



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

Judgment No. 2023-UNAT-1344

**Antonio Ponce-Gonzalez
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Graeme Colgan Judge Dimitrios Raikos
Case No.:	2022-1669
Date of Decision:	24 March 2023
Date of Publication:	11 May 2023
Registrar:	Juliet Johnson

Counsel for Mr. Ponce-Gonzalez:	George G. Irving
Counsel for Secretary-General:	Amanda Stoltz

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (UNAT or Appeals Tribunal) has before it an appeal by the Secretary-General of the United Nations against Judgment No. UNDT/2021/161 issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) on 23 December 2021 (impugned Judgment), in the case of *Ponce-Gonzalez v. Secretary-General of the United Nations*. In the impugned Judgment, the UNDT granted Mr. Ponce-Gonzalez's application challenging the Administration's failure to afford full and fair consideration to his candidacy for the post of P-5 Chief, Operations and Resource Management (CORM), advertised under Recruit-from-Roster (RFR) exercise number 104637 and abuse of authority in cancelling the RFR in violation of the applicable rules following his unlawful disqualification. The UNDT ordered the rescission of the contested decision, in-lieu compensation, as well as damages for loss of opportunity.

2. For the following reasons, UNAT grants the Secretary-General's appeal, reverses the UNDT Judgment and dismisses the application in its entirety.

Facts and Procedure

3. Mr. Ponce-Gonzalez is a Chief, Budget and Finance Officer, serving on a fixed-term appointment at the P-4 level with the United Nations Security Force for Abyei (UNISFA).

4. On 9 October 2018, the Administration advertised in Inspira a RFR exercise under the reference 18-Administration-UNISFA-104637-J-Abyei for the position of CORM, at the P-5 level, with UNISFA.

5. Mr. Gonzalez timeously applied for the RFR position as a rostered candidate.

6. The Comparative Analysis Report (CAR) raised on 2 December 2018 showed that a total of six rostered applicants including Mr. Ponce-Gonzalez were assessed, but none of them was recommended.

7. On 11 January 2019, UNISFA circulated a TJO 109862 for the same CORM position. Mr. Ponce-Gonzalez applied for the position in a timely manner and was shortlisted and invited for an interview.

8. RFR 104637 was administratively cancelled on 27 January 2019, and the following day, Mr. Ponce-Gonzalez was notified that the RFR 104637 recruitment exercise had been cancelled and that the post might be advertised at a later stage.

9. On 18 March 2019, Mr. Ponce-Gonzalez requested management evaluation of the decision to cancel RFR 104637 “while the process was proceeding” and the “[fa]ilure to afford full and fair consideration” to his candidacy for the CORM position. In a letter dated 7 May 2019, the Management Evaluation Unit (MEU) informed Mr. Ponce-Gonzalez that his request for management evaluation was not receivable and premature, because the cancellation of RFR 104637 was merely a step in the selection process for the CORM position and was not a final decision amenable to appeal. The MEU noted that the advertisement of RFR 104637 had not resulted in the selection of any rostered candidate, and moreover, it had been superseded by the circulation of TJO 109862.

10. On 28 May 2020, the UNDT issued Judgment No. UNDT/2020/079 dismissing Mr. Ponce-Gonzalez’s application as not receivable, because it lacked jurisdiction to review preparatory steps of an administrative decision.

11. Mr. Ponce-Gonzalez appealed. In Judgment No. 2021-UNAT-1099, UNAT found that the circumstances of the case warranted allowing Mr. Ponce-Gonzalez to challenge the decision to disqualify him from the selection process, since it could not be regarded as a mere continuation of the eventually cancelled selection exercise, and it remanded the case for adjudication on the merits.

12. On 23 December 2021, the UNDT issued Judgment No. UNDT/2021/161. The UNDT found that the RFR exercise had been “improperly cancelled”¹ and that Mr. Ponce-Gonzalez’s candidacy did not receive full and fair consideration. The UNDT concluded that the hiring manager’s assessment of Mr. Ponce-Gonzalez’s experience had “no relationship at all with the published criteria” and that “the published criteria were not invoked and that unpublished criteria were instead evoked during the Applicant’s evaluation”.² The UNDT then proceeded to substantively review Mr. Ponce-Gonzalez’s PHP, concluding that he had “met and exceeded” the requirements for the position as well as the “unpublished desirable criteria for which he was negatively assessed” and that therefore he should have received a “positive assessment”.³

¹ Impugned Judgment, para. 37.

² *Ibid.*, para. 29.

³ *Ibid.*, paras. 30 to 36.

13. The UNDT further found that the Administration had “irregularly maintained two recruitment exercises” and that the Administration had failed to notify Mr. Ponce-Gonzalez that he had “been eliminated as required by section 10 of ST/AI/2010/3”.⁴ The UNDT further found that the hiring manager had acted without authority and was conflicted: The UNDT accepted Mr. Ponce-Gonzalez’s assertions that the hiring manager acted without authority on the basis that the Secretary-General “failed or refused” to provide the information requested by the UNDT in its Order No. 215.⁵ The UNDT further found that the hiring manager was conflicted because he acted both as the head of entity who had to make the decision as well as the hiring manager who was to execute it. The UNDT considered this to be a violation of the segregation of duties under Section 2.3 of ST/SGB/2019/2 and a breach of Staff Rule 1.2(q). The UNDT concluded that the Administration’s discretionary authority to cancel the RFR exercise had been “misused and abused”.⁶

14. The UNDT ordered the rescission of the contested decision or compensation in lieu of rescission of the sum equivalent to the difference in Mr. Ponce-Gonzalez’s pay between the P-4 and P-5 levels from the date of the selected candidate’s appointment to the TJO 109862 to the date of Mr. Ponce-Gonzalez’s retirement in approximately five years’ time, including the difference in pension contributions, as well as damages for loss of opportunity in the amount of USD 40,500.

15. On 21 February 2022, the Secretary-General appealed Judgment No. UNDT/2021/161, and on 21 April 2022, Mr. Ponce-Gonzalez filed his answer.

Submissions

The Secretary-General’s Appeal

16. The Secretary-General submits that the UNDT committed various errors of law and fact and exceeded its jurisdiction. Pursuant to Article 101.3 of the Charter of the United Nations and Article IV of the Staff Regulations, the Secretary-General has the exclusive authority to select and appoint staff. ST/AI/2010/3 sets up a broadly drawn legal framework for the selection process. The legal framework does not regulate when a selection process may be cancelled. Recent UNAT jurisprudence on the cancellation of selection processes provides it falls within the discretionary authority of the Administration to decide to cancel a recruitment exercise and/or to initiate a

⁴ *Ibid.*, para. 44.

⁵ *Ibid.*, para. 48.

⁶ *Ibid.*, para. 51.

new one. A decision to cancel a selection process will be a lawful exercise of this discretion where it is based on sound reasons and is not tainted by improper motives.

17. In the present case, the evidence adduced by the UNDT shows clearly that the decision to cancel the RFR exercise was based on a sound reason; namely, that none of the rostered candidates were suitable for the position following a review by the hiring manager. Moreover, the evidence adduced by the UNDT demonstrates that the evaluation criteria were applied fairly and consistently to all candidates in compliance with the applicable Regulations and Rules, and the contested decision was not tainted by any improper motive or procedural irregularity. In these circumstances, the discretion to decide to cancel was lawfully exercised as it was based on sound reasons and there was no evidence of improper motives.

18. Rather than considering whether the Administration's discretionary authority to cancel a selection exercise was lawfully exercised, the UNDT essentially made its own promotion decision and, in doing so, improperly usurped the broad discretion of the Secretary-General in matters of staff selection and promotion. It is well-settled that being part of a roster does not create any right or entitlement to selection for a particular position. The UNDT erred in both law and fact in finding otherwise. It was not for the UNDT to determine whether it would have made a different assessment of the suitability of the candidates but rather to determine whether there were sound reasons for the cancellation of the selection exercise in the first place. A non-biased assessment that none of the candidates were suitable is a sound reason for cancelling a selection exercise. Mr. Ponce-Gonzalez's candidacy was reviewed on the same basis as all the other candidates, and he received full and fair consideration during the hiring manager's assessment of the rostered candidates.

19. The Secretary-General submits that the UNDT erred in law and fact and exceeded its jurisdiction in concluding that Mr. Ponce-Gonzalez was evaluated against unpublished "selection criteria" and that he, in fact, "met and exceeded" the criteria. The UNDT erred in law by suggesting that a candidate who meets the minimum requirements of a job opening is entitled to a "positive assessment". The UNDT erroneously relied on Section 7.1 of ST/AI/2010/3 which states that applicants applying to job openings will be pre-screened to determine whether they meet the minimum requirements of the job opening. Mr. Ponce-Gonzalez was not disqualified during the pre-screening under Section 7.1 of ST/AI/2010/3; rather, the hiring manager's assessment of the candidates was documented in a CAR under Section 7.6 of ST/AI/2010/3. It is within the hiring manager's discretion to draw upon both the required and the desirable experience

when determining the applicable evaluation criteria used to shortlist, and ultimately recommend, candidates.

20. The Secretary-General further contends that the UNDT erred in its consideration of the Administration's assessment of Mr. Ponce-Gonzalez's experience against the evaluation criteria and improperly substituted its own interpretation for that of the hiring manager, who was familiar with the job requirements and the demands of the position. Moreover, the evaluation criteria were applied equally to Mr. Ponce-Gonzalez and to the other five candidates who were considered for the position. The hiring manager's application of the evaluation criteria was neither manifestly unreasonable nor arbitrary, nor was there evidence of any bias, discriminatory practice or mala fides, and there was therefore no basis for the UNDT to interfere in the hiring manager's substantive assessment.

21. The Secretary-General avers that the UNDT erred in law in finding that there were procedural irregularities in the RFR exercise. Despite concluding that the Administration had "irregularly maintained two recruitment exercises", the UNDT failed to identify any element of the legal framework or the jurisprudence of the UNAT that supported this conclusion. There is no provision in ST/AI/2010/3 that prohibits two recruitment exercises to be running at the same time. To the contrary, Section 2.2(d) of Administrative Instruction ST/AI/2010/4 (Administration of temporary appointments) provides that the Organization may use temporary appointments to fill a vacant position pending the finalization of a regular selection process.

22. The UNDT also erred in concluding that the Administration failed to notify Mr. Ponce-Gonzalez of his elimination "as required" by ST/AI/2010/3. Such notification is only required when a selection decision has been made. However, in the present case no selection decision was made that would be capable of triggering the 14-day notice requirement. Mr. Ponce-Gonzalez was formally notified that the RFR exercise had been cancelled on 27 January 2019, the same day that the RFR exercise was administratively cancelled. Nothing more is required by the legal framework. In any event, there is no evidence that either of these alleged irregularities were relevant to the contested decision or prejudiced Mr. Ponce-Gonzalez in any way. The UNDT's findings of procedural error are thus erroneous and immaterial to any claims that the alleged irregularities vitiated the cancellation decision or provide a basis for compensation.

23. The Secretary-General says that the UNDT erred in law and in fact in finding that the hiring manager acted without authority. Contrary to the UNDT's findings, the Secretary-General did not fail or refuse to provide the information requested by the UNDT. The UNDT was provided with a copy of the 11 January 2019 delegation of authority addressed from the Head of Mission to the hiring manager, as well as a copy of the delegation details contained in the delegation portal that had been established and operated in accordance with ST/SGB/2019/2. Together, these documents establish the authorities that were sub-delegated from the Head of Mission to the hiring manager. The fact that the Head of Mission elected to broadly sub-delegate the human resources authorities for which they had delegated authority to the hiring manager without imposing additional restrictions or reserving certain authorities, does not have any impact on the validity of the delegation.

24. Furthermore, the Secretary-General contends that the UNDT erred in law and in fact in finding that the hiring manager had a conflict of interest because he acted as the head of entity who had to make the decision as well as the hiring manager who was to execute it. The UNDT's assumption that heads of entities cannot be hiring managers is incorrect. All hiring and selection authority stems from the Secretary-General's authority to appoint staff, as provided in Article 101 of the United Nations Charter. Section 2.3 of ST/SGB/2019/2 in no way suggests that officials who make administrative decisions cannot execute these decisions because of a conflict of interest. The hiring manager had, and lawfully exercised, discretionary authority to cancel the RFR exercise.

25. Turning to the award of compensation, the Secretary-General submits that the contested decision was lawful, and accordingly, the UNDT's award of compensation should be set aside. In the event that the UNAT upholds the UNDT's findings on the lawfulness of the contested decision, it should nevertheless decrease the UNDT's award of in-lieu compensation under Article 10(5)(a) of the UNDT's Statute. The UNDT based its award on the assumption that Mr. Ponce-Gonzalez was entitled to be promoted to the position and as such, it did not amount to the economic equivalent of him being considered for the position. There was no selection decision capable of being rescinded by the UNDT and the UNDT was not entitled to calculate the compensation owed to Mr. Ponce-Gonzalez on that basis.

26. The Secretary-General asserts that the UNDT erred in law in finding that Mr. Ponce-Gonzalez's chance of being recommended for the position was 100 per cent and subsequently in assuming that if he was recommended, then he necessarily also had a 100 per cent chance of selection. Furthermore, by assuming the role of the Administration in making a selection

decision the UNDT *inter alia* failed to consider either geography or gender, as the hiring manager would have been required to consider. There was also no logical basis for the UNDT's assumption that Mr. Ponce-Gonzalez would have been the only candidate, among six, who met the job requirements. Even if Mr. Ponce-Gonzalez had been recommended, and subsequently selected, for the position, he would have received, at most, the difference in salary between the P-4 and P-5 level for one year, being the duration of his underlying fixed-term appointment.

27. Finally, the UNDT failed to consider Mr. Ponce-Gonzalez's duty to mitigate his losses. Mr. Ponce-Gonzalez had the opportunity to, and indeed did, apply for the same position when it was advertised as a TJO (TJO 109862). However, by refusing to participate in the selection exercise, Mr. Ponce-Gonzalez failed to mitigate his losses. In addition, the UNDT failed to take into account the legal and factual circumstances of the present case when it ordered the rescission of the contested decision. Not only did the purported irregularity have no impact on Mr. Ponce-Gonzalez's status as a staff member, but the RFR exercise had been cancelled in January 2019. The position therefore no longer existed, and another candidate had since been appointed to the post advertised under TJO 109862.

28. As to the award of damages for loss of opportunity under Article 10(5)(b) of the UNDT's Statute, the Secretary-General submits that the UNDT erred in finding that there was a 100 per cent probability that Mr. Ponce-Gonzalez would have been recommended for the post had he been given fair consideration; when he had only lost the opportunity to be considered for the position in a resumed selection exercise. The UNDT therefore, erred in finding that Mr. Ponce-Gonzalez was entitled to be appointed to the position and that he would have remained in the position until retirement. In addition, the UNDT erred in law by awarding compensation that was duplicative with its award under Article 10(5)(a) of the UNDT's Statute. The UNDT failed to identify the nature or extent of any alleged harm directly caused by the administrative decision or how the alleged pecuniary harm differed from the value of the rescinded administrative decision.

29. The Secretary-General requests that the Appeals Tribunal grant the appeal, reverse the UNDT Judgment and dismiss the application in its entirety.

Mr. Ponce-Gonzalez's Answer

30. Mr. Ponce-Gonzalez submits that the UNDT properly conducted a judicial review of the manner in which the decision-maker reached the impugned decision and did not substitute its own decision for that of the hiring manager. The Dispute Tribunal exercised its inherent jurisdiction in

conducting a judicial review for additional fact-finding and reaching a judgment on the merits. Mr. Ponce-Gonzalez submits that the UNDT did not impose any additional obligations on the existing framework but only examined whether that framework was applied in a reasonable and fair manner. The underlying argument of the appeal criticizing this as judicial activism is thus seriously misplaced and only reinforces the impression of a reluctance to enforce accountability or to allow judicial oversight.

31. Mr. Ponce-Gonzalez submits that improper interference by a manager has been found by UNAT to be a ground for challenging the cancellation of a selection process. Here, the hiring manager retained full control over the selection exercise with no oversight. This allowed the hiring manager to circumvent procedural safeguards and manipulate the RFR recruitment process by improperly cancelling the exercise following Mr. Ponce-Gonzalez's unlawful disqualification. In trying to justify an unwarranted cancellation, the Secretary-General suggests ST/AI/2010/3 is a legal framework that would allow for such unfettered discretionary authority to be applied to staff selection. However according to the Manual for the Recruiter job openings are not to be cancelled where at least one candidate has been deemed suitable, a practice which has been consistently upheld by the Tribunals to avoid prejudice against a successful candidate. Moreover, as established by the Appeals Tribunal, the JO cancellation should occur at the earlier stages of the exercises whereas in this case it occurred at the end in conjunction with a verifiably unsustainable and false misrepresentation of Mr. Ponce-Gonzalez's qualifications. The UNDT did not err when it concluded that discretionary authority to cancel the JO was misused and abused.

32. The UNDT found *prima facie* evidence that Mr. Ponce-Gonzalez possessed both the necessary and desirable qualifications for the position and that the specific qualifications and evaluation criteria imposed to exclude him were not published in the job opening. All this was found to be lacking in impartiality, discriminatory and a clear violation of transparency. The UNDT did not exceed its jurisdiction, nor did it conduct its own evaluation of Mr. Ponce-Gonzalez's candidacy as suggested by the Secretary-General. The findings were based on the evidence of the Job Opening and CAR which demonstrated relevant material was ignored while unpublished material was introduced improperly.

33. Mr. Ponce-Gonzalez further submits that the appeal contains numerous instances of false arguments aimed at distorting the considerations and findings of the Judgment. Neither Mr. Ponce-Gonzalez nor the UNDT argued there was any entitlement to promotion by virtue of being rostered. The UNDT found that Mr. Ponce-Gonzalez did not receive full and fair

consideration and was deprived of a fair chance at a unique opportunity for promotion on the basis of the unlawful rejection of his candidacy and subsequent cancellation of the exercise. While the Secretary-General submits that all candidates were assessed on the same basis, he provides no evidence of this. In fact, there was no consistency or transparency. Annex 1 to the answer shows that the Secretary-General redacted the entire assessment of all other candidates to cover what is an unsubstantiated claim.

34. The CAR of 2 December 2018 shows that the hiring manager conceded that Mr. Ponce-Gonzalez complied with more than one of the experience requirements which proved that he not only met but exceeded the requirements as per the published JO. The Secretary-General never invoked the desirable requirements in the CAR assessment in which the hiring manager concluded in the final comment that he did not meet the “minimum requirements of the position”. The Secretary-General’s efforts to retroactively impose the desirable requirements after already disqualifying Mr. Ponce-Gonzalez for not meeting the minimum requirements are simply not credible. It is also absurd and perverse that the Secretary-General suggests that Mr. Ponce-Gonzalez does not have desirable work experience in the precise same functions he has been performing as Chief Finance and Budget Officer at UNISFA since 2012.

35. Mr. Ponce-Gonzalez avers that the UNDT did not err when it found the process to be flawed and arbitrary and procedurally irregular. The extent to which the CAR of Mr. Ponce-Gonzalez was flawed and irregular is evident in his rating “partially meets requirements” for an interview that never took place. The Secretary-General now seeks to change the requirements of the JO publication, suggesting that Mr. Ponce-Gonzalez had to comply not only with one or more but all six published work experience requirements (whereas the JO publication only required one or more experience requirements) and with two desirable requirements (not invoked) and in addition had to also comply with all three non-published criteria evoked during the assessment. Moreover, according to the evidence made available, this was applied exclusively to Mr. Ponce-Gonzalez.

36. Contrary to the Secretary-General’s arguments, the UNDT did not err in fact or in law when it concluded that the desirable requirements were not invoked during Mr. Ponce-Gonzalez’s disqualification, that he was improperly evaluated against unpublished criteria, that the requirements of Section 7.1 of ST/AI/2013 were not complied with, and that as a result the applicable Regulations and Rules were not complied with in the selection process. Annex 1 shows that the pre-screening for compliance with basic (minimum) requirements was conducted by the hiring manager who ignored the information available to him when he unlawfully disqualified

Mr. Ponce-Gonzalez by arbitrarily determining that he did not meet the minimum (basic) requirements of the job opening. The UNDT properly concluded that Mr. Ponce-Gonzalez was not afforded a fair chance at adequate and impartial consideration and that rules were not applied in a fair, transparent and non-discriminatory manner.

37. Moreover, Mr. Ponce-Gonzalez submits that the UNDT did not err when concluding that running two exercises simultaneously was procedurally irregular. There is no provision in the Staff Rules that allows a hiring manager to abuse and misuse his discretionary authority to circumvent procedures and run a temporary job opening under ST/AI/2010/4 while the recruitment governed by ST/AI/2010/3 is ongoing. The lack of proper notification is further proof of the breach of conduct and inherent lack of integrity and transparency of the process.

38. With regard to the issue of delegated authority, Mr. Ponce-Gonzalez submits that the Administration manipulated the evidence regarding the hiring manager's delegation of authority. He submits that the authenticity of the 12 December 2019 delegation letter is called into question *inter alia* by the fact that the hiring manager sub-delegated the Head of Mission's delegated authorities to himself; the absence of an "official stamp" or the letters "HOM" in the document's reference number; the fact that another staff member physically entered the delegation in the portal on behalf of the Head of Mission, or the fact that a new Head of Mission subsequently issued a new delegation of authority. Also, there was no evidence of a copy provided to the USG for Management Strategy, Policy and Compliance as required and mandatory according to Section 2.5 of ST/SGB/2019/2.

39. According to the documentary evidence, an official subdelegated authority had been effective only as of 28 April 2021 and it clearly stated that the hiring manager had been subdelegated the authority to make appointments restricted to the P-3/FS -6 level and below. It was the Head of Entity who retained the authority to make appointments for the P-4/FS-7 level up to the D-1 level. The UNDT has broad discretion to determine the admissibility of evidence and the weight to accord to it and did so without error as evidenced by its findings during its thorough and extensive fact-finding review. The UNDT's findings were well founded and corroborated by a number of procedural irregularities, such as the lack of compliance on the part of the hiring manager with the core principle of segregation of duties under Section 2.3 of ST/SGB/2019/2 since he acted as Head of Entity who made the decision and as hiring manager who recommended and was to execute it. Mr. Ponce-Gonzalez submits that the UNDT did not err in calculating the award of compensation which fell within the limitation of two years' net base pay generally placed on

reasonable compensation. Furthermore, Mr. Ponce-Gonzalez's contractual status is immaterial to this determination. Mr. Ponce-Gonzalez has been on a fixed term appointment for 25 years due to his irreproachable record and is in expectation of retiring in another year, which renders all speculations raised by the Secretary-General irrelevant.

40. Mr. Ponce-Gonzalez claims that the Secretary-General mistakenly interprets rescission of the contested decision as merely an opportunity for continuing the defective selection exercise. This, however, neglects the fact that but for the illegality cited by the UNDT, there would have been no need to continue the exercise. Nor does the Secretary-General address how this would address the effects of denying Mr. Ponce-Gonzalez his right to be fairly considered *ab initio*, which the UNDT determined equivalent to a 100 per cent chance of selection. The UNDT carefully considered the appropriate level of *in lieu* compensation consistent with the principle that the staff member should be placed as if the breach had never occurred. Contrary to the Secretary-General's assertions, rescission of the contested decision rejecting his candidacy and cancelling the exercise does not re-start the exercise, given the passage of time. Where it can be shown, as here, that the staff member had a significant and unique chance of being selected, justice demands either the implementation of the promotion or compensation sufficient to place him in situation he would have been in.

41. Furthermore, the UNDT did not err when it concluded that the irregularity was of such a nature that, had it not occurred, Mr. Ponce-Gonzalez would have had a foreseeable and significant (100 per cent) chance for promotion as there were no other qualified candidates. There is no duty to mitigate losses for *in-lieu* compensation. The outcome of subsequent selection processes for this same post, including for the temporary job opening are irrelevant to the question of damages for this exercise. The TJO was in any case a different exercise by its nature. Mr. Ponce-Gonzalez has in fact applied every time this post was advertised and has attempted to mitigate his losses.

42. Mr. Ponce-Gonzalez contends that the Secretary-General's analysis of the award of compensation for loss of opportunity is entirely subjective and cites no error. The compensation for loss of opportunity is not duplicative but addresses the long period of time during which Mr. Ponce-Gonzalez's career had been adversely affected, given his proximity to retirement and the effects thereon. The Secretary-General confuses this with compensation for economic harm supported by evidence and moral damages which were not awarded. In this case, Mr. Ponce-Gonzalez was the only qualified candidate to challenge his failure to be afforded fair consideration and denied a unique and fair chance at being promoted. It is established law that

loss of a career opportunity may constitute irreparable harm for the affected individual. Moreover, Mr. Ponce-Gonzalez's proximity to retirement should not be seen as a limiting factor but rather as a pertinent argument in favour of the compensation awarded for loss of opportunity since opportunities for promotion are limited and this position offered a unique chance to be promoted to a higher level.

43. The Dispute Tribunal is in the best position to decide on remedies and there is no indication that the principled approach followed by the UNDT was improper given the nature of the irregularity as well as the chance that Mr. Ponce-Gonzalez would have been promoted, had the exercise been carried out correctly. The evidence supports the conclusion that in this case Mr. Ponce-Gonzalez was the only fully suitable rostered candidate who fully complied with the requirements of the post. He suffered considerable stress and prejudice to his professional standing, status and dignitas at a critical period at the end of his career.

44. Mr. Ponce-Gonzalez asks that the Appeals Tribunal dismiss the appeal and award costs in the amount of USD 5,000. He further asks that UNAT consider a referral for accountability for the official who abused his power and authority to improperly influence adversely Mr. Ponce-Gonzalez's career.

Considerations

Preliminary considerations

45. This is the second time that this case has come before the Appeals Tribunal. In its first Judgment, the UNDT had rejected Mr. Ponce-Gonzalez's application as not receivable, finding that the cancellation of the recruitment exercise for RFR 104637 was a preparatory step in the selection process, and as such it could only be challenged in the context of an appeal against the outcome of the process. On appeal, the Appeals Tribunal reversed the UNDT Judgment and remanded the case to the UNDT for additional fact-finding and judgment on the merits. UNAT found that Mr. Ponce-Gonzalez had standing to challenge the decision to disqualify him from the eventually cancelled selection exercise for RFR 104637, since it could not be regarded as a mere continuation of the subsequent recruitment process for the position of CORM at the P-5 level at UNISFA.⁷

⁷ *Ponce-Gonzalez v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1099, paras. 2 and 3.

46. The UNAT further found that the crux of the present case was not the outcome of the recruitment exercise advertised as TJO 109862, but rather the disqualification of Mr. Ponce-Gonzalez from the first exercise as RFR 104637, even though for the same position. Hence, in the present application Mr. Ponce Gonzalez challenged his non-selection in the first recruitment exercise as RFR 104637, since he contested the failure to afford full and fair consideration to his candidacy and the alleged abuse of authority in cancelling RFR 104637 in violation of the applicable rules following his disqualification.⁸

47. Apart from both recruitment processes, the Appeals Tribunal has now learned that another selection exercise for the same position had been advertised on 31 August 2020 as RFR 140266, being the subject of another application and appeal⁹, in which Mr. Ponce-Gonzales challenges a 14 December 2020 decision not to select him for the position. From the previous Judgment, this Appeals Tribunal is aware of a job opening advertised even earlier under TJO 104314 for the same position, but later cancelled due to procedural irregularities relating to the lack of delegated authority to select and appoint staff at the time.¹⁰

48. As can be seen from the above, at least four selection exercises have been opened for the same position at UNISFA (TJO 104314, RFR 104637, TJO 109862 and RFR 140266), a fact which does not seem to contribute for a fluid, transparent and efficient work environment. Advertisements for open positions should preferably be published in a manner avoiding failures and mistakes, even though sometimes it is inevitable to republish a vacancy announcement due to a lack of success of a recruitment process or any circumstance alike.

49. As established, the present case concerns only the position advertised under RFR 104637.

⁸ *Ibid.*, paras. 15 and 39.

⁹ UNAT Case No. 2022-1694, which will be dealt with separately, Judgment No. 2023-UNAT-1345.

¹⁰ *Ponce-Gonzalez Appeal Judgment, op. cit.*, para. 5.

Merits of the case

50. The contested decision in this case is Mr. Ponce-Gonzalez's disqualification due to failure to afford full and fair consideration to his candidacy for the post of P-5 Chief, Operations and Resource Management advertised under RFR 104637, and abuse of authority by the Administration in cancelling this same recruitment exercise in violation of the applicable rules. Following the remand ordered by this Appeals Tribunal, the UNDT rescinded the contested decision and granted compensation in lieu and compensation for damages for loss of opportunity to Mr. Ponce-Gonzalez.

51. The main issue for consideration and determination is hence whether the UNDT erred in law and fact and exceeded its jurisdiction: i) in concluding that Mr. Ponce-Gonzalez was evaluated against unpublished selection criteria and that he, in fact, "met and exceeded" the requirements for the position; and ii) in ordering the subsequent rescission of the contested decision and awarding compensation.¹¹

52. Concerning staff selection, Article 101.1 of the Charter of the United Nations establishes the authority of the Secretary-General to appoint staff under Staff Regulations established by the General Assembly. Article 101.3 provides that "the paramount consideration in the employment of the staff and in the determination of the conditions of service 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. The power of the Secretary-General to appoint staff members is reiterated in Staff Regulation 4.1. Specifically regarding the pre-screening and assessment and the selection decision, Administrative Instruction ST/AI/2010/3 (Staff selection system) applicable at the relevant time provides that:

Section 7 Pre-screening and assessment

7.1 Applicants applying to job openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job opening.

7.2 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support will release electronically to the hiring manager (for position-specific job openings) and occupational group manager (for generic job openings), within and/or shortly after the deadline of the job opening, the applications of candidates

¹¹ Impugned Judgment, paras. 29, 36 and 62.

who have successfully passed the pre-screening process, together with the names of pre-approved eligible candidates, for consideration for selection.

7.3 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support has the authority to pre-screen individuals identified through an outreach strategy aiming for target groups in terms of gender, geography and/or specialized expertise within the deadline of the job opening. The applications of successful candidates will be released to the hiring or occupational group manager.

7.4 The hiring managers or occupational group managers shall further evaluate all applicants released to them and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation.

7.5 Shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview and/or other appropriate evaluation mechanisms, such as written tests, work sample tests or assessment centres.

7.6 For each job opening, up to and including the D-1 level, the hiring manager or occupational group manager, as appropriate, shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and a selection decision by the head of entity.

7.7 For vacancy-specific job openings, up to and including the D-1 level, the hiring manager or occupational group manager shall transmit the proposal for one candidate or, preferably, a list of qualified, unranked candidates, including normally at least one woman candidate, to the appropriate central review body through the official whom the head of entity has designated to ensure that, in making the proposal, the hiring manager or occupational group manager has complied with the process. (...)

..

Section 9 Selection decision (...)

9.5 Candidates for vacancy-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and higher categories and the Field Service category. Following the selection decision, roster candidates shall be retained in a roster indefinitely or until such time as the present administrative instruction is amended. Candidates included in the roster may be selected by heads of entity for a subsequent job opening without reference to a central review body. (...)

53. With regard to the cancellation of recruitment processes, the jurisprudence of the Appeals Tribunal holds that the Administration is not under an obligation to pursue a recruitment procedure once such process has begun. It is within the discretionary authority of

the Administration to cancel a recruitment procedure on rational grounds on account of irregularities occurring in the recruitment process or for reasons connected with the interests of the service. In general terms, a tribunal ought not to interfere with the discretion to cancel a recruitment exercise for rational reasons, even when a candidate has been recommended but not yet appointed.¹²

54. In its assessment, the UNDT found that the hiring manager invoked the lack of Mr. Ponce-Gonzalez’s “notable experience in organizational performance management and measurement, service delivery, and managing/measuring resources and resource efficiencies” as an evaluation *criterion* with no relationship with the published criteria, which only stipulated five areas, with a requirement of experience in “one or more” areas.

55. In so concluding, the UNDT erred by suggesting that a candidate who meets the minimum requirements of a job opening is entitled to a “positive assessment”. In the Appeals Tribunal’s view, there is a significant difference between *eligibility* and *suitability* and the UNDT appears to have confused these two terms which are, however, quite distinct. While the *eligibility* deals with whether a certain candidate for a position *can* perform the tasks of the job, that is, fulfil the *necessary conditions* and “minimum requirements” for the position, the *suitability* relates to the *ability* of a certain candidate to perform the same tasks, that is possession of the *desirable skills, attitudes, motivation, behaviour, talents, interests and values* for the post. In other words, the responsible person or panel for the selection will evaluate which person fits best for the position. While not fulfilling *eligibility* criteria will normally eliminate the candidate based on lack of qualification, experience or necessary skill as objective motives, the assessment of the candidate’s *suitability* will relate to the question of whether the candidate concerned is *right* for a certain position. This exercise often involves the examination of soft skills, for example, whether the feedback any candidate receives from their colleagues is normally positive or whether they improve the atmosphere in their work environment. In short, while the eligibility criteria are a condition necessary for the success of the candidacy, their fulfillment does not mean that the candidate will be suitable for the vacant post.

¹² *Giuseppe Belsito v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1250, para. 37. See also *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932, para. 21; *Anis Basil AlMousa v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2021-UNAT-1134, para. 46.

56. The very existence of the assessment process reveals that not all candidates meeting the technical requirements for a position will be selected. They will also be assessed in terms of competencies, which encompass an analysis of their identifiable character traits and conduct so as to decide whether their contribution to the service will meet the purpose of the post. Nevertheless, it could occur that a selection exercise finishes with no candidates having been selected, even though they could have met all the eligibility requirements. The UNDT thus also erred in concluding that the requirements of Section 7.1 mentioned above were not complied with, since these requirements were “minimum” and needed to be evaluated “further” based on a review of the documentation¹³, in order “to determine whether they [the candidates] met the technical requirements and competencies of the job opening”.¹⁴

57. Therefore, the UNDT erred in its consideration of the Administration’s assessment of Mr. Ponce-Gonzalez’s experience against the evaluation criteria. The UNDT also erred when it rescinded the cancellation of the selection process, invalidating the reason then given that “none of the rostered candidates had met all of the required and desirable criteria of the job opening”, and concluding that “at least one of the rostered candidates (the Applicant) met and exceeded all criteria”.¹⁵ In so doing, the UNDT improperly appropriated the discretion of the Secretary-General and imposed its own promotion decision.

58. Further, the Secretary-General contends that the UNDT erred in law in finding that there were procedural irregularities in the RFR exercise. Specifically, the Secretary-General first claims that the UNDT’s finding of the Administration’s irregularity in maintaining two recruitment exercises simultaneously is erroneous, as there is no such provision in the applicable legal framework. In this regard, it is true that the two recruitment exercises were running for the period from 11 January 2019, when TJO 109862 was issued, until 28 January 2019, when RFR 104637 was cancelled. This was acknowledged by this Appeals Tribunal in its previous Judgment.¹⁶ However, the Secretary-General rightly asserts that Section 2.2(d) of ST/AI/2010/4 stipulates, on the issue of use and duration of temporary appointments, that a temporary appointment may be granted for specific short-term requirements that are expected to last for less than one year at the time of the staff member’s appointment, such as to temporarily fill a vacant position pending the finalisation of the regular

¹³ Section 7.2 of ST/AI/2010/3.

¹⁴ Section 7.3 of ST/AI/2010/3.

¹⁵ Impugned Judgment, para. 37.

¹⁶ *Ponce-Gonzalez Appeal Judgment, op. cit.*, para. 45.

selection process. There was thus no irregularity in the fact that the Administration had maintained two recruitment exercises for the short period of a few days.

59. Second, regarding the notification of Mr. Ponce-Gonzalez of his elimination from the recruitment exercise, Section 10.1 of ST/AI/2010/3 regarding notification and implementation of the decision provides that “other candidates convoked for assessments but not selected or placed on a roster shall be so informed by the hiring manager or the occupational group manager within 14 days after the selection decision is made in writing”. In the present case, there was no “selection decision” made (and this was the reason why the recruitment exercise was cancelled), therefore no time limit was triggered. In addition, Mr. Ponce-Gonzalez was informed of his elimination on 28 January 2019, the day after the cancellation of the recruitment exercise. The UNDT then erred in concluding that the Administration failed to notify Mr. Ponce-Gonzalez of his elimination “as required” by ST/AI/2010/3. In any event, any delayed communication of his elimination would not have been consequential to the contested decision.

60. Further, the Secretary-General maintains that the UNDT erred in law and in fact in finding that the hiring manager acted without authority and had a conflict of interest. In this regard, the UNDT found that the Secretary-General had failed, or refused, to provide the information requested by Order No. 215 (NBI/2021) and that the 11 January 2019¹⁷ delegation of authority was not evidence of delegation of authority to cancel the selection exercise disputed in this case.

61. In the matter concerning the delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules, Sections 2.3, 2.5, 4.1 and 4.2 of ST/SGB/2019/2 provide that:

2.3 A core principle of delegation of authority is the delegation of centrally held decision-making closer to the point of service delivery. *The exercise of a delegated authority is the taking of a decision within the authority delegated and is separate from the execution of that decision, which may require a specific administrative capacity.* Delegation of authority should not lead to the creation of new duplicative administrative capacities in entities which lack the structural capacity to execute decisions. Consequently, where the head of entity has the capacity to take a decision under delegated authority but the entity lacks the appropriate capacity to execute the decision, another entity will be assigned by the

¹⁷ There is a typographical error in paragraph 45 of the UNDT Judgment when it referred to the 1 January 2019 letter.

Under-Secretary-General for Operational Support, in consultation with the Under-Secretary-General for Management Strategy, Policy and Compliance and the head of entity concerned, to execute the decision on the entity's behalf as a service provider.

...

2.5 All delegations of authority shall be made formally through the dedicated online portal. The authorities delegated shall be clearly stated and accepted by both the delegator and the delegatee, including that such delegation may be suspended, amended or revoked as provided in section 4.4 below. *The delegation should include the description of the authority being delegated and any specific limitations imposed, including but not limited to restrictions on further subdelegation and essential segregations of duties where applicable.* Delegatees shall inform themselves of the delegation and the relevant regulations, rules, policies, practices and standards applicable to any decision or action to be taken under the authority delegated and cannot claim ignorance of such in defence of any decision or action taken in the exercise of any delegated authority. The Department of Management Strategy, Policy and Compliance and the Department of Operational Support shall be available to support delegatees in this regard.

...

Section 4 Management of authorities delegated to heads of entity

4.1 Heads of entity will receive notification of their delegations of authority from the Secretary-General and any actions relating to such delegations, such as amendment, suspension or revocation, through the online portal. The heads of entity will acknowledge receipt of the delegations to them in their capacity as head of entity through the portal.

4.2 Through the online portal, the heads of entity will be provided with a description of the authority being delegated and any specific limitations imposed, including but not limited to restrictions on further subdelegation and essential segregations of duties where applicable. Heads of entity will use the online portal to subdelegate authority and shall be able to view all subdelegations within their entity.

62. As established, the restrictions on possible sub-delegations should be explicitly included in the delegation of authority. This reasoning, which was not followed by the UNDT, is in keeping with the general principle that the main purpose of the delegation of authority is to facilitate the decision-making process, rendering it simpler and smoother, and in one word, less bureaucratic. Moreover, the UNDT also erred when it found that the documents attached to a cover letter could not constitute sufficient evidence of the delegation of authority, since they “do not bear the details and extent of the authority that the acting Head of Mission sub-delegated to the Chief of Mission Support (CMS) as indicated in the second point of the cover letter”.¹⁸ To require that all power

¹⁸ Impugned Judgment, para. 46.

delegated to a delegee be included in a cover letter would be contrary to the principle of efficiency and simplicity.

63. In the present case, the Appeals Tribunal could find from annex 11 to the initial application before the UNDT that, on 1 January 2019, the Secretary-General issued a Delegation of Authority to Heads of Secretariat Entities encompassing the matter of “Human Resources” under Section IV, including with respect to “selection of staff up to and including the D-1 level”. On the same day, an Accountability Framework for Monitoring the Exercise of Delegated Decision-Making Authority was issued. Shortly thereafter, on 11 January 2019, an Inter-Office Memorandum from the Acting Head of Mission and Force Commander to CMS informed further of a Delegation of Authority from the Head of Entity, with an annex. Therefore, the Appeals Tribunal understands that Chapter IV of the “HUMAN RESOURCES” annex to this 11 January 2019 letter containing the delegation of authority to the CMS clearly states that “You are delegated authority with respect to the following matters: a. Selection of staff up to and including the D-1 level.”

64. It is hence the view of the Appeals Tribunal that the 11 January 2019 letter containing the delegation of authority from the Head of Entity to the CMS on the matter of Human Resources and its annex are sufficient evidence that this delegation of authority was properly exercised. In addition, the Appeals Tribunal notes that the cover letter received the official stamp of the CMS office on 07 February 2019. Therefore, the UNDT erred in finding that documents provided by the Secretary-General did not establish the validity of the delegation of authority.

65. Further, the UNDT erred in assuming that heads of entities cannot be hiring managers. As correctly argued by the Secretary-General, there is no provision to this effect. The UNDT appears to misinterpret Section 2.3 of ST/SGB/2019/2 cited above, which merely states that the execution of the decision “*may* [and not *should*] require a specific administrative capacity”,¹⁹ when the entity lacks the appropriate capacity to execute the decision (to cancel the recruitment exercise), which was not the case here.

66. As previously held:²⁰

¹⁹ Emphasis added.

²⁰ *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 27. See also *Niedermayr v. Commissioner-General of United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-603, paras. 20-24, citing *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30, *Abbassi v.*

The judicial review of selection and promotion decisions is limited to the determination as to whether or not a candidate received full and fair consideration. In reviewing the selection process, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Administration regarding its outcome, as we have frequently stated.

67. In light of the foregoing and since no unlawfulness was found in the contested decision to cancel the selection exercise after having afforded Mr. Ponce-Gonzalez's candidacy full and fair consideration, the remedies ordered by the UNDT should be set aside. This conclusion applies to both the UNDT's order of rescission of the contested decision and in-lieu compensation, as well as the award of compensation for loss of opportunity.

68. Lastly, since the Appeals Tribunal grants the appeal of the Secretary-General, there is no room to award costs against him for abuse of process.

Secretary-General of the United Nations, Judgment No. 2011-UNAT-110, paras. 23-24, and *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20-21 and 26.

Judgment

69. The Secretary-General's appeal is granted, Judgment No. UNDT/2021/161 is hereby reversed and the application is dismissed in its entirety.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Raikos

Judgment published and entered into the Register on this 11th day of May 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar