



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

Judgment No. 2016-UNAT-669



Kucherov
(Respondent/Applicant)

v.



Registrar:

Weicheng Lin

Counsel for Mr. Kucherov:

Jiries Saadeh, OSLA

Counsel for Secretary-General:

Zarqaa Chohan

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal by the Secretary-General of the United Nations of Judgment No. UNDT/2015/106, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) on 5 November 2015 in New York, in the case of *Kucherov v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 4 Janu

... Under "Assessment Method" the JO stated:

Evaluation of qualified candidates may include an assessment exercise

an asterisk next to their names. The second unsigned page of this document states:
“Pending clearance by the [Central Review] Secretariat, I recommend that [the selected

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9. The UNDT closed with this observation:¹³

[T]he most accurate scoring system in a competitive comparative review like the one used by the staff selection system is a scoring system based on decimal numbers and the current double system of converting scores into ratings or vice-versa for being recorded in Inspira should be modified in order to reflect real differences between the candidates. Such a system will simplify the procedure to reflect the results of the selection process ensuring full transparency and accuracy. The final scores of each candidate must reflect the results from all of the assessment methods used during the selection process (for example, the average between the scores from the written test and the scores from the interview).

Submissions

The Secretary-General's Appeal

10. The UNDT erred in concluding that Mr. Kucherov did not receive full and fair consideration of his application to the position. In reviewing selection and promotion decisions, the role of the UNDT is to conduct a limited judicial review to determine whether a candidate received full and fair consideration, which entails that discrimination and bias were absent, proper procedures were followed and all relevant material was taken into consideration. If minimally shown that Mr. Kucherov's rights have been observed, the presumption of regularity is satisfied.

11. In the present case, the record shows that all aspects of the selection process were conducted in accordance with Article IV of the Staff Regulations, Chapter IV of the Staff Rules and ST/AI/2010/3, as amended, governing staff selection. The Administration carefully considered Mr. Kucherov's application at every stage of the selection process. He was pre-screened against the requirements in the JO, was short-listed and then invited for a competency-based interview. Mr. Kucherov was found to have met the requirements for the position and was recommended to be considered for selection.

12. The UNDT erred when it identified as a procedural error the absence on the selection panel of an expert on Russian language and a non-voting member representing the ASG/OHRM, because ST/AI/1998/7/Amend.1 does not apply in this situation. This administrative instruction applies solely to generic competitive examinations for language professionals at the P-3 level and

¹³ Ibid., para. 164.

below. Instead, the provisions of ST/AI/2010/3, as amended, apply; and, the composition of the selection panel was in accordance with them.

13. The UNDT erred when it found a procedural error in the JO's failure to identify a specific assessment method to be used for the evaluation of the technical skills. Section 7.5 of ST/AI/2010/3, as amended, indicates that the assessment of short-listed candidates "*may include*" (emphasis added) a competency-based interview and/or other appropriate evaluation methods. It also does not make it mandatory for a job opening to specify the exact mode of assessment.

14. The UNDT erred when it identified as a procedural error the selection panel's failure to assess short-listed candidates through a written language test. Under ST/AI/2000/1, after a staff member has successfully completed the language competitive examination, and has been selected from the roster, he or she may then apply for other language positions without needing to take the competitive examination again. In this case, both short-listed candidates had successfully passed the competitive examinations in 2005 and, thus, had already been assessed for language competency; they were both eligible, therefore, to compete for the position in accordance with ST/AI/2010/3.

15. The UNDT erred when it found that the scoring system used by the selection panel did not accurately reflect the candidates' performance during the interview. It falls within the Secretary-General's discretion to establish the appropriate scoring system and the method of rounding scores. The method applied in the present case is consistent with the Secretary-General's usual practice as the most effective method and also reflects the scoring system in Inspira. The scoring method was appropriate, agreed to by the panel members in advance of the interviews, and the members were clear about the difference between the two candidates. The UNDT stepped into the shoes of the selection panel by substituting its own scoring method.

16. The UNDT erred when it found that the selection decision was made before the CRB's mandatory review and that it did not contain the reasons for the selection. That the head of office signed his recommendation prior to the CRB's endorsement does not invalidate the selection process, because that recommendation explicitly stated it was subject to the CRB's approval. Reasons or a justification are required as to why the recommended candidate was selected only when an external candidate is selected, as per Section 9.3 of ST/AI/2010/3.

17. The UNDT erred in awarding moral damages in the amount of USD 3,000 because the record contains no evidence of harm suffered by Mr. Kucherov.

18. The Appeals Tribunal should vacate the Judgment in its entirety.

Mr. Kucherov's Answer

19. The Secretary-General is essentially asking the Appeals Tribunal to retry the case, without deference to the factual findings of the UNDT. The Secretary-General also fails to identify any legal errors that merit vacating the Judgment. He also fails to address how any purported error of fact resulted in a manifestly unreasonable decision. The appeal should be dismissed in full.

20. The Secretary-General only contests the five procedural irregularities that were included in the UNDT's summary, which does not include other key findings of procedural irregularity identified by the UNDT in its Judgment. On that basis alone the appeal must fail. For example, even if ST/AI/1998/7/Amend.1 were not to apply in this case, the principles underpinning the UNDT's determination of procedural irregularity subsist. For example, the failure to assess technical skills, which the UNDT identified as a recurring flaw, impacted many of its findings. The point is not whether a written test is mandatory; rather, it is that "some form of assessment"

Considerations

25. The Tribunal concurs with the Secretary-General that the Dispute Tribunal reached an erroneous conclusion about the illegality of the selection process.

26. After examining the grounds for appeal, the parties' arguments and evidence, we hold that Mr. Kucherov did receive full and fair consideration when he applied for the Post which was finally filled by another candidate. Therefore, we find no flaw in the competitive selection procedure, and we agree with the Secretary-General that the UNDT Judgment contains errors of fact and law.

27. 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.¹⁴

28. The selection exercise in the present case was conducted in accordance with Article IV of the Staff Regulations, Chapter IV of the Staff Rules and ST/AI/2010/3, as amended. All the steps and requirements were fulfilled.

29. No omission vitiated the job opening. Section 7.5 of ST/AI/2010/3, as amended, does not provide that a job opening *must* identify the specific assessment method to be used for the evaluation of technical skills. It only provides that it *may* include a competency-based interview and/or other appropriate evaluation methods. Nor was a written test a mandatory assessment method required in this case, because under ST/AI/2000/1, once a candidate has been successful in a language competitive examination and put on the corresponding roster, there is no need to repeat the test. The two short-listed candidates were in that position. Therefore, the UNDT Judgment erred on these two issues.

30. The UNDT also erred in considering as a procedural error the fact that the selection panel did not include an expert on Russian language nor a non-voting member representing the ASG/OHRM. ST/AI/1998/7/Amend.1 did not apply in this case; it only applies to generic

¹⁴ *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. 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.

competitive examinations for language professionals at the P-3 level and below. The provisions of ST/AI/2010/3, as amended, are the ones applicable and the selection panel was composed in accordance with them.

31. Another error is the UNDT's finding that the scoring system used by the selection panel did not accurately reflect the candidates' performance during the interview. The common method applied was within the Administration's discretion. The UNDT overstepped its role to the extent that it selected the scoring system that should have been applied, requiring what not even the applicable norms require.

32. Finally, the UNDT erred in finding that the selection decision was made before the CRB's mandatory review and did not contain the reasons for the selection. What the norms require is the endorsement and that existed, turning that initial error irrelevant. Moreover, a justification for why the recommended candidate is selected is only required when an external candidate is selected in accordance with Section 9.3 of ST/AI/2010/3. This was not the case here.

33. As no unlawful behavior was found, the absence of illegality leads to the impossibility of awarding compensation as it is deprived of any foundation. As we have stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrongdoing in need of repair".¹⁵

Judgment

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