



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/010  
(UNAT 1572)  
Judgment No.: UNDT/2010/063  
Date: 14 April 2010  
Original: English

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**Before:** Judge Coral Shaw  
**Registry:** Geneva  
**Registrar:** Víctor Rodríguez

WEILER

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Bettina Gerber, UNOG

## **Introduction**

1. The Applicant unsuccessfully applied for a promotion in 2004. She appealed against the decision first to the Joint Appeals Board (JAB) and then to the United Nations Administrative Tribunal (UNAT). The case was transferred to the United Nations Dispute Tribunal (UNDT) on 1 January 2010 as it could not be completed by UNAT before that body ceased to exist.

## **Issues**

2. The issues in the present case are:
- a. What is the scope of the Secretary-General's discretion in selection of staff for promotion?
  - b. Where does the burden of proof lie in promotion cases?
  - c. Was the Applicant's candidacy given full and fair consideration?

## **Background**

3. The Applicant entered the service of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva as a Clerk, at the G-2 level, on 2 June 1975. From 1975 to 1981, she continued to work for the OHCHR on a series of short-term and fixed-term appointments and was promoted to the G-3 and G-4 level during this period. The Applicant's fixed-term appointment was converted into a permanent appointment in 1981. In July 1982, the Applicant was promoted to the G-5, step 4 level. On 1 April 1997, she reached step 12 within G-5 level. She remained on that level and step until her retirement as of 1 January 2009.

4. In February 2004, the Applicant applied for the G-6 post of Secretary to the Chief of Branch, Capacity Building and Field Operations Branch (CBB), OHCHR, but heard nothing until she wrote asking to be informed about the date on which the post had been filled. She was informed by memorandum dated 23 August 2005 that the post had been filled on 1 June 2005.

5. The Applicant submitted a request to the Secretary-General for review of the administrative decision not to select her for the post and later appealed to the Geneva JAB. In reply, the Respondent objected to the admissibility of the appeal. It alleged the appeal had been brought out of time. The JAB panel, having examined the issue of receivability, found the appeal admissible.

6. The JAB issued its report on the merits in May 2007. The Secretary-General accepted the recommendation of the JAB and decided to reject the appeal.

7. The Applicant appealed to UNAT against the Secretary-General's decision. The application was transferred to the UNDT on 1 January 2010. In response to pre-trial orders, the Respondent submitted documents related to the selection process with the request that the confidentiality of the documentation be observed. The Applicant provided a copy of her UN Language Proficiency Certificate in Spanish dated 1979. In her submission to UNAT, she had stated that she used each of the three languages referred to in the vacancy announcement (English, French and Spanish) as working languages in her daily work and that the successful candidate did not have proficiency in Spanish. This was not denied by the Respondent. The Respondent provided a copy of the successful Applicant's certificate of proficiency in the French language but no evidence of her abilities in the Spanish language.

8. At a directions hearing, both parties agreed to the matter being determined on the papers without an oral hearing. The Respondent does not contest the receivability of the appeal. This is an appropriate concession given the previous finding of the JAB.

9. The Applicant requests the Tribunal:

- a. To make a finding that the facts of this case illustrate the deficiencies of the promotion procedures of general service staff in the [OHCHR];
- b. To grant her a measure of compensation for the loss of income resulting from the failure to promote her (as of 1 June 2005); and

- c. To formulate an appropriate indication of OHCHR Administration aiming at favourable consideration for an early promotion of the Applicant to the G-6 level.”
10. The Respondent requests the Tribunal to find that:
- a. “The Applicant was given full and fair consideration for the G-6 post. The non-selection of the Applicant constituted a proper exercise by the Secretary-General of his discretionary powers”;
  - b. “The decision not to select the Applicant was not based on arbitrariness, discrimination or other improper motivation.”
11. Hence, the Respondent “requests the Tribunal to dismiss each and all of the Applicant’s pleas and to dismiss the Application in its entirety”.

### **Facts**

12. The following factual findings are made on the basis of evidence and documentation presented in the written submissions to the UNAT and as supplied by the parties following the directions hearing. None of the relevant facts were disputed.
13. The vacancy announcement which the Applicant responded to described the position as Secretary, G-6. It set out the responsibilities and competencies of the position. The required qualifications included secretarial or related experience of a minimum of eight years of which preferably five had been with the UN. The position also required language proficiency to be a “very good ability to read, write and speak English and French or Spanish; knowledge of the third language highly desirable”.
14. The Applicant was shortlisted and interviewed for the position. In the written evaluations of the candidates, the competencies were described in a narrative section. Each qualification was given a numerical rating.
15. A comparison of the results for each of the top four candidates who were interviewed shows that three received 85 and the Applicant received 80. Although the work experience of each of these candidates ranged from over 20

years in the case of the Applicant and one other, to over 8 and 9 years for two other candidates, all were given the same score of 20 for experience.

16. The scores for language also varied. The Applicant and the successful candidate were fluent in both English and French. The Applicant was described as having very limited Spanish, while it was said that the successful candidate had limited Spanish. In spite of those similarities and the fact that she, unlike the successful candidate, had a certificate in Spanish, the Applicant received only 20 points for language while the successful candidate received 25. The difference was enough to give the successful candidate more points than the Applicant.

17. The narrative section of the evaluations, which described competencies, noted some negative aspects of the Applicant's interview. In spite of her long experience in OHCHR, it was recorded that she was unable to articulate well the functions and organisation of the work in CBB as well as its organisational structure and respective roles of related units. It noted that the Applicant had good written skills but her oral communication skills were weaker. On the positive side it recorded her good institutional memory and knowledge of internal policies, processes and procedures and her technological awareness, some planning and organisational skills as well as experience in teams and multicultural environments.

18. The report on the successful candidate had similar positive aspects but no negative comments about her competencies.

19. Following the interviews, the Applicant was not included on the list of best qualified candidates which was submitted for ultimate selection.

## **The Issues**

### ***Issue 1: What is the scope of the Secretary-General's discretion in selection of staff for promotion?***

20. In her submissions, the Applicant accepts the Secretary-General has a discretionary power with respect to the promotion of staff members and that there is no right to promotion, but she considers "that the Administration has an affirmative duty to enable career development and to ensure that promotion of

staff members who have served satisfactorily is not unreasonably delayed”; she stresses that despite her satisfactory performance appraisal system (PAS) reports and her numerous applications, her last promotion dates back to 1982.

21. The Applicant also submitted that the discretion with respect to promotion “is not absolute and must be exercised in such a way that the staff member is accorded fair treatment”.

22. On behalf of the Respondent, counsel referred to the discretionary power of the Secretary-General in promotion matters confirmed by the longstanding jurisprudence of the UNAT, which has held that its role was limited to ascertaining whether full and fair consideration has been given to each candidate. It is submitted that it is not the role of the Tribunal to substitute its judgment for that of the Secretary-General; UNAT has held that the review body should examine whether the contested decision was “reached on reasonable and rational grounds”, if it was “within the scope of the authority of the person or the body which made it” and if it was “fair and free from prejudice”.

### Discussion

23. The appointment and promotion procedures applicable to this case were set out in Article IV of the former Staff Regulations, embodied in ST/SGB/2002/1. They provide the framework within which the Secretary-General should exercise his discretion. The following regulations are material to that exercise:

Former staff regulation 4.2:

“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. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.”

Former staff regulation 4.3:

“In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or religion. So far as practicable, selection shall be made on a competitive basis.”

Former staff regulation 4.4:

“Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations...”

24. ST/AI/2002/4 is an Administrative Instruction concerning staff selection.

Section 5 sets out eligibility requirements. Paragraph 3 of Section 5 states:

“Time-in-grade eligibility requirements formerly in use shall no longer be applicable. However, experience, knowledge and institutional memory relevant to the functions must be considered as the personal contribution of the candidate to the achievement of the goals of the Organization and as such are an important element of the selection process.”

25. ST/SGB/2002/6 established central review bodies to give advice on the appointment and promotion of staff. In addition to approving evaluation criteria for vacancies, the central review body is required to ensure when reviewing a proposal for filling a vacancy that candidates have been evaluated on the basis of the pre-approved criteria and that applicable procedures were followed. Section 5.3 states:

“In so doing, the central review bodies shall consider whether:

(a) The proposal made by the department/office is reasoned and objectively justifiable based on the pre-approved evaluation criteria and is accompanied by a certification that, in making the proposal, the head of department/office has taken into account the Organization’s human resources planning objectives, especially with regard to geography and gender balance; and

(b) The record indicates the existence of a mistake of fact, a mistake of law or procedure, prejudice or improper motive that could have prevented a full and fair consideration of the requisite qualifications and experience of the candidates.”

26. An analysis of these provisions shows that the Secretary-General’s discretion to select staff must be exercised with the following factors in mind:

- The need for highest standards of efficiency, competence and integrity;
- No distinction as to race, sex or religion;

- The need for geographical and gender balance;
- The qualifications and experience of persons already in the service of the UN;
- The importance of experience, knowledge and institutional memory in the selection process;
- Evaluations of candidates must be reasoned and objectively justifiable;
- Candidates are to be given full and fair consideration of their requisite qualifications and experience.

27. It is apparent that the regulations and associated instructions highlight the need for objective evaluation as part of the selection process. While there is an element of discretion involved in selection of candidates for advertised vacancies, it is necessarily constrained by the prescriptive elements referred to above.

***Issue 2: Where does the burden of proof lie in promotion cases?***

28. The Applicant submitted that the burden of proof lies on the Administration which must show why a staff member with satisfactory PAS has been denied career development for such a long period of time.

29. The Respondent submitted, in contrast, that the UNAT jurisprudence is clear in that the burden of establishing that the Administration has failed to fully and fairly consider the Applicant's candidacy only falls on the Respondent when there are serious questions about whether such consideration has been given, which is not the case here; this is different from the question of discrimination or other improper motivation, brought forward by the Applicant in the present case, where the burden of proof for establishing arbitrariness, discrimination or other improper motivation falls upon the Applicant. In the Respondent's submission the Applicant has not provided substantiating evidence in support of her allegations, hence did not discharge her burden of proof.



Discussion

30. The case now before the Tribunal has been transferred from the now defunct UNAT. There is a body of jurisprudence being developed by the UNDT in the context of the new cases coming before it but that jurisprudence was not in existence at the time the present case was brought before UNAT. It is doubtful that such jurisprudence should be applied retroactively.

31. The test to be applied is that articulated in UNAT Judgement No. 1122, *Lopes Braga*: “Where a staff member has raised a challenge as to whether he or she has been fully and fairly considered, the burden of proving that such full and fair consideration has taken place rests upon the Respondent.”

***Issue 3: Was the Applicant’s candidacy given full and fair consideration?***

32. The Applicant submitted that her candidacy was not given the full and fair consideration to which she was entitled in accordance with article 101, paragraph 3, of the UN Charter, former staff regulations 4.2 and 4.4 and UNAT jurisprudence.

33. She maintains that she fulfilled all the requirements of the vacancy announcement and even exceeded them; as a previous incumbent of the post, she was fully familiar with and had the required competency for the post; the selected candidate did not have experience comparable to hers and did not merit a promotion. The Applicant also submits that the selected candidate did not have proficiency in Spanish, whereas the Applicant is a native English speaker and had passed the United Nations Language Proficiency Examination in Spanish and French.

34. The Applicant made it very clear in her submissions that, contrary to the JAB findings, she was not alleging prejudice or discrimination in the failure to promote her but was alleging arbitrariness in circumstances where her qualifications, experience and competence fully matched and even exceeded the qualifications called for in the vacancy. Her case is not about discrimination, but

rather about arbitrariness; she alleged that the system of promotion is deficient in that it puts an emphasis on interviews in which candidates have to oversell themselves, implying the abandonment of objective criteria, such as seniority, in favour of subjective criteria.

35. For the Respondent, it was submitted on this issue that the Applicant was interviewed and the interview panel found that the Applicant's oral communication skills were weaker than her written communication skills and that she was unable to "articulate well her familiarity with the functions and the organization of the work".

36. The knowledge of a third language was highly desirable but not a requirement hence, in the Respondent's submission, both the selected candidate and the Applicant met the work experience and language requirements for the G-6 post.

37. The contested decision "was based on an assessment of the respective qualifications and interviews of the candidates and a reasoned and well-documented determination that the selected candidate was a stronger candidate than the Applicant".

38. In summary the Respondent's case is that the contested decision was a proper exercise of the discretionary power of the Secretary-General and the Applicant was given full and fair consideration.

#### Discussion

39. The question of whether the Applicant was given full and fair consideration is a question of fact. Were the factors relied on to evaluate the Applicant applied in accordance with the requirements of the relevant regulations and administrative instructions?

40. I find that the way in which the numerical evaluation was carried out was not at all fair in two respects.

41. First: the evaluation of experience. Of the three numerically evaluated qualifications, experience was the most highly rated. A candidate could potentially earn 50 per cent of the total points through experience alone compared with 20 per cent for education and 30 per cent for languages. This reflects the requirements of the staff regulations and administrative issuances referred to above.

42. Candidates for this vacancy were required to have a minimum of 8 years experience. Two of the candidates, including the Applicant, had more than 20 years of relevant experience, yet both received the same number of points for experience as those candidates with 8 or 9 years. If the interviewing panel believed that the 8 years minimum experience was all that was required, then it would be expected that all of the candidates with 8 years experience or more would have received the maximum 50 points. It is more likely, because as stated by ST/AI/2002/4, experience is an important element of the selection process, that logically those candidates with more years of relevant experience should have received more points.

43. I find that the apportionment of points for experience was not done fairly or objectively. The candidates with more years of relevant experience should have received more points. In that regard I note that both the Applicant and the other candidate with 20 years were treated in the same, albeit wrong, manner.

44. Second: the evaluation of languages. The vacancy notice made it clear that a third language was highly desirable. Although it was not a mandatory qualification, the interview panel differentiated between candidates on the basis of their ability in a third language. One candidate for example who spoke fluent Spanish as well as English and French received the maximum 30 points for language, which was appropriate.

45. In contrast there is no apparent objective basis for the 5 extra language points allocated to the successful candidate but not to the Applicant according to their knowledge of Spanish. The Applicant had a certificate of proficiency in Spanish, the successful candidate did not. At the very least, both should have

received the same points for language, but because the Applicant's certificate confirmed her knowledge of Spanish, an objective evaluation would have given her more points.

46. The apportionment of points for languages was also not done fairly or objectively.

47. The Respondent therefore breached the requirements of the regulations governing staff selection, in particular the requirement that evaluations of candidates must be reasoned and objectively justifiable and that candidates are to be given full and fair consideration of their requisite qualifications and experience.

### **Conclusion**

48. In view of the foregoing, the Tribunal decides that the Respondent did not carry out the evaluation of the Applicant's candidacy for the position of Secretary in a full and fair manner. To that extent, the Applicant's claim that the decision was made in an arbitrary manner is upheld. The Applicant is entitled to a remedy for this illegal action which affected her directly.

### **Remedies**

49. Of the three remedies sought by the Applicant the only one within the jurisdiction of the Tribunal is the claim for compensation. Having regard to the range of compensation awarded in similar, although not identical, cases decided by UNAT, the Tribunal decides that the Respondent shall pay compensation to the Applicant equivalent to four months of the final net base salary received by the Applicant at the date of her retirement.

Case No. UNDT/GVA/2010/010

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*(Signed)*

Judge Coral Shaw

Dated this 14<sup>th</sup> day of April 2010

Entered in the Register on this 14<sup>th</sup> day of April 2010

*(Signed)*

Víctor Rodríguez, Registrar, UNDT, Geneva