



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1199

Nazma Banaras Khan
(Respondent/Applicant)

v.

Secretary -General of the United Nations
Appellant /Respondent

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Graeme Colgan Judge Sabine Knierim
Case No:	2021-1563
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Mr. Khan: Marcos Zunino, OSLA

Counsel for Secretary-General: André Luiz Pereira de Oliveira

JUDGE JOHN RAYMOND MURPHY , PRESIDING .

1. The Secretary-General of the United Nations appeals Judgment No. UNDT/2021/034 (the Impugned Judgment) of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).

2. Before the UNDT, Ms. Nasma Banaras Khan had contested the decision not to select her for a specific position. In the Impugned Judgment, the UNDT found that Ms. Khan did not receive full and fair consideration for the position and ordered rescission of the decision or

cs-3.9 (c1.5 (4))T.9 (c)592)-0.6 (p)25 (4)] .5 (r)5d t.9fsir r (nd)-d in NoT96. of the Impugned Judgment - 0.258 03153

7. The CMS then held a meeting with the Hiring Manager and the Chief Human Resources Officer (CHRO) to discuss the complaint. Following the discussion, the CMS concluded that the impartiality of the Hiring Manager had been brought into question by his decision to lower the qualifying score on the written assessment. Following the advice of the CMS, the Hiring Manager recused himself from the selection process. The Chief FTS then assumed the role of Hiring Manager for the selection exercise for the position and chaired the competency-based interviews.

8. The interview panel then submitted to the Mission Review Panel (MRP) a reasoned and documented record of its evaluation of the candidates in which it recommended Ms. Khan and the selected candidate for selection to the position without ranking them. The MRP reviewed the recommendation, ensured that the evaluation criteria had been applied correctly and that the applicable procedures had been followed under the Staff Regulation 3ed thec8 (a)-

selected candidate had an edge over Ms. Kharin that regard. Although Ms. Khan had assumed responsibility for the tasks of the position after the incumbent left for assignment in

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Submissions

The Secretary -General's Appeal

25. The Secretary-General submits that the UNDT erred in holding that the considerations of seniority and career advancement were irrelevant and hence that the contested decision was unreasonable on grounds of taking into account of irrelevant factors. Such factors are relevant in the exercise of discretion in securing the highest standard of

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2c.

functions. Hence, she submits that the UNDT did not err in rescinding the contested decision.

32. Ms. Khan further submits that the award of in lieu compensation was a proper exercise of judicial discretion.

33. Ms. Khan requests the UNAT to dismiss the appeal in its entirety.

Considerations

34. The *ratio decidendi* of the UNDT Judgment is that seniority and career advancement were irrelevant factors relied on to the detriment of Ms. Khan as there was no basis in the legal framework for the Administration to consider seniority and professional experience as priority considerations favouring the selected candidate.

35. The Secretary-General argues that the UNDT erred on a question of law by essentially stepping in his shoes in a matter of staff selection by substituting its own judgment on the most suitable candidate rather than considering if the Secretary-General had exercised his discretion properly. That characterisation of the issue by the Secretary-General misrepresents the UNDT's finding. The UNDT did not usurp the function of the Secretary-General. Rather it concluded legitimately that the decision of the CMS was unreasonable as he had not properly exercised his discretion by taking into account irrelevant considerations. The true question on appeal is whether the considerations relied on were indeed irrelevant. If not, then the UNDT will have erred in law.

36. The point of departure is the presumption that the acts the Administration performed in the course of a selection process are regular. In *Rolland*¹, the Appeals Tribunal held that if the management is able to even minimally show that a candidate was given a full and fair consideration, then the presumption of law that official acts have been regularly performed stands satisfied. Thereafter the burden of proof shifts to the staff member who must show through clear and convincing evidence that he or she was denied a fair chance of promotion.

¹ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para 26.

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40. The decision of the UNDT is also inconsistent with established jurisprudence. In *Kinyanjui*³, the Appeals Tribunal held that the High Commissioner for Refugees was entitled to rely on the selected candidate's seniority and previous experience in selecting one of the recommended candidates at the end of the selection process, provided there was no evidence that the exercise of discretion was unlawful or unreasonable. It held:

Consequently, we hold that the UNDT gave careful and fair consideration to Mr. Kinyanjui's arguments regarding the legality of the selection exercise. Moreover, Mr. Kinyanjui, contrary to his allegation, has failed to discharge his burden of proving through clear and convincing evidence that he was denied a fair chance of selection. Be that as it may, the High Commissioner had the list of potential candidates for final selection and Mr. Kinyanjui was included in that list. The High Commissioner could have selected any one of these candidates, when he exercised his discretion and made a selection. However, he did not select Mr. Kinyanjui; instead, he selected another candidate, taking into account, inter alia, the abovementioned criteria of the selected candidate's seniority and experience as compared to those of Mr. Kinyanjui. Taking such factors into account falls within the Administration's discretion. There is no evidence that the exercise of this discretion was abusive, arbitrary, discriminatory, or irregular.⁴

41. Furthermore, the UNDT erred in fact and law by failing to consider that other factors were considered by the CMS when choosing the selected candidate, which were in fact the decisive relevant considerations in this selection exercise. The 28 February 2020 Memorandum indicated that in addition to seniority and career advancement the CMO reasonably believed that the selected candidate had better skills and experience. The memorandum noted that the post required a good background in accounting in terms of asset management with regard to capitalisation and depreciation (of assets) as well as the

amended after the test was written, would have resulted in Ms. Khan's exclusion from consideration.

42. The UNDT accordingly erred by failing to appreciate that the contested decision rested on a careful consideration of a range of relevant factors, including the selected candidate's superior skills.

43. For those reasons the appeal must succeed. Having reached that conclusion it is unnecessary to determine whether the UNDT erred in granting the relief it did. Suffice it to say, its rescission of the selection decision without effecting a joinder of the selected candidate was in all likelihood an irregularity, but one ultimately of no consequence in the light of the outcome of this appeal.

44. Counsel on behalf of Ms. Khan has made submissions in his brief with regard to the various other findings made by the UNDT in relation to the replacement and non-consultation of the Hiring Manager, the alleged bias of the CMS and the issue of gender-amounting in effect to grounds of cross-appeal. It is not appropriate to deal with them, if only because it would be unfair to the Secretary-General who, absent a crossappeal, has not furnished an answer to the grounds of cross-appeal.

Judgment

45. The appeal is upheld and Judgment UNDT/2021/034 is vacated.

Original and Authoritative Version: English

Dated this 18th day of March 2022 .

(Signed)

Judge Murphy , Presiding
Cape Town, South Africa

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Knierim,
Hamburg, Germany

Entered in the Register on this 20th day of April 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar