on the basis of his gender, nationality or otherwise. The R10 a highly respected group of Auditors from the Five Regions of the AU validated the entire recruitment process except the appointments by the Chairperson who did not apply the MBRS but his discretion.
170. The test for bias is a 'reasonable apprehension' of bias rather than a 'reasonable suspicion'<sup>5</sup> because of the many nuances associated with the word suspicion. The test for apprehended bias is objective and the onus of establishing it rests upon the Applicant. The test contains two-fold objective elements the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case.<sup>6</sup>
171. During the recruitment process at no stage did Applicant complain about biasness from the DCP. When asked why he did not seek her recusal from the panel she chaired, his response was that the panelists are not shared with candidates, which answer is false for the reason that the TOR for the interim RSC prescribes who should sit on which panel, that is why the DCP sits on both the selection and interview panels. When the question was repeated, he said seeking recusal has never happened before and he was not expecting 'all this to happen'. He further said after the DCP's meeting with the Ambassador, the DCP also called him and asked him why he involved the Ambassador. She told him that she was not going to transfer him. He believed that, that chapter was closed. When asked the same question again he said he could not assume bad faith, and whatever happened before was a closed chapter. It was only after he saw the Facebook message by Ms N T and the scores on him by the DCP that the bias or suspicious bias manifested; but the bias is unreasonable as the acts of bias alleged are unfounded, for example, the DCP withdrew her decision to transfer him. She is not the one who changed the TOR for the post of DHRM, it appears the TOR are standard, she initially did not shortlist him because Applicant did not meet the 15 years post graduate requirement, paragraph 36 of the TOR for the Interim RSC does not override Rule 35(1)(d) and APROB violated Rule 35(1)(d) when they shortlisted Applicant for the interview stage; there is no evidence the President of DRC interfered in the recruitment process, the passport argument was an ambush on the Respondent, it was not pleaded, in any case there is absolutely no evidence on the issue. Calibration was also an ambush on the Respondent, there is no evidence that the DCP refused to do Calibration. The Artificial low score is consistent with the other Panelists' scores. Ms N T's previous employment was verified by Ernest and Young. Applicant believes that he was discriminated for his nationality and gender when there is no evidence to support the belief. There is no evidence that Ms T N was appointed because she was allegedly favoured by the DCP or that the Applicant was not appointed for the reason that he ranked number 3, nor is there evidence that the Chairperson exercised his discretion wrongly.
172. Applicant held no reasonable apprehension of bias throughout the recruitment process. That explains why Applicant took no action from 7 September 2021 when he was informed of the unsuccessfulness of his application until allegedly the Facebook message during December 2021. The alleged bias rests on suspicion which is reasonable not and unfounded.
173. A staff member contesting a decision not to appoint him or her must generally establish that: (a) the procedure as laid down in the Staff Regulations and Rules (SRR) and other relevant laws of the Organization were not followed;

<sup>5</sup> *President of the RSA v South African Rugby Football Union* 1999(4) SA 147 (CC) at 175.

<sup>6</sup> *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No 2) [1999] 1 ALL ER 577 (HC) ([1999] 2 WLR 272). See also *Committee for Justice and Liberty et al v National Energy Board* (1976) 68 DLR (3d) 716 at 735, *R v S* (RD) (1997) 118 CCC (3d) 353 at para [111].



and (b) the staff member was not given fair and adequate consideration<sup>7</sup>. It is very clear from the evidence that Applicant's candidacy was given full and fair consideration, in fact he was favoured when he was shortlisted against the provisions of Rule 35.1(d) and recommended for appointment. It follows necessarily that the grounds of appeal are without any merits and stands to be rejected.

*Order*

174. Consequently, the application in its entirety is dismissed.

Date: 22 January 2024

*/signed/*

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SYLVESTER MAINGA, PRESIDENT  
JAMILA B. SEDQI  
PAULO D. COMOANE

/s/ Secretary

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<sup>7</sup> Abbasi, 2011 – UNAT – 110; para 23 & 24.