



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-595

Survo

(Appellant/Respondent)

v.

Secretary-General of the United Nations

(Respondent/Appellant)

JUDGMENT

Counsel for Mr. Survo:

Self-represented

Counsel for Secretary-General:

Amy Wood

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it two appeals against Judgment No. UNDT/2014/144, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York

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20. On 2 September 2014, after efforts to also resolve this matter through mediation had failed, the parties filed their closing submissions. In his closing submissions, Mr. Survo indicated that he had a list of witnesses to call to testify. He also stated that he had been “sidelined to interim positions” and reiterated that the selection for the P-5 post of Chief, SISS, and his non-selection remained illegal since he had yet to be assigned to a suitable position.

21. On 11 December 2014, the UNDT issued its Judgment. Having regard to the parties’ closing submissions, the UNDT noted that no further documents or additional oral evidence were required and that a case management discussion and/or hearing was not needed. On the merits of the application, the UNDT found that Mr. Survo’s challenge to:

(a) “the persistent refusal to reclassify” his post at the P-5 level from June 2003 to July 2009 was not receivable as he had failed to pursue the procedure to contest the classification of his post outlined in ST/AI/1998/9 (System for the classification of posts) and, therefore, there was no actual administrative decision denying such a request;

(b) his non-selection for the P-5 level post of Chief, SDAS, was not receivable as he had not requested management evaluation thereof in a timely manner; and

(c) his non-selection for the P-5 level post of Chief, SISS, was receivable but without merit, in that there was no evidence that the selection process was marred by bias or otherwise flawed.

22. The UNDT further found that since Mr. Survo performed duties at the P-5 level between 1 August 2009 and 6 September 2010, when the new Chief of SISS was appointed, he thus appeared eligible for special post allowance (SPA) for that period. As Mr. Survo had requested “financial compensation for the difference in salary and benefits between P-4 and P-5 since June 2003” in his MEU request, the UNDT considered that such request amounted to a timely and retroactive request for the payment of SPA. This amounted to “a new legal matter” which the MEU had failed to address. Accordingly, the UNDT remanded this aspect of Mr. Survo’s application to the Administration for a full and fair consideration.

23. The UNDT rejected Mr. Survo’s claims concerning abuse of authority, finding that there was no evidence that Mr. Survo had attempted to use the procedures set out in the Secretary General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment,

including sexual harassment, and abuse of authority) and Chapter XI of the Staff Rules requiring a staff member to deal with a complaint prior to filing an appeal with the Dispute Tribunal.

24. The UNDT also noted that Mr. Survo had filed, without the UNDT's leave, "new documents and a new additional ground of appeal" in his closing submissions. The UNDT held that the new issues were not considered as part of Mr. Survo's appeal against the non-selection decision for the post of Chief, SISS, and/or evidence, as they were not part of the initial application. The UNDT declined to take them into consideration finding, *inter alia*, that it had adequate information before it to enable it to reach a decision on the papers without an oral hearing.

Submissions

Case No. 2015-693

Mr. Survo's Appeal

25. The Judgment contains many factual errors, misrepresentations of Mr. Survo's arguments and instances of incomprehensible language leading Mr. Survo to believe that the Dispute Tribunal did not thoroughly examine or understand his case. Numerous paragraphs in the Judgment demonstrate that the UNDT deliberately diminished and misinterpreted his case for its own convenience. Further, the UNDT erred on questions of fact in paragraphs 1, 8, 16, 19, 21(b) and (c), 22(a), 53, 79 and 80 of the Judgment, and produced a judgment of disappointing quality with "incomprehensible sentences".

26. Mr. Survo alleges a number of procedural errors in breach of the UNDT Statute, including: Article 2(1)(a), insofar as the UNDT did not review relevant Regulations and Rules in force at the time of the alleged non-compliance; Article 9, in that the UNDT did not access required documents and evidence from witnesses; and Article 11(1), on the basis that the UNDT did not state the reasons, facts and law on which the Judgment was based. The Judgment also violates the UNDT's Rules of Procedure (UNDT Rules), namely: Article 9 insofar as the UNDT misused the summary judgement procedure; Article 16, in that the UNDT denied a requested hearing without pro were no [(w.1e)5.:7(o)3.2.e8uand Art)0051o.g thes), tandd56 [(and Art)5GTsted

27. The UNDT also erred because it categorically ignored his evidence and rejected his request to hear witness testimonials that were to contest the Respondent's reply. The UNDT further erred in judging that his clarifications were new submissions which could not be considered, and treated him harshly in rejecting them.

28. The UNDT failed to properly exercise its jurisdiction as it: (a) erred with respect to his claims concerning the classification of his post and his non-selection for the post of Chief of SDAS, and instead impermissibly based its rejection on the MEU's decision that such matters were not receivable; (b) did not adequately consider "the legality of the Chief SISS selection" and, *inter alia*, examine whether the Administration "explicitly confirmed that [the selected candidate] met the required work experience" or whether the Executive Secretary of ESCAP had presented the Central Review Body with all the necessary information; and (c) did not "examine and conclude anything on the damages that [he] had suffered in terms of his health, reputation and career prospects".

29. The UNDT erred on a question of law because it, *inter alia*: (a) ignored, without explanation, the relevant jurisprudence and principles that govern United Nations employment; and (b) did not adequately "examine the issues of discrimination and abuse of authority" raised in Mr. Survo's UNDT application.

30. Mr. Survo requests that the Appeals Tribunal remand the case for a hearing and full and proper examination of the evidence and his requested relief by a different UNDT judge. Alternatively, should the Appeals Tribunal choose to review the case, Mr. Survo requests that this Tribunal order production of requested evidence and grant an oral hearing.

The Secretary-General's Answer

31. The UNDT correctly rejected each of the claims set out in Mr. Survo's UNDT application, but exceeded its jurisdiction and erred on a question of law and fact in remanding an aspect of the matter concerning the payment of retroactive SPA to the Administration for consideration, as further argued in the Secretary-General's appeal summarized below.

32. Mr. Survo failed to establish any basis for his appeal as prescribed in Article 2(1) of the Appeals Tribunal Statute (Statute), or to demonstrate any error warranting reversal of the Judgment. While Mr. Survo asserts that the UNDT committed numerous errors of procedure, he fails to substantiate such alleged errors, much less establish how any of such alleged errors

affected the UNDT's decision in the case. For instance, he did not identify what specific documents he asserts the UNDT should have ordered to be disclosed or identify specific witnesses the UNDT should have heard, or offer detail as to what specific evidence the UNDT allegedly ignored. Consequently, his allegations of error should be dismissed. Mr. Survo's complaints concerning the issuance of a summary judgment should also be dismissed as the UNDT did not issue a summary judgment.

33. Mr. Survo also failed to demonstrate that the UNDT failed to properly exercise its jurisdiction in rejecting some of his claims as not receivable. Contrary to his submissions, the UNDT is not vested with the authority to make general proclamations concerning questions of administrative policy; its jurisdiction is limited to reviewing specific administrative decisions and the UNDT correctly exercised its jurisdiction by declining to "use the review of the case" as a general opportunity to establish principles of law.

34. Concerning the "legality of the Chief SISS selection", the UNDT properly discharged its authority by examining whether the relevant policies and procedures had been respected and whether Mr. Survo's candidacy had been given fair and adequate consideration.

35. Mr. Survo's claim that the UNDT erred by not adequately considering the issue of damages must also fail since the UNDT did not find that any of Mr. Survo's rights, procedural or substantive, had been breached or that he had otherwise suffered harm as a result of any act or omission by the Administration. As such, there was no legal basis on which the UNDT could have awarded him compensation.

36. Mr. Survo has failed to demonstrate that the UNDT committed any error of law or fact warranting reversal of the Judgment. Mr. Survo merely states his disagreement with the outcome of the case and impermissibly reiterates arguments that were considered and rejected by the UNDT. Matters relating to allegations of harassment or abuse of authority were not receivable, and consequently, the UNDT did not err by declining to address such matters. Further, the terms and conditions of the settlement agreement referred to by Mr. Survo were not before the UNDT for adjudication in any manner.

37. The Secretary-General requests that the Appeals Tribunal reject Mr. Survo's appeal in its entirety.

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Mr. Survo's Answer

41. The Respondent has not disputed that Mr. Survo was asked to perform, and successfully performed, P-5 level tasks for over seven years. The Appeals Tribunal clearly stated in Chen that equal pay must be paid for equal United Nations work and that the equal-pay principle overrides administrative and budgetary constraints.⁴

42. Although the Secretary-General appeals on technical grounds, it is undisputed that ESCAP did not follow the rules in continuously failing to reclassify his post over the six-year period that Mr. Survo held the post. As the post was classified at the P-4 level in 2003 when he took up the position, Mr. Survo could not apply for or be granted SPA as per ST/AI/1999/17

Mr. Survo's appeal on the merits

45. Mr. Survo claims that the UNDT, in reaching its findings which were adverse to him:
- (a) Committed errors in procedure such as to affect the decision of the case;
 - (b) Failed to exercise the jurisdiction vested in it;
 - (c) Erred on questions of law; and
 - (d) Erred on questions of fact, resulting in a manifestly unreasonable decision.

47. In the course of its Judgment, the UNDT addressed the issue of whether there was a need for further documents or oral evidence in the following terms:⁵

... In the present case, which is not related to a disciplinary decision, based on

of case management when it decided that neither the submission of further documents nor the calling of witnesses was required.

53. We also reject Mr. Survo's assertion that the UNDT did not state why additional documentation and oral testimony were not needed, given the clear statement in paragraph 20 of the Judgment, quoted above, that it had before it "extended submissions and evidence" filed by the parties. Moreover, the UNDT was entitled to factor into its consideration that there were receivability issues concerning some of Mr. Survo's claims when considering the extent to which further documentation or oral testimony were necessary for a "fair and expeditious disposal of the proceedings".

54. Further, as per our jurisprudence in *Riano*, "[i]n order to establish that the Judge erred [in not admitting evidence], it is necessary to establish that the evidence, if admitted, would have led to different findings of fact and changed the outcome of the case".⁷ In the course of his appeal submissions, Mr. Survo has not id

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framework” of the United Nations and ignored without explanation UNDT and Appeals Tribunal jurisprudence quoted in his closing submissions to the UNDT.

65. We agree with the Secretary-General’s observation that Mr. Survo does not provide details of what law was “brushed aside” by the UNDT in its analysis of his claims. We are satisfied that the UNDT properly found as not receivable his claims regarding the failure to reclassify his post, his non-selection for the SDAS P-5 post and his claims of abuse of authority and discrimination during the SISS P-5 selection process.

66. Insofar as Mr. Survo alleges that the UNDT failed to examine, with regard to the SISS P-5 post, “convincing evidence that the decision not to promote him was totally unfair, unreasonable, illegal, irrational, biased, capricious, arbitrary, and lacked proportionality”, that argument is rejected. We have already stated that a reading of the UNDT Judgment demonstrates that the UNDT was cognisant of the claims made by Mr. Survo in his application and closing submissions. It duly considered those claims against the vacancy announcement for the SISS P-5 post, the official overall evaluations of Mr. Survo and the selected candidate, as made available by the Administration, and the applicable legal principles against which the treatment of Mr. Survo’s candidacy was to be assessed on judicial review.

67. In *Scheepers et al*, the Appeals Tribunal reprised its jurisprudence on matters of staff selection in the following terms:⁹

... In *Ljungdell* , we stated:

... Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals’ role is not to substitute their decision for that of the Administration.

⁹ *Scheepers et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-556, paras. 39-40, citing respectively *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30 (internal cites omitted) and *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, paras. 23-24.

... In Abbassi, we also emphasised that:

... In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

... The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

68. In Rolland, we considered the role of the UNDT when reviewing non-selection cases:¹⁰

... The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion.

... All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

... [...]

... There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

69. As Mr. Survo has failed to persuade us that the UNDT erred in law in relation to the matters raised by him, this ground of appeal is rejected.

- Alleged errors of fact

70. Paragraph 90 of the UNDT Judgment states:

... The Tribunal observes that the case Survo [Judgment No.] UNDT/2011/109, where the contested decision was "the Administration's attempt to identify the incumbent

¹⁰ Rolland v. Secretary-General of the United Nations, Judgment No. 2011-UNAT-122, paras. 20-21, 26.

(Applicant) 'a suitable post', which should have been done before the successful candidate

75. In his appeal submissions, Mr. Survo also lists a myriad of other matters under the umbrella of “errors on 52(o)15050.3(n)1t150.31(i5dj91)15dj9.4p154 T8150.3(n)1515dj51

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remedy of “monetary compensation for the P-5 level work” he asserted he was doing from 2003, that he was contesting before the MEU the issue of payment of SPA for that work. However, we do not find any legal or factual premise upon which the UNDT was entitled to base its conclusion. While the UNDT has the inherent authority, as upheld by the Appeals Tribunal in *Massabni*, “to individualize and define the administrative decision impugned by a party” in a specific case,¹⁹ the UNDT is not at large in this regard. We find that the UNDT had no primary legal or factual basis from which it could conclude that Mr. Survo had properly sought management evaluation of a request for SPA where there had, in fact, not been such a request in the first place. We highlight that the MEU was established by General Assembly resolution 63/228 with a specific mandate to review contested administrative decisions, not to make decisions in respect of staff members’ requests in the first instance.²⁰

85. Accordingly, we find that the UNDT erred and exceeded its competence in purporting to review the issue of an SPA payment, in the absence of Mr. Survo ever having first requested SPA and thereafter having properly sought management evaluation of this issue. In all the circumstances, having regard to the statutory criteria which prescribe that management

Original and Authoritative Version: English

Dated this 30th day of October 2015 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 18th day of December 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar