



**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 compensation in lieu of rescission.
3. For the reasons set out herein, we uphold the appeal and vacate the Impugned Judgment.

Facts and Procedure

4. Ms. Khan is an Administrative Assistant at the GL-5 level employed in the Supply Chain Management and Service Delivery Section (SCSD) of the United Nations Military Observer Group in India and Pakistan (UNMOGIP) in Islamabad.
5. On 8 September 2019, UNMOGIP advertised a job opening for the position of Property Control and Inventory Assistant at the GL-6 level. On 17 September 2019, Ms. Khan applied for the position. Ms. Khan and 11 other candidates were found to be eligible and invited to take a written assessment. The written assessment was administered on 19 November 2019. Initially, the passing score was set at 60 per cent. Only three job candidates passed the written assessment. The selected candidate scored 80 per cent. Ms. Khan scored 52 per cent and therefore did not achieve the initial pre-determined passing score. However, the Hiring Manager, who was Ms. Khan's supervisor, lowered the passing score to 50 per cent on the grounds that the interview panel should consider at least four job candidates. The reduced passing score meant that Ms. Khan obtained a passing mark on the written assessment. Ms. Khan and the other three candidates who had also passed the written assessment were then invited for the competency-based interviews.
6. Prior to the competency-based interviews, however, the Chief of Mission Support (CMS) received a complaint concerning the selection exercise. The complainant, a staff member in the Field Technology Section (FTS) of UNMOGIP, alleged that Ms. Khan had discouraged her from applying for the position by saying that the Hiring Manager had promised Ms. Khan that she would be selected.

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 Regulations and Rules and the Guidelines for the Selection of Locally Recruited Staff Members in the United Nations Peacekeeping Operations and Special Political Missions (the Guidelines). The MRP endorsed the selection process on 18 February 2020.

9. On 28 February 2020, the CMS chose the selected candidate for appointment to the position. In making his decision the CMS considered UNMOGIP's human resources objectives, reviewed the reasoned and documented record of the selection exercise, and weighed the professional qualifications and experience of the two recommended job candidates against the requirements of the position. He concluded that the selected candidate was the most suitable for the position due to his superior analytical and writing skills, as well as his experience in finance; asset management (capitalisation and depreciation); International Public Sector Accounting Standards (IPSAS); and Umoja, the Organisation's enterprise resources planning platform.

10. The CMS documented the reasons for his decision in a memorandum dated 28 February 2020 to the CHRO. The memorandum recorded that gender had not been a decisive factor in the selection as both candidates were internal and therefore the selection of a female candidate would not have had any impact on the entity's gender balance. Seniority and career advancement were significant considerations as the selected candidate had joined the Mission in September 2007 and had since been at the same level while Ms. Khan joined the Mission in July 2010 and was moved to a higher level (GS-5) in 2014. It was accepted that the position required analytical and writing skills and the CMS concluded that the

selected candidate had an edge over Ms. Khan in that regard. Although Ms. Khan had assumed responsibility for the tasks of the position after the incumbent left for assignment in another peacekeeping mission, the post required a background of accounting in terms of asset management with regard to capitalisation and depreciation of assets and a knowledge of IPSAS, and the selected candidate was stronger in these functional areas and had handled assets and inventory through the finance process, as well as substantial knowledge and understanding of Umoja processes which is an important requirement of managing assets and inventory.

11. Ms. Khan was made aware of her non-selection for the position on 8 March 2020. On 19 March 2020, she submitted a request for management evaluation of the decision not to select her for the position (the contested decision). Ms. Khan was formally informed that she had not been selected for the position on 27 March 2020.

12. On 2 May 2020, the Under-Secretary-General for Management Strategy, Policy, and Compliance upheld the contested decision.

13. Ms. Khan filed an application appealing against the contested decision with the UNDT on 25 June 2020.

The UNDT Judgment

14. The UNDT issued the Impugned Judgment on 8 April 2021.

15. Ms. Khan argued before the UNDT that she had not been given full and fair consideration in the contested selection on three grounds: i) the CMS had no authority to ask the hiring manager to recuse himself and unlawfully removed him from the interview panel on the basis of a perceived conflict of interest when there was no conflict of interest; ii) in making the selection decision among the two recommended candidates, the CMS unlawfully failed to consult with the hiring manager and took into account irrelevant matters and did not take into account relevant matters; and iii) the CMS exhibited bias against her by a series of actions he took in the contested decision.

16. The UNDT held that the Guidelines did not prohibit the replacement of the Hiring Manager. Thus, his replacement did not violate any provision of the Guidelines and fell within the Administration's broad discretion in matters of staff selection. It doubted that there was sufficient evidence to conclude that the replacement of the hiring manager was a

reasonable exercise of discretion. However, in somewhat contradictory fashion, the UNDT held that as the selection documentation did not provide for the replacement of a hiring manager in the middle of the selection process due to a perceived conflict of interest, the replacement of the hiring manager may not have complied with the applicable procedures as it was not reviewed by the MRP which was tasked to determine whether the applicable procedures were followed under the Guidelines. Nevertheless, this procedural irregularity, if such, was inconsequential because Ms. Khan was successful in the competency-based interview which resulted in her being recommended for the position together with the selected candidate on an unranked basis. Any procedural irregularity was thus not determinative of the outcome of the selection exercise. The UNDT accordingly held that Ms. Khan failed to show that the removal of the Hiring Manager from the interview panel affected her right to full and fair consideration.

17. The UNDT also rejected Ms. Khan's claim that the contested decision was tainted by ulterior motives since the actions of the CMS throughout the selection exhibited bias against her. The UNDT held that Ms. Khan had failed to discharge the evidentiary burden to establish bias.

18. The UNDT also rejected Ms. Khan's claims that the CMS unlawfully failed to consult with the Hiring Manager. The Guidelines provide that the "Head of Mission will select the candidate he/she considers to be best suited for the functions, in consultation with the Hiring Manager concerned". It was not disputed that the Hiring Manager was not consulted in making the selection decision. However, the UNDT held that Ms. Khan had failed to demonstrate how the failure to consult with the Hiring Manager adversely affected her right to full and fair consideration and thus to prove that there was a consequential or vitiating procedural irregularity.

19. Regarding Ms. Khan's claim that the CMS failed to consider her gender in the selection decision in an appropriate manner, the UNDT held that the applicable law, ST/AI/1999/9 (Special Measures for the Achievement of Gender Equality), only applies to "the filling of all vacant posts in the Professional category and above" (sec. 1.2) and "temporary assignments in the Professional category and above and in the General Service and related categories" (sec. 2.1). Since the contested decision related to an appointment in the General Service categories that was not a temporary assignment, ST/AI/1999/9 did not

apply. In any event, the facts show that gender was considered in the selection and was held to be a neutral consideration.

20. It is important to note that Ms. Khan has not filed a cross-appeal challenging the findings of the UNDT in relation to the issues of the replacement and non-consultation of the Hiring Manager, alleged bias and gender.

21. The UNDT however held that the Administration had considered irrelevant matters in making the selection decision, namely the seniority and career advancement of the two candidates, and rescinded the contested decision on that basis. It referred in particular to Staff Regulation 4.2 which provides that the paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity and that due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. In addition, para 39 of the Guidelines provides that the Head of Mission can take into account “the human resources objectives and targets as set out in the human resources scorecard” and give consideration to “staff members who are victims of malicious acts or natural disasters” and staff members who were “affected by abolition of positions or workforce reduction in a Secretariat entity”. In light of these provisions, the UNDT held that there was no legal basis to consider the fact that the selected candidate joined the Mission earlier than Ms. Khan and that the selected candidate had been at the same level since 2010 to warrant giving priority consideration to the selected candidate to the detriment of Ms. Khan.

22. The UNDT accordingly held that the seniority and career advancement of the two candidates were irrelevant matters in the selection decision; and thus Ms. Khan’s right to full and fair consideration was violated and the contested decision was unlawful. The UNDT rescinded the selection decision (without a joinder of the selected candidate) and set in lieu compensation at the equivalent of 50 per cent of the difference between Ms. Khan’s net base salary and the net base salary she would have obtained in the vacant position for two years.

23. On 7 June 2021 the Secretary-General filed an appeal against this finding of the UNDT and the relief granted by it.

24. As mentioned, Ms. Khan has not filed a cross-appeal against any of the other findings of the UNDT.

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 efficiency, competence and integrity as contemplated in Staff Regulation 4.2 and Paragraphs 37 and 39 of the Guidelines.

26. The Secretary-General further submits that the UNDT exceeded its competence and erred on a question of law by erroneously stepping in the Secretary-General's shoes in a matter of staff selection by using its own judgment on the most suitable candidate rather than considering if the Secretary-General had exercised his discretion properly.

27. The UNDT erred further by failing to appreciate that the contested decision rested on a consideration of the selected candidate's skills in addition to the considerations of seniority and career advancement.

28. The Secretary-General argued further that the UNDT erred in its award of in lieu compensation without evidence that Ms. Khan would have received an appointment of two-year duration.

29. The Secretary-General requests that the Impugned Judgment be vacated in its entirety.

Ms. Khan's Answer

30. Ms. Khan (despite not having filed a cross-appeal) maintains that the selection was unreasonable due to the replacement and non-consultation of the Hiring Manager, the alleged bias and failure to properly consider the issue of gender.

31. Ms. Khan argued that seniority and career advancement were irrelevant factors, and not legally prescribed, the consideration of which rendered the contested decision unreasonable and unlawful. Such considerations have no logical bearing to suitability for

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.

37. The Charter of the United Nations, the United Nations Staff Regulations and Rules, and the Guidelines require the Secretary-General to secure the highest standards of efficiency, competence, and integrity when appointing staff members to the service of the Organisation. Furthermore, the UNAT has consistently affirmed that the Secretary-General's broad discretion in matters of the appointment of staff members implies the duty to choose the best evaluation method to assess which candidates are most qualified for selection.²

38. In assessing reasonableness, there can be no pre-ordained *numerus clausus* of relevant factors. Relevance depends on the circumstances in which the discretion is exercised and is thus factually or context specific. Thus, in exercising its discretion to make a selection, the Administration is not restricted to factors or considerations explicitly listed in any governing legal instruments. It may consider all relevant factors, as long as such factors are not arbitrary, irrational or capricious. The UNDT, therefore, erred in law in finding that the Administration was not legally allowed to consider seniority or career advancement. Such considerations are rationally connected to the power of the Secretary-General to secure the highest standards of "efficiency, competence and integrity" in making appointments in that they take account of track record (proven efficiency, competence and integrity) and fairness. This is precisely what Staff Regulation 4.2 and Paragraphs 37 and 39 of the Guidelines are aimed at, the provisions of which the UNDT puzzlingly and erroneously relied on to hold irrelevant the highly relevant considerations of seniority and career advancement.

39. The finding of the UNDT discloses a misunderstanding of what constitutes a lawful and reasonable exercise of discretion in a selection exercise. It is entirely proper to make a choice between two recommended candidates based partly on their respective seniority and time already served at a particular grade. The UNDT also erred in essentially reversing the burden of proof by requiring the Secretary-General to show that the factors considered were explicitly provided for in the legal framework rather than considering whether the staff member had shown by clear and convincing evidence that the contested decision was unreasonable in its basis, motive or effect.

² *Riecan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-802, para. 22.

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 IPSAS. The selected candidate was found to possess sound knowledge in all these areas and had in the past handled assets and inventory through the finance process. In addition, he had superior knowledge and understanding of the Umoja process. It is, therefore, clear that the Administration preferred the selected candidate not only because he had served longer than Ms. Khan but also had superior skills, confirmed perhaps by the fact that he scored much higher than Ms. Khan on the written test, which, had the evaluation criteria not been

³ *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932.

⁴ *Ibid.*, para. 27.

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 cross-appeal, 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