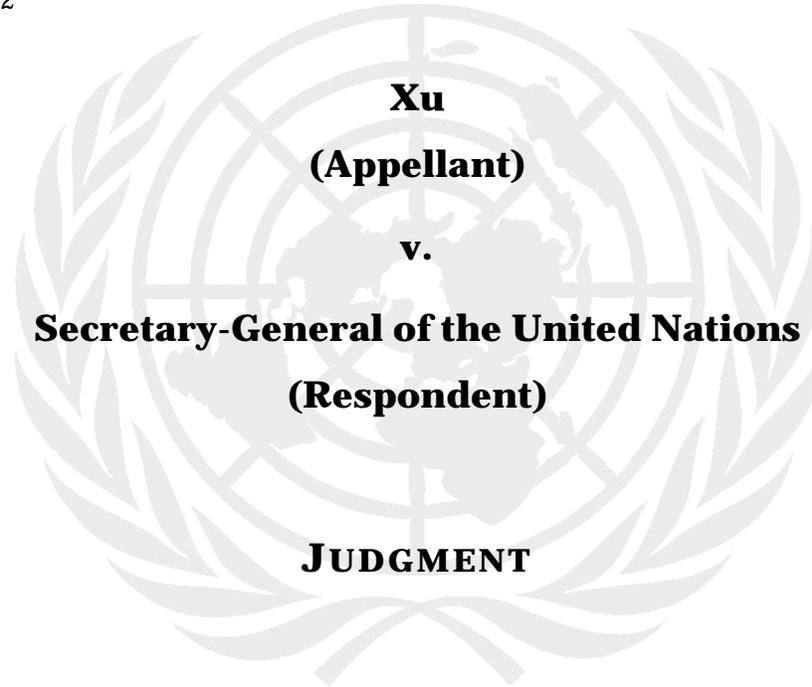




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-272



Before:	Judge Luis María Simón, Presiding Judge Inés Weinberg de Roca Judge Mary Faherty
Judgment No.:	2012-UNAT-251
Date:	29 June 2012
Registrar:	Weicheng Lin

Counsel for Appellant: Self-Represented

Counsel for Respondent: Wambui Mwangi

JUDGE LUIS MARÍA SIMÓN, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Mr. Jin Xu against Judgment No. UNDT/2011/171 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in the case of *Xu v. Secretary-General of the United Nations* in Geneva on 5 October 2011. Mr. Xu appealed on 17 November 2011, and the Secretary-General answered on 23 December 2011.

Synopsis

2. This Tribunal holds that “consideration” of a candidate for the purposes of administrative instruction ST/AI/2006/3 (Staff selection system) does not necessarily mean that a candidate can only be meaningfully considered after the relevant assessment tools have been administered to the candidates and the outcome communicated to them (in the case at bar, the written test and the interviews).

3. On the contrary, we hold that the fact that the Administration invited the 30-day mark candidates to undertake a written test before the assessment of the 15-day mark candidates was completed does not mean that Mr. Xu was not afforded priority consideration. When the test and interviews of the 30-day mark candidates took place, the priority candidates such as Mr. Xu had already been adequately treated and evaluated.

4. The procedure adopted by the Administration with regard to the 30-day mark candidates’ written test was, in the view of this Tribunal, merely a reasonable precautionary measure taken to have certain timeframes in place, in the event that none of the 15-day mark candidates were successful. That measure could be easily cancelled if a priority candidate was found adequate for the position, after the closure of the 15-day assessment process. That precautionary measure became meaningful, but only after the Administration learnt of the negative results of Mr. Xu’s evaluation: his failure in the written test.

5. Thus, this Tribunal finds no flaw in the selection process that would warrant the requested compensation.

6. Therefore, the UNDT’s dismissal of Mr. Xu’s application is affirmed.

Facts and Procedure

7. At the material time, Mr. Xu was a staff member at the P-4 level with the United Nations Office at Geneva (UNOG). In September 2009, he applied laterally for a P-4 position in New York, but was not selected. He appealed his non-selection to the UNDT in June 2010. In Judgment No. UNDT/2011/171, the UNDT dismissed Mr. Xu's application.

8. The UNDT found that Mr. Xu had been given priority consideration as a 15-day mark candidate in compliance with the former Staff Regulations and Rules. The UNDT found that "consideration" of a candidate for the purpose of ST/AI/2006/3 meant assessing his or her qualifications and skills against the requirements and competencies set out in the relevant vacancy announcement with a view to determining his or her suitability to successfully perform the functions of the post. A meaningful consideration can only begin once the relevant assessment tools, in the present case the written test and interviews, have been administered to the candidates. The order of interviews is not relevant as long as the 15-day mark candidate is considered first. In the present case the test and interviews of the two pools of candidates took place separately and no 30-day mark candidates took even the first part of the appraisal process, until the interviews of the 15-day mark candidates had been completed. The 15-day mark candidates were therefore considered first, in compliance with ST/AI/2006/3.

9. The UNDT emphasized that 15-day mark candidates were only entitled to be granted precedence under ST/AI/2006/3 provided that they were suitable for the position. A 15-day mark candidate who, after consideration for a position, appears not to be fit for the position, can claim no further right to priority consideration.

10. The UNDT found that in the present case, Mr. Xu had been rightfully considered as not suitable for the post because of his failure at the written test as well as his insufficient performance during the interview. The UNDT found that Mr. Xu failed to submit evidence in support of his contention that the selection process was tainted by bias, discrimination and improper motive.

Submissions

Mr. Xu's Appeal

11. Mr. Xu maintains that the UNDT made errors both in law and in fact. In his view, the UNDT's "arguments are flawed, unreasonable, illogical, its conclusions ill-founded, biased, and discriminatory".

12. Mr. Xu submits that the UNDT disregarded its own jurisprudence and all relevant facts of the case when it concluded that he had been accorded priority consideration. ST/AI/2006/3 leaves no room for interpretation. The 15-day mark and 30-day mark candidates are two separate and distinct classes; the former are required to be considered on a priority basis before the latter may be considered. But this was not the case here.

13. Mr. Xu also submits that the UNDT was selective in its presentation of facts and its citation of case law, and did not address many inconsistencies in the Respondent's submissions.

Secretary-General's Answer

14. The Secretary-General submits that the UNDT applied the appropriate standard for review and concluded that Mr. Xu was accorded priority consideration as a 15-day mark candidate during the selection process and thus received "full and fair" consideration.

15. The Secretary-General also submits that the UNDT's factual findings are supported by the evidence, and that the Appellant has failed to satisfy the burden to show that the Judgment at issue was defective.

Considerations

16. The Appellant contends that the UNDT committed an error of fact in concluding that Mr. Xu had been given the priority consideration he was entitled to as a 15-day mark candidate during a selection process under the former applicable rule (ST/AI/2006/3).

17. As stated in *Abbassi*, in order to overturn a finding of fact by the UNDT, the Appeals Tribunal must be satisfied that the finding is not supported by the evidence or that it is

unreasonable.¹ The Appeals Tribunal is of the opinion that deference should be given to the factual findings by the UNDT as the Court of first instance, best placed for that task.

18. As the UNDT, this Tribunal holds that “consideration” of a candidate for the purposes of ST/AI/2006/3 does not necessarily mean that a candidate can only be meaningfully considered once the relevant assessment tools have been administered to the candidates and the outcome communicated to them (in the case at bar, the written test and the interviews).

19. On the contrary, we hold that the fact that the Administration invited the 30-day mark candidates to undertake a written test before the assessment of the 15-day mark candidates was completed does not mean that Mr. Xu was not afforded priority consideration. In this case, the 15-day mark and 30-day mark candidates were considered separately, and the former before the latter. It is true that the 30-day mark candidates were invited for the written test the day before Mr. Xu had his interview. But the written test took place after Mr. Xu’s interview and after he had been found not to be suitable for the post. This means that when the test and interviews of the 30-day mark candidates took place, the priority candidates such as Mr. Xu had already been adequately treated and evaluated.

20. The procedure adopted by the Administration with regard to the 30-day mark candidates’ written test was, in the view of the Tribunal, merely a reasonable precautionary measure taken to have certain timeframes in place, in the event that none of the 15-day mark candidates would be successful. That measure could be easily cancelled if a priority candidate was found adequate for the position, after the closure of the 15-day assessment process. The precautionary measure became meaningful, but only after the Administration learnt of the negative results of Mr. Xu’s evaluation: his failure in the written test. The exigencies of the selection process justified the adoption of such a procedure and did not interfere with the main elements of priority consideration, which were nevertheless kept. And it must also be taken into account that when the evaluation report was presented to the appointing authority, clear distinction was made between the 15-day mark and the 30-day mark candidates, in a way that made possible the adoption of a proper and reasoned decision.

21. Thus, this Tribunal finds no flaw in the selection process that would warrant the requested compensation.

¹ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 26.

22. Mr. Xu failed to provide evidence in support of his contention that the selection process was biased and unfair. The UNDT did not err in finding that the selection panel had rightfully determined that Mr. Xu was not suitable for the position he was seeking. As that finding has not been proved unfounded or unreasonable, it must be sustained.

Judgment

23. The appeal is dismissed, and the UNDT Judgment affirmed.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Faherty

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar