

UNITED NATIONS A

017-UNAT-744



r. Krioutchkov: Self-represented

ecretary-General: Carla Hoe

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2017-UNAT-744

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16. The UNDT accepted that there had been a delay in advertising and filling the vacancy, but held that the purpose of the delay was not contrived to favour the selected candidate, but was motivated by the Hiring Manager's desire to protect his own position in the event that he was not appointed to the P-5 post of Chief, RTU. He

22. The Appellant also had difficulty with the fact that the Secretary of the CRC transmitted the recommendation to appoint the selected candidate to the Director, DCS, UNON. The Hiring Manager failed to make the final recommendation to the decision-maker. This, the Appellant said, was in contravention of Section 9.2 of ST/AI/2010/3 which requires the selection decision for positions up to and including D-1 level to be made by the head of department/office on the basis of proposals made by the responsible hiring managers. The UNDT acknowledged that there may have been a procedural irregularity in this regard. However, it held that insofar as the selected candidate alone had been recommended, there is no doubt as to whom the Hiring Manager would have recommended. The Appellant could not have been legally recommended by the Hiring Manager because after the intervention of the CRC, the panel did not recommend him. In short, the procedural irregularity in the process of recommendation made no difference and had no impact on the Appellant's prospects. The UNDT essentially invoked the so-called "no difference principle" which

- iii) The written test for the post was based on a typing requirement, which was not a requirement of the JO, and had disadvantageded him in that he would have done better had he been allowed to handwrite the test;
- iv) The Hiring Manager failed to prepare a reasoned and documented record of the
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- xi) The assessment panel did not evaluate him for the post of Russian Reviser and for the specific requirements of the JO, and he, therefore, did not receive full and fair consideration for the position.

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34. As regards the new claims raised on appeal for the first time, it is trite that an appeal to this Tribunal is an appeal on the record. It follows that ordinarily this Tribunal will not entertain novel grounds of review or claims that are raised for the first time on appeal. The reason for that is self-evident. Neither the Respondent nor the UNDT had an opportunity to address the claims in evidence or argument, but furthermore the issues have not been the subject of management evaluation.

35. The eleven new grounds of appeal raised by the Appellant for the first time on appeal go beyond legal points arguable on the record. All of them require further oral testimony, as they make and rest upon factual allegations likely to be contested by the Respondent. The Appellant has not furnished any reason as to why these issues were not addressed in evidence and argument at the UNDT. Nor has he requested the matters to be referred back to the UNDT for oral evidence. Nor are we inclined *mero motu* to remand the matter to the UNDT for that purpose. Resolution of the factual and procedural issues is in any event unlikely to be practically conclusive. They are for the most part alleged minor procedural defects that in all probability, if proven, will have minimal, if any, impact on the fair and full consideration received by the Appellant. They will not conclusively alter the facts that the panel appropriately resolved aa

this Tribunal in another appeal involving the Appellant.⁷ We need merely repeat what was stated there as follows:⁸

... As to Mr. Krioutchkov's contention that he has been repeatedly included in the P-4 roster since 2008, but has never been selected, in contrast to all other candidates who were normally selected within one to two years without any additional evaluation tests, we note that the Appeals Tribunal has previously held in *Charles*, that:

The roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant position.

... The Appeals Tribunal understands that the Appellant may be frustrated by the fact that he has been on the roster for many years without obtaining a promotion, particularly because he has a wide experience in his professional area, having allegedly occupied different posts in Nairobi, New York and Bangkok for over 25 years. Nevertheless, having clearly and unconditionally accepted the invitation for the technical evaluation, he is now precluded from arguing bias against the examination itself. Moreover, being on the roster does not create an expectancy or entitlement to promotion. In the present case, actually, not all rostered candidates who submitted texts for evaluation were successful. Only three out of five who presented their texts managed to obtain the required minimum points. The mere fact of being on the roster does not guarantee a promotion.

... Moreover, and contrary to Mr. Krioutchkov's contention, when the Organization invites rostered candidates to a technical evaluation, it does not avoid the "best qualified candidates"; it rather creates conditions so that these candidates can compete on equal terms.

40. In the premises, the appeal falls to be dismissed.

Judgment

41. The appeal is dismissed and Judgment No. UNDT/2016/066 is upheld.

⁷ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-707, paras. 30-32.

⁸ *Ibid.*, paras. 28-30, citing *Charles v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-416, para. 28 (internal footnotes omitted).

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Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Knierim

Entered in the Register on this 22nd day of June 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar

Concurring Opinion by Judge Rosalyn Chapman

1. I agree with the Judgment, that is, the appeal is denied and Judgment No. UNDT/2016/066 is affirmed. However, I respectfully disagree with both the format of the Judgment and its reasoning.

2. The judgments of the Appeals Tribunal should be well-structured, clear and precise in order to enable the parties, including self-represented staff members and management personnel, to understand them. Among other things, this means that the format of the judgments should be consistent in all the judgments of the Appeals Tribunal. Over the years, the Appeals Tribunal has developed a format with separate sections which set forth the factual and procedural backgrounds, the parties' submissions, and the considerations. There is no reason to depart from the established format and it is unnecessarily confusing to mix together the parties' contentions with the background facts and legal analysis.

3. The Appeals Tribunal's jurisprudence on issues related to non-selection for appointment is well-settled, as we stated in *Aliko*:¹

... "[I]t is not the function of the Dispute Tribunal [...] to take on the substantive role with which the interview panel was charged."^[2] Rather, the Dispute Tribunal reviews the challenged selection process to determine whether a "candidate[] ha[s] received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration".^[3] The burden is on the candidate challenging the selection process to "prove through clear and convincing evidence" that he or she did not receive full and fair consideration of his or her candidacy, the applicable procedures were not followed, the members of the panel exhibited bias, or irrelevant material was considered or relevant material ignored.^[4]

4. The Dispute Tribunal carefully and correctly applied the foregoing principles in considering Mr. Krioutchkov's challenges to the selection process for the JO, and properly concluded that Mr. Krioutchkov's "allegations of bias and procedural flaws are not supported by the extensive examination of the documents and the assessment of the oral evidence".⁵

¹ *Aliko v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-540, para. 30.

² *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141, para. 32.

³ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 20.

⁴ *Ibid.*, para. 21.

⁵ Impugned Judgment, para. 54.

Thus, I concur that there is no merit to Mr. Krioutchkov's claims that his candidacy did not receive full and fair consideration and that the selection process was unlawful.

5. Additionally, I concur that Mr. Krioutchkov cannot raise new claims on appeal which he

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Dated this 31st day of March 2017 in Nairobi, Kenya.



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