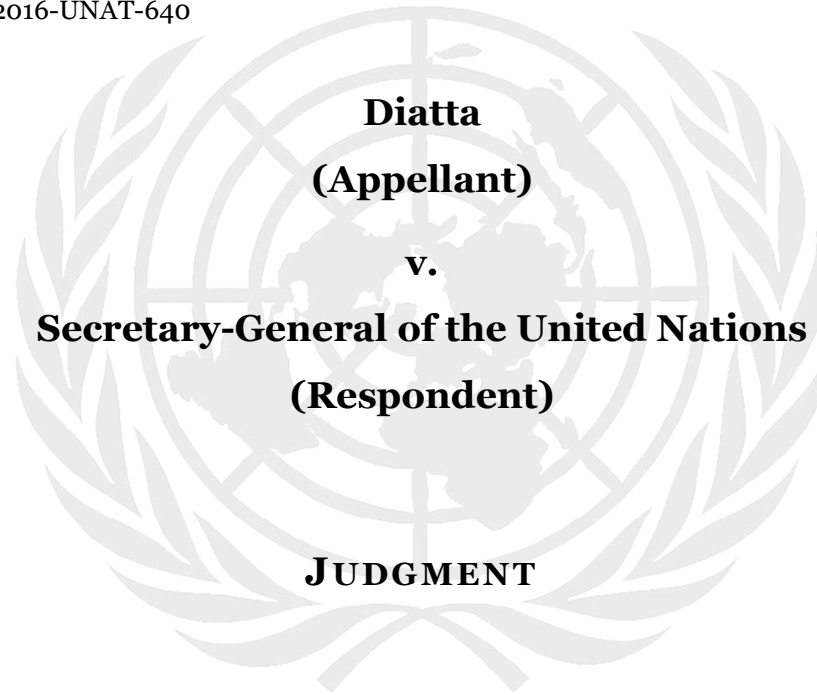




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-640



**Diatta
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Sophia Adinyira Judge Deborah Thomas-Felix
Case No.:	2015-849
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Mr. Diatta:	Self-represented
Counsel for Secretary-General:	Ernesto Bondikov

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/054, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 19 June 2015. Mr. Alassane Diatta filed an appeal against the Judgment on 14 August 2015 and the Secretary-General answered on 19 October 2015.

Facts and Procedure

2. Mr. Diatta is a retired staff member since 30 April 2014. On 16 November 2012, he filed an application with the UNDT contesting the decision not to select him for the position of Director, Documentation Division, Department of General Assembly and Conference Management (DGACM) at the D-2 level. The following facts leading up to his application are uncontested:¹

... The first job opening regarding the Post (number 11-ADM-DGACM-17359-D-NEW YORK (“JO 17359”)) was advertised with a posting period of 31 December 2010 to 1 March 2011. The Applicant indicated that he received confirmation of his application for the Post on 10 February 2011.

... The second job opening regarding the Post (number 11-ADM-DEPT FOR GA & CONFERENCE MGMT-19376-R-NEW YORK (“JO 19376”)) was advertised with a deadline of 14 May 2011. The Applicant and seven other candidates, including two female candidates, were short-listed and participated in a competency-based interview. The Applicant was assessed as only partially meeting the requirements and was not among the four candidates who were recommended for the post.

... A comparative analysis of the candidates included the following comments in the “Interview Assessment” column in respect of the Applicant:

While the candidate has direct conference management experience, all examples were tied to his work at the ICTR dating back to 1998-2001. Though verbose, the candidate’s responses were vague and not on point. Candidate’s presentation during interview was neither focused nor well articulated. Partially meets the requirement.

... By memorandum dated 30 June 2011, the Chairman of the Senior Review Group submitted the names of the four recommended candidates to the Secretary-General for consideration.

¹ Impugned Judgment, paras. 3-17.

... In a note dated 13 October 2011, the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) was advised that “the recommendation was not accepted by the Secretary-General” and asked to advise DGACM to re-advertise the position.

... The Post was then re-advertised. JO 21524 was posted between 27 October and 26 November 2011. The job opening include[d] the following information:

Assessment Method

Eligible applicants will be assessed via an essay, which may be followed by a competency-based interview depending on the result of the essay.

Special Notice

SPECIAL NOTE: This is a reissuance of Job Opening 19376. This job opening has been posted for an additional 30 days to attract a larger pool of candidates. Qualified female candidates are encouraged to apply. ...

...

... Eight candidates, including the Applicant, were short-listed for the position. Six of the short-listed candidates were internal and two were external. Three of the short-listed candidates were female.

... The short-listed candidates took part in a competency-based interview. The five-member interview panel consisted of the Under-Secretary-General, DGACM (“USG/DGACM”), two directors from DGACM, a director from the Office of Human Resources Management (“OHRM”), and a director from the Department of Public Information.

... By memorandum dated 28 December 2011 to the Chair of the Senior Review Group, the USG/DGACM submitted the recommendations of the interview panel. Attached to the memorandum was a comparative analysis of all of the interviewed candidates. The following comments were provided in the “Interview Assessment” column in respect of the Applicant (emphasis in original):

While the candidate has direct conference management experience, and acts as OIC of the Documentation Division from time to time, all examples [relate] to his work at the [International Criminal Tribunal for Rwanda (ICTR)] dating back to the period from 1998-2001. Though verbose, his responses were vague and not on point. Partially meets the requirement.

... By email from the ASG/OHRM dated 16 April 2012, the USG/DGACM was advised that the Secretary-General had selected a candidate for the Post. However, this candidate declined the Post. The Secretary-General selected one of the other recommended candidates and, by email dated 6 June 2012, the ASG/OHRM advised the USG/DGACM of the Secretary-General’s decision to appoint the selected candidate.

... By email dated 11 June 2012, the USG/DGACM advised a number of colleagues, including the Applicant, of the decision to appoint the selected candidate, stating:

Please note that the contents of my 17 April 2012 email notification have been overtaken by events. Following [Ms. V's] decline of the offer, the ASG/OHRM informed me on 6 June that the Secretary-General had decided to appoint [Ms. L] to the position. ...

... By email dated 13 June 2012, the Deputy Executive Officer, DGACM, personally advised the Applicant that a candidate other than him had been selected for the Post.

... On 5 July 2012, the Applicant submitted a request for management evaluation of the selection decision.

... By memorandum dated 24 July 2012, addressed to the Chief of the Management Evaluation Unit, the USG/DGACM attached documentation regarding the selection exercise for job openings 21524 and 19376, and provided the following explanation for the decision not to select the Applicant (emphasis in original):

For JO 21524, for which I was the Chair, I wish to state that the majority of the panel members found [the Applicant] as *'requiring development'* in one or more of the following competencies: accountability, technological awareness, leadership and managing performance. The only competency that he was deemed unanimously fully competent was professionalism.

Mr. Diatta's candidature was fully and fairly considered. It was his performance at the competency-based interview, on both occasions, which was below par. Each time, he failed to convince the five-member panel of his proven ability in four out of five requisite competencies, which resulted in his exclusion from the recommended list.

... By letter dated 1 August 2012, the Under-Secretary-General for Management advised the Applicant that based on a review by the Management Evaluation Unit, the Secretary-General had decided to uphold the decision not to select the Applicant for the Post.

3. On 16 November 2012, Mr. Diatta filed his application before the UNDT contesting the decision not to select him for the post and on 19 June 2015, the UNDT issued its Judgment, granting the application, in part.

4. The UNDT found numerous procedural irregularities in the advertisements of JO 19376 and JO 21524, including the failure to formally cancel JO 17359 and notify candidates of its cancellation prior to the issuance of JO 19376, the failure to advertise JO 19376 and JO 21524 for the required 60-day posting period, the use of the new openings

to extend the posting periods of the previous ones, after the deadlines for application had expired and the amendment of the work experience requirements in JO 19376.

5. The UNDT found that since the Director, DGACM, participated in the interview panel for JO 19376 which considered Mr. Diatta not to be suitable for the post, he should not have sat on the assessment panel for JO 21524; Mr. Diatta's essay was evaluated only by one out of five panel members; the scores contained in the table "Applicants['] Scores for the Essay Test" were not supported by individually signed scoring sheets of the panel members; the scores that the panel for JO 19376 awarded for presentation were not part of the assessment method provided for in the JO and were baseless since no presentation exercise took place. Finally, the scores awarded after the interview were contradicted by Mr. Diatta's performance evaluations and the facts on record.

6. The UNDT further found that there was no evidence showing the final scores received by Ms. L and Ms. V for their essays; there was no evidence regarding the final scores of the candidates for JO 21524 based on which the assessment panel decided to recommend candidates and not to recommend Mr. Diatta; and there were no records for the assessment of the interviews of the recommended candidates for JO 21524, including the selected candidate, by one of the panel members, Ms. M.H.L. The UNDT also found that the fundamental principle of equal treatment of candidates was not respected, as evidenced by the fact that Ms. L and Ms. V were evaluated on both the essay and the interview by the assessment panel for JO 21524, while the rest of the candidates were evaluated on the essay by the panel for JO 19376 and on the interview by the panel for JO 21524.

7. In light of the foregoing, the UNDT concluded that the mandatory provisions for the selection process were not followed for the post and that Mr. Diatta's right to be fully and fairly considered for the post was not respected. The UNDT, however, rejected Mr. Diatta's claims that the selection decision was tainted by improper motives and bias, that the requirements of the job opening were not respected and that the candidate lacked the crucial element of the necessary years of experience in conference management as compared with his experience.

8. The UNDT held that even if Mr. Diatta had been recommended, he had no right to be selected for the post. Taking into account the consistent jurisprudence and the fact that Mr. Diatta retired from the Organization on 30 April 2014, the UNDT rejected Mr. Diatta's

request to set aside the contested decision and to award him compensation equivalent to the salary at the D-2 level from the date he would have held the D-2 post until the date of his retirement on 30 April 2014. As to moral damages, the UNDT found that absent an express request for moral damages arising from the breach of Mr. Diatta's due process right, the UNDT Judgment represented reasonable and sufficient relief requested by Mr. Diatta in this regard.

Submissions

Mr. Diatta's Appeal

9. The UNDT erred in fact and law and failed to exercise its jurisdiction by failing to draw the only reasonable inference available from its own factual findings, namely that both Ms. L's selection and Mr. Diatta's non-selection "were rescindable and had to be rescinded".

10. The factual findings by the UNDT reveal that there was no record for the assessment of the successful candidate's interview by one of the panel members which suggests that her interview was assessed by only four out of the five panel members. The panel could not rely on the scores awarded by five panel members for some candidates and the scores awarded by four panel members for the selected candidate. Given the absence of the score of the selected candidate for the essay and the invalidity of her score for the interview, there was no evidence to suggest that she met the requirements for the post.

11. Having found that the proper procedures were not followed, that Mr. Diatta's right to full and fair consideration was violated, that irrelevant material was considered and that there was no evidence showing the final scores of the candidates for JO 21524 based on which the assessment panel decided to recommend Ms. L, the UNDT was required to rescind the contested decision. By refusing to do so, the UNDT erred in law and failed to exercise its jurisdiction.

12. Mr. Diatta contends that the record contains compelling evidence that, absent the established irregularities, he would have had a significant chance for promotion. In support of his contention, he submits that the panel member who made the essay assessments contained in the marking sheets ranked him third in a group of 11 shortlisted candidates; Mr. Diatta had served as Officer-in-Charge of the Documentation Division; and the poor scores awarded him after the interview were contradicted by documents and facts in the record. The fact that Mr. Diatta retired from the Organization did not reasonably prohibit the UNDT

from applying Article 10(5)(a) of its Statute to award him compensation as an alternative to rescission. While it could possibly be difficult to enforce a rescission order in the circumstances of the case, the payment of compensation was “irrefutably practicable”.

13. Even assuming *arguendo* that Mr. Diatta did not have a significant chance of promotion, as required by *Vangelova*,² *Bofill*,³ and *Dualeh*,⁴ he was still entitled to compensation for material damages under the subsequent consistent jurisprudence in *Marsh*,⁵ *Gusarova*⁶ and *Asariotis*⁷ which appears to have lowered the threshold to a “slight chance of being selected”.

14. The UNDT erred in fact and law and failed to exercise its jurisdiction in failing to award Mr. Diatta compensation for moral harm. Mr. Diatta explained before the UNDT how severely he was psychologically affected by the contested decision. Contrary to the UNDT’s contention, he never submitted that he filed his application only in the interests of justice and, absent an express waiver, the UNDT could not properly consider that he gave up his right to compensation. Moreover, the UNDT failed to do him justice by denying his request for compensation. Finally, there is a clear contradiction between the UNDT’s position that Mr. Diatta waived his right and its statement that he requested compensation for pecuniary damages. It was self-evident that the compensation could only be in monetary form.

15. Mr. Diatta asks that the Appeals Tribunal rescind Mr. L’s selection and Mr. Diatta’s non-selection; award appropriate compensation for his pecuniary loss and compensation for the moral harm he suffered; and affirm the Judgment in all other respects. In the alternative, he requests that the Appeals Tribunal remand the case for a fresh judgment by a different judge.

The Secretary-General’s Answer

16. The UNDT correctly held that the assessment panel’s determination that the selected candidate met the experience requirements of JO 21524 was in accordance with the job opening and supported by evidence. Having found no evidence of bias or improper motivation against Mr. Diatta, the UNDT applied the correct standard and concluded that

² *Vangelova v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-172.

³ *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174.

⁴ *Dualeh v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-175.

⁵ *Marsh v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-205.

⁶ *Gusarova v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-439.

⁷ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-496.

the successful candidate had been properly selected. Mr. Diatta failed to invalidate the assessment or to show any error in the UNDT's conclusion.

17. While the interview assessment sheet by one of the five panel members for JO 21524 could not be produced by the Secretary-General, the UNDT correctly concluded that the selected candidate had been properly selected. There is no evidence for Mr. Diatta's assertion that this panel member did not assess the candidates at all, and it follows, from the presumption of regularity, that all panel members assessed the candidates. Furthermore, the UNDT's conclusion with regard to one of the five panel members is erroneous, as the fact that the panel member in question had previously sat on the panel, is legally insufficient to show that he was not impartial. This conclusion is based on the provisions in the Inspira Hiring Manager Manual, which do not have the legal force attributed to it by the UNDT.

18. The only procedural irregularities that were identified in this case derived from the Secretary-General's failure to comport with certain requirements in manuals and guidelines of the Office of Human Resources Management governing recruitment systems. There were no findings by the UNDT that the Secretary-General failed to follow the relevant procedures under ST/AI/2010/3 (Staff Selection System).

19. The UNDT correctly exercised its discretion by not rescinding Mr. Diatta's non-selection and declining to award compensation. Mr. Diatta suffered no harm from any procedural irregularities, as he was considered all the way through the competency-based interview for JO 21524. Mr. Diatta and the other applicants from JO 19376 were automatically shortlisted and invited for the competency-based interview for JO 21524 and did not have to write an essay. Two additional candidates, applying for the first time for JO 21524, including the successful candidate, were added to the list of interviewees after they passed the written test required by the JO. All candidates were then assessed by the same panel on the same questions during the same competency-based interview with no indication from the record that any extraneous evidence had been considered by the panel.

20. In the Comparative Analysis report the panel prepared in accordance with Section 7.9 of ST/AI/2010/3, the panel provided its reasoned conclusion with respect to Mr. Diatta's work experience, stating that all of Mr. Diatta's examples of relevant experience related to a previous position from 1998 to 2001 and that "[t]hough verbose, his responses were vague and not on point", resulting in a rating of "partially meets the requirement". It was well

within the panel's discretion to conclude that Mr. Diatta did not demonstrate the requisite competencies during his competency-based interview. The Staff Regulations, Staff Rules, ST/AI/2010/3, and JO 21524 did not require the panel to consider Mr. Diatta's performance evaluations or other extraneous material in assessing his competencies.

21. Finally, the UNDT did not err in basing the decision not to rescind the selection decision partly on the ground that Mr. Diatta had retired at the time of the Judgment. A rescission would have served no purpose. The UNDT explained that Mr. Diatta's case was preceded by a backlog of 64 pending cases at the time and Mr. Diatta has presented no evidence that the UNDT improperly delayed consideration of his case.

22. The UNDT correctly exercised its jurisdiction by not awarding moral damages. Contrary to Mr. Diatta's contention, the UNDT was not required by law to ask Mr. Diatta whether he waived any damages. Rather, it was his burden to specify what type of damages he was seeking compensation for and it was his burden thereafter to adduce evidence of such damages. In the present case, Mr. Diatta did not request compensation for moral damages in his application to the UNDT. Even if there was an "inquiry" requirement on the UNDT, Mr. Diatta was given ample opportunity to express whether he was seeking moral damages, but failed to do so. The UNDT acted within its discretion and correctly decided not to award moral damages.

23. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety and affirm the UNDT Judgment.

Considerations

24. Article 2(1) of the Appeals Tribunal Statute provides:

1. The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

(a) Exceeded its jurisdiction or competence;

(b) Failed to exercise jurisdiction vested in it;

(c) Erred on a question of law;

(d) Committed an error in procedure, such as to affect the decision of the case; or

(e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

25. In the instant case, Mr. Diatta in his appeal reiterates his claims but does not address any error of fact or law in the UNDT Judgment.

26. The UNDT did not rescind the promotion process because it found that the irregularities in the procedure did not amount to bias or discrimination and that Mr. Diatta had received fair consideration.

27. Both the selected candidate and the initial preferred candidate were female candidates.

28. JO 21524 was issued to replace JO 19376 and was posted for additional 30 days to attract a larger pool of candidates. Qualified female candidates were encouraged to apply because none had applied when the prior job openings were advertised. A prior job opening 17359 should have but was not formally cancelled. Candidates who applied for the prior job openings did not need to apply again.

29. The procedural irregularities of not formally cancelling the first JO and the fact that the selected and preferred candidates were evaluated both in the essay and interview by the same panel while the other candidates were interviewed by the same panel but their essays were evaluated by a different one do not warrant the rescission of the selection process. Mr. Diatta had already submitted his essay for JO 19376 and was not required to write a new essay. The score already awarded was accepted for JO 21524.

30. Mr. Diatta also argues that his right to full and fair consideration was violated and assumes that only four of the five panel members interviewed the selected candidate and contests the scores awarded to him. His essay allegedly was ranked third and the poor scores awarded after the interview in 2011 contradicted the 2008 selection process in which he was recommended and the fact that he had been officer-in-charge.

31. Whatever the scores in 2008, the MEU noted that the panels in both interviews in 2011 did not recommend Mr. Diatta because his performance was rated as “requiring development”.

32. The record of the case shows that the irregularities in the procedure do not amount to a breach of Mr. Diatta’s due process rights. He was not singled out or discriminated.

33. In *Rolland*, we stated:⁸

... 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.

34. In *Ljungdell*, we stated:⁹

... 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.

35. In *Charles*, we held:¹⁰

... [T]he Appellant has not established any error of fact or law that would warrant reversal of the first instance Judgment. This Court held in *Isarabhakdi* that “[i]t is not enough to demonstrate an illegality to obtain compensation: the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If these other two elements of the notion of responsibility are not justified, only the illegality can be declared but compensation cannot be awarded.” As stated by this Tribunal in *Wu*, “not every violation of due process rights will necessarily lead to an award of compensation”.

36. Finally, it is irrelevant whether Mr. Diatta filed his application before the UNDT in the interests of justice or seeking an award of moral damages since there is no evidence of damages.

37. No compensation is awarded.

⁸ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 20.

⁹ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30, citing *Schook v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-216, quoting *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

¹⁰ *Charles v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-283, para. 21 (internal footnotes omitted).

Judgment

38. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Thomas-Felix

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar