



Judgment No. 2017-UNAT-762



Counsel for Mr. Lemonnier: Daniel Trup, OSLA

Counsel for Secretary-General: Ernesto Bondikov

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/187, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 14 October 2016, in the case of *Lemonnier v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 13 December 2016. On 27 December 2016, Mr. Emmanuel Lemonnier filed his answer which was considered filed on 9 January 2017.¹

Facts and Procedure

2. The Appeals Tribunal, effective 30 June 2016, issued *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-679 which remanded to the Dispute Tribunal for consideration on the merits Mr. Lemonnier's case challenging the Administration's decision not to select him for the position of Chief, Integrated Support Services (CISS), of the United Nations Stabilization Mission in Haiti (MINUSTAH).

3. The UNDT Registry assigned Case No. UNDT/NY/2015/011/R1 to the matter upon remand. In the impugned Judgment, the Dispute Tribunal made the following factual findings,² which the parties do not dispute:

... The Applicant joined the Organization in 2001 as a P-2 level staff member. By 2010, he was rostered for P-4 and P-5 level positions in the area of information and communication technology resources.

... Effective 20 December 2010, the Applicant joined MINUSTAH as Chief Telecommunications and Information Technology Officer at the P-4 level on a fixed-term appointment. Effective 1 January 2011, he was promoted to the P-5 level.

... On 1 July 2012, the post used to finance the Applicant's appointment was abolished. The Applicant is not disputing the decision to abolish his post in July 2012. The Applicant was thereafter moved to the post of Chief of Administrative Services, which was vacant.

... On 1 July 2013, the General Assembly abolished the post of Chief, Administrative Services, following its approval of MINUSTAH's 2013–2014 budget.

¹ Order No. 273 (2016).

² Impugned Judgment, paras. 11-16 and 18.

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requirements”³ in the job opening. In particular, it was decided that he “had no experience in any of the requisite areas at Headquarters (or experience at Headquarters generally)”⁴. Thus, he was not selected to fill job opening 34579 as CISS (P-5).

8. On 1 December 2014, the hiring manager made a recommendation to the Director of Mission Support (DMS), MINUSTAH, to select the successful candidate for job opening 34579 for CISS (P5), stating, in part:

Having considered the recommended candidates [which did not include Mr. Lemonnier], I confirm that [the selected candidate] is the most suitable candidate for the position, on the basis of her relevant experience in field missions and at the [Headquarters (HQ)] level. I also confirm that ... I have taken into consideration MINUSTAH's human resources objectives and targets, especially with regard to geography and gender

9. On the same date, the DMS approved the recommendation.

10. On or about 2 December 2014, Mr. Lemonnier made a request to management to review the decision not to select him for the CISS position. On 5 February 2015, Mr. Lemonnier was advised that the decision not to select him for the CISS position was affirmed since he was not qualified for the CISS position.

11. On 14 October 2016, the UNDT issued Judgment No. UNDT/2016/187 concluding: (i) the decision finding Mr. Lemonnier was not qualified for the CISS position was unlawful in that it was arbitrary; (ii) the decision not to select Mr. Lemonnier for the CISS position violated Staff Rule 9.6(e); and (iii) there was insufficient evidence to show bias against Mr. Lemonnier in the selection process for the CISS position. In short, the UNDT determined that Mr. Lemonnier's challenge to the decision not to select him for the CISS position “succeeds”. The UNDT did not award Mr. Lemonnier moral damages or compensatory damages for “pecuniary loss”, finding that such an award would duplicate an award in a companion case⁵

³ Annex 3.1 to Mr. Lemonnier's application (5 February 2015 letter to Mr. Lemonnier from the Under-Secretary-General for Management, in response to his request for management evaluation).

⁴ Ibid.

⁵ On 14 October 2016, the UNDT issued Judgment No. UNDT/2016/186 in Case No. UNDT/NY/2016/007, concluding that the Administration, in terminating Mr. Lemonnier's appointment with MINUSTAH, had breached his rights under Staff Rule 9.6(e) and paternity leave

12. On 13 December 2016, the Secretary-General filed the appeal and on 27 December 2016, Mr. Lemonnier filed his answer.

Submissions

The Secretary-General's Appeal

13. The appeal is receivable because the merits of the UNDT Judgment are in Mr. Lemonnier's favour although he was not awarded damages. "[B]ut for the award in Judgment UNDT/2016/186 [a companion case], [Mr. Lemonnier] would have been awarded compensation in the present case."

14. The Dispute Tribunal overstepped its authority by putting itself in the position of the Administration and erred in law and fact in substantively considering Mr. Lemonnier's qualifications. More specifically, the UNDT er

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Merits of Appeal

Qualification Decision

26. The Appeals Tribunal has explained that a “roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant post”.⁷

27. Section 9.5 of ST/AI/2010/3/Amend.1 describes how a roster for a generic job opening, such as job opening 34579, is created:⁸

... Qualified candidates for generic job openings are placed on the relevant occupational roster after review by a central review body and may be selected for job openings in entities with approval for roster-based recruitment. The roster candidate shall be retained on an occupational roster indefinitely or until such time the present administrative instruction is amended. Should an eligible roster candidate be *suitable* for the job opening, the hiring manager may recommend his/her immediate selection to the head of department/office/mission without reference to the central review body.

28. Generally, a “job opening ... reflect[s] the functions and the location of the position and include[s] the qualifications, skills and competencies required”.⁹ This means that qualifications or requirements for a position may change over time, depending upon an unlimited number of factors which reflect the realities of the position at the time the job is open.

29. This also means that a staff member on a roster for a generic job opening for a position (such as CISS (P-5)) may not necessarily possess the qualifications or requirements for the position as listed in the specific job opening (34579). In other words, there may be a difference between a staff member on a roster being *eligible* for a position and the staff member on the roster being *qualified* for the position, as described in the job opening. Thus, a staff member on a roster may be determined to be unqualified for a roster-related job opening due to his failure to meet particular requirements or competencies described in the

⁷ *Charles v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-416, para. 28.

⁸ Emphasis added.

⁹ ST/AI/2010/3, Section 4.5.

job opening.¹⁰ As we have noted in another context, “[t]he mere fact of being on the roster does not guarantee a promotion”.¹¹

30. Initially, the Secretary-General has “broad discretion” in staff selection decisions under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1.¹² However, the Secretary-General’s “discretion is not unfettered and is subject to judicial review”.¹³

31. Judicial review of a staff selection decision is not for the purpose of substituting the Dispute Tribunal’s selection decision for that of the Administration.¹⁴ Rather, as we stated in *Abassi*,¹⁵ the Dispute Tribunal’s role in reviewing an administrative decision regarding an appointment is to examine: “(1) whether the procedure laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration”. The role of the UNDT is “to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner”.¹⁶

32. As the Appeals Tribunal has explained, the starting point for judicial review is a presumption that official acts have been regularly performed:¹⁷

... But this presumption is a rebuttable one. If the management is able to even minimally show that the [staff member’s

33. Before the UNDT, Mr. Lemonnier claimed that:¹⁸

... [H]e was incorrectly deemed ineligible [for the CISS position] on the basis that he lacked Headquarter Logistics experience, despite having logistics experience at the United Nations Logistics Base in Brindisi, Italy, and having been on frequent logistics missions to the United Nations Headquarters in New York. He also submits that the selected candidate did not have any Logistics experience.

34. The UNDT found merit to Mr. Lemonnier's claims, stating:¹⁹

... Firstly, the Applicant placed before the Tribunal a copy of the *selected* candidate's publicly-accessible employment profile (LinkedIn page), which indicates that she had never held any positions in the United Nations Headquarters in New York. The accuracy of this information has not been contested by the [Secretary-General]. Secondly, the memorandum dated 1 December 2014 stated that the *selected* candidate had "relevant experience in field missions and at the HQ level." However, the memorandum provides no specifics regarding the *selected* candidate's employment profile as submitted by the Applicant. Further, the Applicant has raised *reasonable argument* that his experience in Brindisi, where the United Nations has its main Logistics Base used for peacekeeping operations, and his frequent work visits to New York, should have been given due weight.

... Accordingly, as [the Secretary-General] has *not* challenged the Applicant's submission regarding the selected candidate's lack of Headquarters experience or the publicly-accessible records provided by the Applicant, the Tribunal accepts them as accurate. It follows that the vacancy requirement of "Headquarters experience" was applied arbitrarily and inconsistently.

... The Tribunal finds that, *on the balance of the evidence* before it, the decision to deem the Applicant *ineligible* for the CISS post was vitiated by the arbitrary and inconsistent application of the requirement of "Headquarters experience".

35. The Dispute Tribunal made several errors of law in reaching the foregoing conclusions, apart from confusing eligibility for a position (being on the roster) with having the qualifications for the position advertised (job opening 34579). First, the UNDT applied the wrong standard of proof in weighing the evidence. At all times, it was the staff member's burden to prove by clear and convincing evidence that the Administration did not give his

concluded that the Administration's decision that Mr. Lemonnier was "ineligible" for the CISS position was unlawful "on the balance of evidence".²⁰

36. The "balance of evidence" standa3.5(hib 61f12 Ance)-np

outside the administrative record of which the Administration was not aware. And certainly not evidence outside the record relating to the qualifications of the *selected* candidate. Of course, this does not mean that a staff member cannot present evidence outside the administrative record to show bias or ill motive against him or her or in favour of the selected candidate.²³

Administration, the UNDT *inter alia* failed to consider either geography or gender, as the hiring manager was required to consider – and did consider, as stated in the 1 December 2014 memorandum.

42. For all these reasons, the Appeals Tribunal determines that the Dispute Tribunal erred in law and fact when it concluded that the Administration unlawfully found Mr. Lemonnier was not eligible, and did not select him, for the CISS position.

Staff Rule 9.6(e)

42. The Dispute Tribunal held that Mr. Lemonnier “was not afforded proper priority consideration for the CISS position under the framework established by [S]taff [R]ule 9.6(e) [and] ... therefore lost a fair chance of being selected for the CISS post”.²⁶ Staff Rule 9.6(e) addresses termination for abolishment of posts and reduction of staff:²⁷

(e) ... if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of *suitable posts* in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the order of preference:

- (i) Staff members holding continuing appointments;
- (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
- (iii) Staff members holding fixed-term appointments.

43. The UNDT’s conclusion that Mr. Lemonnier was not afforded proper priority consideration under Staff Rule 9.6(e) for the CISS position is premised upon the UNDT’s factual finding that Mr. Lemonnier was qualified for the position, i.e., had the requisite “headquarters experience”. As the UNDT’s factual finding was erroneous – not based on clear and convincing evidence – Staff Rule 9.6(e) did not apply to Mr. Lemonnier, for whom the position of CISS was *not* a suitable post as the Administration determined, and the conclusion that the Administration unlawfully failed to apply Staff Rule 9.6(e) to his candidacy for the CISS position is manifestly unreasonable.

²⁶ *Ibid.*, para. 35.

²⁷ Emphasis added.

Judgment

44. The appeal is granted; Judgment No. UNDT/2016/187 is reversed.

Original and Authoritative Version: English

Dated this 14 July 2017 in Vienna, Austria.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Knierim

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar