



Judgment No. 2018-UNAT-880



Counsel for Mr. Munyan: Robbie Leighton, OSLA

Counsel for Secretary-General: Francisca Lagos Pola

JUDGE RICHARD LUSSICK , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/028, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 26 February 2018, in the case of Munyan v. Secretary-General of the United Nations . The Secretary-General filed the appeal on 27 April 2018, and Mr. Jason Munyan filed his answer on 28 June 2018.

#### Facts and Procedure

2. The following facts are uncontested:<sup>1</sup>

... The Applicant is an Economic Affairs Officer at the United Nations Conference on Trade and Development (“UNCTAD”), who holds a continuing

... Following the interview, the Applicant was placed on the list of recommended candidates, along with the four other candidates. The list was submitted to the CRC on 16 June 2016 for approval.

... At its meeting on 23 June 2016, the CRC concluded that it “was not in a position to endorse the list of recommended candidates, at this stage”. The CRC noted that the Applicant and another candidate “[did] not seem to meet [the] minimum requirements for the job opening, i.e. ‘five years of relevant experience in humanitarian affairs’”. The CRC “request[ed] that the hiring manager provide more clarifications as to how these candidates were deemed eligible and found to be fulfilling the criterion stated above”.

... Following the CRC’s request, the hiring manager changed the assessment of the Applicant’s candidacy and that of the other candidate to “not suitable”, without any further assessment or providing any explanation.

... On 1 July 2016, the hiring manager transmitted a revised memorandum to the CRC, which indicated that three candidates met all the evaluation criteria and were therefore placed on the list of recommended candidates. This list did not include the Applicant. On 13 July 2016, the CRC endorsed the three recommended candidates.

... On 21 July 2016, the successful candidate was selected for the position and the two other recommended candidates were placed on the roster.

... In their submissions of 6 and 16 February 2018, both parties agreed for this case to be decided on the papers.

3. On 26 February 2018, the UNDT rendered its Judgment. The UNDT found the decision to remove Mr. Munyan's name from the list of recommended candidates which led to the decisions not to select him or place him on the roster was procedurally flawed, the Organization failed to minimally show that Mr. Munyan's candidacy had been fully and fairly considered and therefore the decisions not to select him for the post and/or place him on the roster were unlawful. The UNDT ordered rescission of the contested decisions and in the alternative, compensation in the amount of two months' net base salary at the P-3, step 1 level. The UNDT noted that it would exceed its power if it were to order the Secretary-General to place Mr. Munyan on the roster and that as a consequence of the rescission of the decisions, the CRC would have to make that determination.

4. By application dated 23 March 2018, the Secretary-General requested revision of the impugned Judgment alleging that he had become aware of new facts that were not known to the UNDT at the time the impugned Judgment was rendered. On 11 April 2018, the UNDT issued Judgment No. UNDT/2018/048, Summary Judgment on Application for Revision, dismissing the Secretary-General's request for revision as not receivable on the grounds that the Judgment was not executable and the relevant fact was known to the Secretary-General prior to the issuance of the impugned Judgment.

#### Submissions

##### The Secretary-General's Appeal

5. The UNDT erred in law in finding that the Hiring Manager could not remove Mr. Munyan's name from the list of recommended candidates after the CRC had asked for clarifications. In *Cranfield*,<sup>2</sup> *Husseini*,<sup>3</sup> *Neocleous*<sup>4</sup> and *Cicek*,<sup>5</sup> the Appeals Tribunal affirmed the Administration's entitlement and duty to correct its own errors. By removing Mr. Munyan from the list of recommended candidates, the Hiring Manager exercised her discretion to correct her initial decision deeming Mr. Munyan eligible for the position in accordance with

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<sup>2</sup> *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367.

<sup>3</sup> *Husseini v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* Judgment No. 2016-UNAT-701.

<sup>4</sup> *Neocleous v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-635.

<sup>5</sup> *Cicek v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-636.

the Appeals Tribunal's jurisprudence. Moreover, the UNDT's finding that the Hiring Manager was not entitled to remove Mr. Munyan from the list at that stage sets out a prohibition which is not stipulated in Administrative Instruction ST/AI/2010/3 (Staff Selection). There is no provision in ST/AI/2010/3 prohibiting the Hiring Manager from removing a candidate from the list of recommended candidates after the CRC has asked questions about the qualifications of such a candidate.

6. The UNDT further erred in law in reviewing the Hiring Manager's initial assessment of Mr. Munyan's work qualifications. The Hiring Manager's initial assessment was not subject to review by the UNDT given that it had no bearing on her decision not to include Mr. Munyan in the final list of recommended candidates. The UNDT therefore erroneously used its analysis of the first assessment as a basis to conclude that the decision not to recommend Mr. Munyan for the position was procedurally flawed. The contested decisions in the present case are the decisions not to select Mr. Munyan and not to place him on the roster which resulted from the Hiring Manager's further and subsequent assessment that Mr. Munyan was not qualified after the CRC had asked for clarification. Had the UNDT reviewed this assessment, it would have found that the Hiring Manager's assessment was lawful, free of discrimination and bias, and it followed the correct procedures.

7. The UNDT erred in law in awarding compensation to Mr. Munyan. Article 10(5) (b) of the UNDT Statute requires evidence of harm before an award of compensation can be justified. In the present case, the UNDT based its calculation for compensation on the assumption that, after expiration of his temporary appointment at the P-3 level, Mr. Munyan would not continue to receive a P-3 salary and would return to his P-2 position in UNCTAD. The UNDT's finding, however, was speculative and not supported by evidence. Furthermore, the UNDT should have requested relevant information on Mr. Munyan's employment prior to making a calculation on compensation based on the assumption that Mr. Munyan would no longer receive a P-3 salary. Finally, Mr. Munyan should have appraised the UNDT of his employment information in order to contribute to the fair administration of justice.

8. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment and dismiss Mr. Munyan's application to the UNDT in its entirety. In the alternative, if the Appeals Tribunal were to conclude that the UNDT correctly found that procedural violations resulted in Mr. Munyan's not having been fully and fairly considered for the position, the

Secretary-General requests that the Appeals Tribunal vacate the award of compensation made by the UNDT.

Mr. Munyan's Answer

9. Contrary to the Secretary-General's contention, the Hiring Manager did not act to correct an initial error. At no point before the UNDT did the Secretary-General allege that the Hiring Manager had acted to correct an error. The pleading is inconsistent with the facts that the Secretary-General presented to the UNDT. Before the UNDT, the Secretary-General indicated that the removal of Mr. Munyan's name from the list of recommended candidates resulted from a presumption on the part of the Hiring Manager that otherwise the list would not pass the CRC. The Secretary-General informed Mr. Munyan by management evaluation that his name was removed because he was not the strongest candidate. The Secretary-General's assessment that Mr. Munyan did not meet the work experience requirements for the contested post was not the assessment that motivated the Hiring Manager to remove his name from the list of recommended candidates. This assessment was post facto exercise and was presented to the UNDT as such. The Secretary-General essentially accepted that the removal was unlawful as it did not follow a genuine reassessment of work experience.

10. What was presented before the UNDT was an argument on remedy that because any such reassessment would have revealed a flaw in Mr. Munyan's candidacy, he had suffered no harm. The UNDT could not have found that the Hiring Manager (7322 701725( )5.h bef)ted to th

procedure. On appeal, the Secretary-General has changed the account and asserts that the process was in conformity with the rules. The Appeals Tribunal should therefore dismiss his contention that the UNDT should have found, contrary to the Secretary-General's pleadings before the UNDT, that the Hiring Manager's actions were sanctioned by ST/AI/2010/3 and that they were taken to correct an error.

12. The UNDT did not err in reviewing the initial assessment of Mr. Munyan's work experience. By claiming that the UNDT should have instead reviewed the subsequent assessment, the Secretary-General is essentially asking the UNDT to consider an assessment that the Secretary-General himself stated, in his reply before the UNDT, had not taken place. The assessment that Mr. Munyan did not meet the work experience requirements was not one conducted at the time of his removal from the list of recommended candidates. It was not even conducted at the time of management evaluation. It was only conducted after the contested decision had been appealed to the UNDT.

13. Mr. Munyan submits that there are obvious issues with relying on such post facto assessment. The Hiring Manager's objectivity may be questionable when the assessment involves reviewing her own decision not to place Mr. Munyan on the list of recommended candidates to determine whether she would have acted in the same manner even if no error had been committed.

14. The Secretary-General contends that Mr. Munyan had not suffered any loss as a consequence of the irregularity of the removal of his name. He further argues that had a proper review been conducted, Mr. Munyan would have suffered no loss. Such argument could only be evaluated based on the first assessment of Mr. Munyan's work experience as the subsequent assessment had not been conducted at the time of the contested decision and, therefore, could not have resulted in the Hiring Manager's actions. To find otherwise would allow the Secretary-General to always adopt this strategy; whatever the decision, the Administration could potentially argue that its actions would have been consistent regardless of the error accepted or identified in the decision-making process.

15. Turning to remedies, the Secretary-General sought, before the UNDT, revision of the Judgment on the basis of Mr. Munyan's subsequent promotion to the P-3 level. The request for revision of Judgment was plainly procedurally barred as the Judgment was not executable and the relevant fact was known to the Secretary-General. The Secretary-General also could

not have sought to introduce and rely on this new fact on appeal, as under Article 2(5) of the Appeals Tribunal Statute, he should have presented the evidence before the UNDT. The Secretary-General uses a “spurious request for revision of judgment as a mechanism to subvert the evidence rules of the [Appeals Tribunal] and introduce this fact in evidence”, thereby abusing the process. In the alternative, Mr. Munyan does not accept that this fact represents part of the written record in this case. The request for revision was filed in a separate case resulting in a separate judgment. The request for revision of judgment should therefore be struck from the record and the matter of Mr. Munyan’s promotion should not be subject to the Appeals Tribunal’s deliberations.

16. On the compensation awarded, the Secretary-General erred in citing Article 10(5) (b) of the UNDT Statute. In the absence of specific material damage, no award was made subject to Article 10(5)(b). In the instant case, the UNDT awarded compensation as an alternative to rescission. The jurisprudence the Secretary-General cites in support of his argument does not apply as it concerns moral damages. The Secretary-General contests the award of alternative compensation on the basis of a provision and jurisprudence that do not apply. In any event, the award corresponded to harm suffered by Mr. Munyan and is in line with the Appeals Tribunal’s jurisprudence. The UNDT applied a principled approach which corresponded to the facts, arriving at a reasonable award of alternative compensation which should not be disturbed.

17. The Secretary-General’s submissions seeking overturn of the compensation awarded do not match the record. The Secretary-General claims that the UNDT based its calculation for compensation on the assumption that, after expiration of his temporary assignment at the P-3 level, Mr. Munyan would continue to receive a P-3 salary and would not return to his P-2 position in UNCTAD. This may be contrasted by the actual content of the Judgment which states that Mr. Munyan’s appointment to the contested post would not necessarily entail an increase in salary as at the time of the Judgment he was assigned to a P-3 post receiving SPA, but since that assignment was of limited duration, Mr. Munyan was not guaranteed to continue to receive salary at the P-3 level. Mr. Munyan, however, concedes that for a period of one year following the contested decision, he continued





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30. We hold that it is not admissible for the Secretary-General to introduce new grounds of appeal which were not part of his case before the UNDT.<sup>12</sup> It is quite unreasonable for the Secretary-General to assert that the UNDT erred on questions of fact and law with respect to allegations which were not raised before the UNDT for its consideration.<sup>13</sup> Such allegations cannot be raised for the first time on appeal.<sup>14</sup>

31. We also find that the Secretary-General's submissions contesting the compensation awarded to Mr. Munyan are entirely without merit.

32. The Secretary-General's appeal shows a misunderstanding of the different types of compensation provided for in Article 10(5) of the UNDT Statute. Contrary to what the Secretary-General submits, the UNDT did not award any compensation pursuant to Article 10(5)(b). In fact, the UNDT rejected Mr. Munyan's claim for moral damages pursuant to Article 10(5)(b) on the ground that the claim was not supported by any evidence.

33. The compensation awarded by the UNDT was pursuant to Article 10(5)(a) of the UNDT Statute, which provides:

As part of its judgement, the Dispute Tribunal may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tr

UNDT. Such compensation is completely different from the compensation regulated by Article 10(5)(b), which compensates the victim for the negative consequences caused by the illegality committed by the Administration. <sup>15</sup>

36. Moreover, we find no error in the UNDT's calculation in setting the amount for compensation. This Tribunal has previously stated that on the question of compensation awarded by the UNDT, the Appeals Tribunal will not interfere with the UNDT decision absent a finding of error of law or fact on the part of the UNDT. Specifically, the Appeals Tribunal has held that "[t]he trial judge is best placed to assess the nature and evidential value of the information being provided by an applicant to the UNDT to justify an award of damages, including pecuniary damages. In the absence of a compelling argument that the UNDT erred on a question of law, or on a question of fact resulting in a manifestly unreasonable decision, we will not lightly interfere with the findings of the Dispute Tribunal." <sup>16</sup>

37. The Secretary-General has failed to establish that the UNDT erred in any way in arriving at its judgment. The appeal has no merit and cannot succeed.

38. We conclude with the observation that the Secretary-General, in presenting on appeal factual and legal arguments which directly contradict his submissions to the UNDT, has manifestly abused the appeals process.

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<sup>15</sup> Zachariah v. Secretary-General of the United Nations , Judgment No. 2017-UNAT-764, para. 36, quoting Eissa v. Secretary-General of the United Nations , Judgment No. 2014-UNAT-469, para. 27; Gakumba v. Secretary-General of the United Nations , Judgment No. 2013-UNAT-387, para. 19.

<sup>16</sup> Flores v. Secretary-General of the United Nations , Judgment No. 2015-UNAT-525, para. 26, quoting Goodwin v. Secretary-General of the United Nations, Judgment No. 2014-UNAT-346, para. 23.

Judgment

39. The appeal is dismissed and Judgment No. UNDT/2018/028 is affirmed.

Original and Authoritative Version: English

Dated this 26<sup>th</sup> day of October 2018 in New York, United States.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Knierim

(Signed)

Judge Halfeld

Entered in the Register on this 20<sup>th</sup> day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar