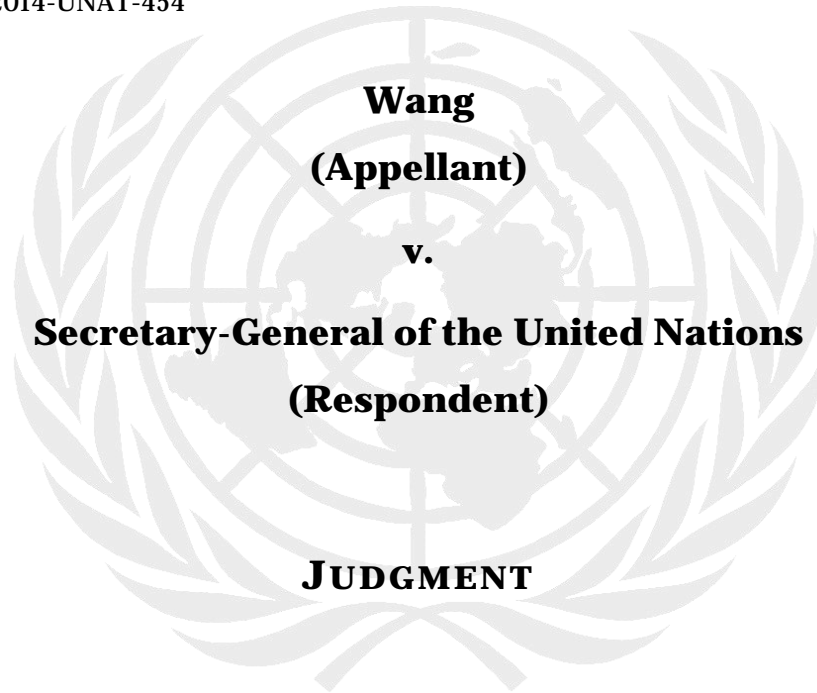




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-454



Before:	Judge Sophia Adinyira, Presiding Judge Mary Faherty Judge Rosalyn Chapman
Case No.:	2013-526
Date:	27 June 2014
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Secretary-General:	Stéphanie Cartier

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Jialu Wang against Judgment No. UNDT/2013/099, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 31 July 2013 in the case of *Wang v. Secretary-General of the United Nations*. Mr. Wang appealed on 13 September 2013 and the Secretary-General of the United Nations answered on 18 November 2013.

Facts and Procedure

2. The Dispute Tribunal made the following findings of fact:¹

... On 6 December 2011, [the United Nations Office at Geneva (UNOG)] advertised two posts of Chinese Reviser at the P-4 level in Geneva with 4 February 2012 as the deadline for receiving applications. The Applicant applied on 13 January 2012.

... On 21 February 2012, the Applicant and five other candidates sat for a written test which was evaluated [i]n the same month by three Senior Chinese Revisers. Following the written test results, five candidates—including the Applicant—were selected to participate in a competency-based interview.

... The competency-based interview was conducted on 13 and 14 March 2012 with the Chief, Chinese Translation Section, UNOG, a senior Chinese Reviser and the Chief, Russian Translation Section, UNOG, as assessment panel members.

... On 23 March 2012, the Applicant sought to know if the written test had been graded and requested if he could review his examination; however, this request was rejected. On 30 March 2012, an Associate Administrative Officer in the Division of Conference Management transmitted a memorandum to the Central Review Committee (“CRC”) listing five recommended candidates with the Applicant being one of them.

... On 12 April 2012, the CRC endorsed the list of recommended candidates and recommended that the Director-General of UNOG proceed with the final selection of the candidate. Subsequently, by memorandum dated 17 April 2012, the Chief of the Chinese Translation Section submitted to the Director-General UNOG, his selection request in favour of two of the recommended candidates endorsed by the CRC: one Ms. L. Y. and Ms. C. Y.

... On 30 April 2012, the Officer-in-Charge, Division of Administration submitted the above-mentioned selection recommendation to the Director-General,

¹ Impugned Judgment, paras. 2-16.

UNOG, for his final approval. In his submission, he *inter-alia* indicated that as at “31 March 2012, the representation of women in all categories at UNOG was 45% and 39% in senior positions.” Subsequently, on 1 May 2012, the Director-General, UNOG, approved the selection of the two recommended candidates: Ms. L. Y. and Ms. C. Y.

... On 4 May 2012, the selected candidates were informed of their selection to the posts, and the Applicant received the contested decision which further informed him that he was being placed on a roster of pre-approved candidates for potential consideration for future United Nations Secretariat job openings with similar functions for a period of two years (“roster”).

... On 11 May 2012, the Applicant filed a request for management evaluation of the contested decision and, on 16 July 2012, the management evaluation unit replied that the Secretary-General had decided to uphold it.

... On 3 August 2012, the Applicant lodged his application with the [Dispute] Tribunal challenging the contested decision. The Respondent filed a reply on 3 September 2012 with some annexes filed as *ex-parte*.

... By Order No. 139 (GVA/2012) of 10 September 2012, the [Dispute] Tribunal granted the Applicant access to a redacted version of the Respondent’s annexes filed *ex-parte* and, on 24 September 2012, the Applicant filed his comments to the Respondent’s reply.

... On 4 October 2012, the Applicant filed a motion for production of documents. In his motion, the Applicant requested the production of the written tests administered to the shortlisted candidates as part of the selection process to verify the scores.

... The [Dispute] Tribunal, by Order No. 51 (GVA/2013) of 3 May 2013, rejected the Applicant’s motion and ordered the Respondent to provide supporting documents concerning one of the selected candidate’s work experience, evidence of the “established monthly workload standard” of United Nations translators, and the calculation method to determine the ratio of the selected candidate’s part-time experience to full-time employment within the United Nations. On 17 May 2013, the Respondent filed the requested documents/information.

... By Order No. 68 (GVA/2013) of 30 May 2013, the [Dispute] Tribunal gave notice to the parties of a hearing to be held on 19 June 2013.

... On 5 June 2013, the Applicant filed a motion requesting the [Dispute] Tribunal to summon five staff members as witnesses. By order No. 73 (GVA/2013) of 5 June 2013, the [Dispute] Tribunal requested the Applicant to provide the reasons for requesting the witnesses listed in his motion, and gave the Respondent the possibility to comment on the Applicant’s motion and its subsequent rationale.

... By Order No. 81 (GVA/2013) of 17 June 2013, the [Dispute] Tribunal summoned to the hearing two witnesses, namely the Chief, Chinese Translation

Section, UNOG and a Senior Human Resources Officer, Human Resources Management Service, UNOG. The hearing was held on 19 June 2013 in which the Applicant, Counsel for the Respondent and witnesses appeared in person.

3. On 31 July 2013, the UNDT issued its Judgment, finding that contrary to Mr. Wang's assertion, one of the selected candidates fulfilled the requirements for the post and that Mr. Wang was accorded full and fair consideration in the selection process. Therefore, the UNDT dismissed the application.

Submissions

Mr. Wang's Appeal

4. Mr. Wang submits that the UNDT committed several errors of fact.
- (a) The UNDT failed to address several facts including its judgment on suspension of action where the UNDT found the selection decision to be *prima facie* unlawful.
 - (b) The UNDT erred in fact by accepting the Administration's calculation of Ms. C. Y.'s part-time employment during her full-time studies as amounting to one year and one month. He submits his own calculation according to which the UNDT should have found her not eligible.
 - (c) Mr. Wang further challenges the evaluation method applied to the written exam, in particular the seven grading criteria; the equal number of four points allotted to each criterion; the setting of the maximum score at 28 points instead of 100; and the grading of his examination.
 - (d) The UNDT erred in concluding that "[Mr. Wang's] allegations regarding bias and a lack of anonymity are not based on any facts"² when the written examination was in fact not graded anonymously since the hiring manager asked one of the non-selected candidates how she had translated certain words in the exam. Furthermore, the job opening had been specifically catered to Ms. C. Y. since it required a minimum of five years' experience when normally a P-4 position requires seven years of relevant experience.

² UNDT Order No. 51 (GVA/2013), para. 8.

5. Mr. Wang next contends that the UNDT erred in questions of law.
- (a) The UNDT erred in accepting the Administration's position that the purpose of the written test was to shortlist candidates to be invited for a competency-based interview. Since the advertisement was for the posts of reviser, the selection should be based on the result of a written test, not an interview.
 - (b) The UNDT erred in rejecting Mr. Wang's motion for production of documents.
 - (c) The UNDT erred in relying on evidence submitted in a suspension of action case.
 - (d) The UNDT erred in disrespecting Chinese law which prohibits counting of part-time employment, even more so since Ms. C. Y.'s part-time employment took place in China.
 - (e) The UNDT erred in reversing its suspension of action judgment without any new evidence.
6. Mr. Wang submits that the UNDT erred in procedure. The UNDT failed to order that the Secretary-General provide evidence clarifying the contradicting evidence in relation to the words that Ms. C. Y. translated per month at relevant times. The UNDT was "complicit in attempting to cover up [a] possible problem of fraud" by using the imprecise term "at least 20,000 words per month".
7. The UNDT failed to exercise jurisdiction vested in it by accepting the misrepresentation of crucial facts on the part of the hiring manager in the Comparative Analysis Report. The Report was biased in favour of the two selected candidates. Furthermore, the UNDT ignored his argument that the selected candidates had been treated as senior translators during sectional meetings, which in his view, indicates that their promotion was imminent.
8. The UNDT exceeded its jurisdiction by "downplaying or covering up the possible problem of fraud", which the conflicting evidence suggests.

9. The UNDT contradicted itself

(a) when it found that the evaluation method was reasonable while also stating that the invitation to a competency-based interview “should not be interpreted to mean that the fact of being invited to a competency-based interview after a successful written test would prevail over any flaws that may have been detected concerning the written test”; and

(b) when it stated at the oral hearing that it was not in possession of the documents in relation to the 20,000 word count, but on the other hand did not ask the Administration to produce such documents.

10. Mr. Wang requests that the Appeals Tribunal order rescission of the unlawful selection decision, his retroactive promotion and compensation in the amount of three years’ net base salary.

The Secretary-General’s Answer

11. The Secretary-General contends that the UNDT correctly concluded that Ms. C. Y. fulfilled the requirements of the posts. In accordance with the Guidelines for determination of level and step on recruitment to the professional category and above (Guidelines), the Administration gave Ms. C. Y. proportionate credit for her part-time employment in the amount of one year and one month. The UNDT correctly determined that Ms. C.Y. had “a little more than five years” of relevant work experience and that she thus met the threshold of “at least five years” relevant work experience.

12. The Secretary-General contends that contrary to Mr. Wang’s contention, the UNDT did not err in declining to apply Chinese law in order to determine how Ms. C. Y.’s part-time experience can be translated to full-time experience. The Organization’s processes are governed by the internal law of the Organization and national laws do not directly apply to the Organization’s staff members.

13. The Secretary-General submits that it was well within the UNDT’s discretion to decide that it did not require further evidence with respect to the number of words translated by Ms. C. Y. per month during the material time. Furthermore, the fact that Ms. C. Y. chose to

indicate “a more conservative estimate of her workload on her PHP” is not in contradiction with the word count indicated in the letter of Ms. C. Y.’s former employer.

14. The Secretary-General rebuts Mr. Wang’s contention that the UNDT erred in fact in calculating Ms. C. Y.’s part-time experience as amounting to one year and one month full-time employment. In accordance with the jurisprudence of the Appeals Tribunal, it is not the role of the UNDT to take on the substantive function of assessing the number of years of relevant work experience of candidates. Furthermore, the evidence before the UNDT supported the Administration’s calculation.

15. The Secretary-General submits that the UNDT correctly concluded that Mr. Wang was accorded full and fair consideration in the selection procedure for the post. The UNDT correctly concluded that the evaluation method was reasonable and that all candidates, including Mr. Wang, had received full and fair consideration. All the short-listed candidates were required to take a written examination, a requirement included in the vacancy announcement. It was well within the Administration’s discretion to evaluate candidates against objective criteria that had already been developed in assessing the quality of translation of other translators. Mr. Wang presents no evidence to support his assertion that the interviews were not conducted anonymously and in any event, Mr. Wang’s supervisor, who was the hiring manager, did not participate in the evaluation of the examinations.

16. The Secretary-General contends that the fact that Mr. Wang disagrees with the evaluation method and his personal grade does not mean that the evaluation method was unreasonable or unfair. Mr. Wang purports to substitute his own evaluation method for that of the Administration without articulating any errors on the part of the UNDT. The UNDT properly declined to assume the role of deciding which alternative evaluation method should have been used when the evaluation method used by the Administration was reasonable and fair.

17. The Secretary-General rebuts Mr. Wang’s contention that the UNDT contradicted itself by determining that the evaluation method was reasonable while at the same time stating that the invitation to a competency-based interview “should not be interpreted to mean that the fact of being invited to a competency-based interview after a successful written test would prevail over any flaws that may have been detected concerning the written test”.

The UNDT's statement is merely an *obiter dictum* and does not constitute a finding of a flawed written examination in the present case.

18. The Secretary-General submits that the other errors alleged by Mr. Wang are equally without merit. Mr. Wang points to the selection panel member notes to argue that the UNDT ought to have found him to be the only qualified candidate for the position. The Secretary-General submits that it was not for the UNDT to take on the substantive role with which the assessment panel was charged. Mr. Wang merely disagrees with the final outcome but does not show how his candidature was unfairly assessed.

19. The Secretary-General rebuts Mr. Wang's assertion that the fact that the vacancy announcement required five years' experience showed that it was catered to the needs of Ms. C. Y. and therefore showed that the selection process was biased. Contrary to Mr. Wang's contention, the generic job opening for a position of reviser at the P-4 level, as approved, does require a minimum of five years of experience in translation.

20. Finally, the Secretary-General submits that Mr. Wang has not demonstrated any errors in relation to previous proceedings before the UNDT regarding his application for suspension of action. The previous and current proceedings relate to the same case and accordingly, making reference to the same case record does not constitute an error. Furthermore, the fact that the UNDT found the administrative decision in the suspension of action decision to be *prima facie* unlawful does not mean that the Judgment on the merits will reach the same conclusion.

21. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

22. Mr. Wang requested an oral hearing, but this was rejected as his brief sufficiently covered the issues raised in his grounds of appeal.

23. Mr. Wang raised several grounds of appeal, namely, the UNDT erred on several questions of fact; erred on several questions of law; committed errors of procedure; failed to exercise jurisdiction vested in it on numerous occasions; exceeded its competence;

contradicted itself in its argument and judgment, resulting in a decision which is manifestly unreasonable and illogical.

24. We recall the jurisprudence of this Tribunal that our function is to determine if the UNDT has made errors of fact or law, exceeded its jurisdiction or competence or failed to exercise its jurisdiction as prescribed in Article 2(1) of our Statute. The Appellant has the burden of satisfying the Appeals Tribunal that the Judgment rendered by the UNDT is defective. It follows that the Appellant must identify the alleged defects in the Judgment and state the grounds relied upon in asserting that the Judgment is defective. It is not sufficient for an appellant to state that he or she disagrees with the outcome of the case or repeat the arguments submitted before the UNDT.

25. Since Mr. Wang was in effect challenging the selection of Ms C. Y. over and above him for the advertised post of the P-4 Reviser (Chinese), Geneva, this Tribunal will consider the appeal from three perspectives, namely:

- (a) Whether the UNDT correctly concluded that the selected candidate, Ms. C. Y. fulfilled the requirements for the posts.
- (b) Whether the UNDT correctly concluded that Mr. Wang was accorded full and fair consideration in the selection process for the posts.
- (c) Whether any errors in law, fact or procedure were established by Mr. Wang warranting a reversal of the UNDT Judgment.

Whether the UNDT correctly concluded that the selected candidate, Ms. C. Y., fulfilled the requirements for the posts.

26. Mr. Wang submits that Ms. C. Y. did not fulfill the requirements for the posts as she did not have the requisite work experience. He submits further that the UNDT erred in fact by accepting the Administration's calculation of Ms. C. Y.'s part-time employment during her full-time studies as amounting to one year and one month's work experience. He submits his own calculation according to which the UNDT should have found her not eligible.

27. With regard to the work experience, the vacancy announcement for the two P-4 positions of Chinese Revisor, which is attached to Mr. Wang's brief, provides:

At least five years of translation experience in a broad range of subjects dealt with by the United Nations (political, social, legal, economic, financial, administrative, scientific and technical), with a recognized specialization in a particular substantive, technical or administrative area. Preferably including three years within the United Nations and some experience of self-revision.

Although Mr. Wang claims the vacancy announcement was specifically catered to Ms. C. Y. since it required a minimum of five years' experience when normally a P-4 position requires seven years of relevant experience, this is a bare assertion, which he has failed to substantiate. "The burden of proving improper motivation lies with the staff member contesting the decision."³

28. Mr. Wang further submits that the UNDT committed numerous errors in calculating Ms. C. Y.'s work experience, and as a result she was not eligible for the position. Mr. Wang claims that the UNDT erred on a question of fact by taking into account Ms. C. Y.'s two year part-time work experience during her full-time studies at the Master's level.

29. Mr. Wang's insistence that by his own calculation the UNDT should have found Ms. C. Y. not eligible is clearly unreasonable and out of place as he cannot set up his own guidelines for the selection process. We note that the UNDT relied on the Administration's method of calculating work experience which it found reasonable and consistent with paragraph 8 of the "Guidelines", which provides that "work experience can be acquired on a full-time or part-time basis. Work experience acquired on a part-time basis should be credited proportionately to the time worked. This applies to self-employment, including consultancies, internships and volunteer work."⁴

30. In accordance with the Guidelines, the Administration gave Ms. C. Y. proportionate credit for her two-year part-time employment in the amount of one year and one month. Adding this to Ms. C. Y.'s work experience of three years 11 months and 17 days with the Organization, she had the requisite five years' work experience.

³ *Assad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021, para. 10. See also *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-081.

⁴ Quoted from Judgment No. UNDT/2013/099, para. 33.

31. We are satisfied that the evidence before the UNDT supported the Administration's calculations. It was not for the UNDT to substitute its own assessment for that of the Administration.⁵

32. We find Mr. Wang's further submission that the UNDT erred in disrespecting the Chinese law which prohibits counting of part-time employment as misconceived. The Organization's selection process is governed by its internal rules and regulations and not the national laws of its Member States, unless the Organization adopts such national laws as part of its internal law.⁶

33. On the issue of word count, while Ms. C. Y. stated in her PHP that she translated on average 20,000 words per month from 1 July 2005 to 30 June 2007, the reference letter from Ms. C. Y.'s former employer states that she translated some 30,000 words per month during that period of time.

34. Mr. Wang submits that the UNDT erred in procedure as it failed to order the Secretary-General to provide evidence clarifying the contradicting evidence in relation to the words that Ms. C. Y. translated per month at the relevant times. The UNDT was therefore "complicit in attempting to cover up [a] possible problem of fraud" by using the imprecise term "at least 20,000 words per month".

35. The Secretary-General in response submits that the UNDT did not err in deciding not to order production of further evidence as Ms. C. Y.'s employer letter at least corroborated her statement that she had translated an average of 20,000 words per month.

36. The Appeals Tribunal has held in *Messinger* and *Larkin* that the UNDT has a broad discretion to determine the admissibility of any evidence under Article 18(1) of its Rules of Procedure and the weight to be attached to such evidence.⁷ The UNDT has an appreciation of all the issues for determination and therefore has the discretion under Article 9 of the UNDT Statute to order or not to order the production of documents or such other evidence as it deems necessary. In this instance, we do not see any error committed by the UNDT as there was sufficient evidence that the selected candidate had the requisite word count. The reverse

⁵ *Gordon v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-262.

⁶ *Ernst v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-227.

⁷ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 33; *Larkin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-134, para. 38.

would have been the case if Ms. C. Y. had claimed a higher word count than what her previous employer had stated.

37. In all these circumstances, we find that the UNDT correctly held that Ms. C. Y. fulfilled the requirements for the post.

Whether the UNDT correctly concluded that Mr. Wang was accorded full and fair consideration in the selection process for the post

38. Mr. Wang submits that the administration of the written examination deprived him of a full and fair consideration in the selection process. He further submits that the UNDT erred in accepting the Administration's position that the purpose of the written test was to shortlist candidates to be invited for a competency-based interview.

39. Mr. Wang argues that since the advertisement was for the posts of Reviser, the selection should be based on the result of a written test, not an interview. These were bare assertions as Mr. Wang did not provide any legal basis for that argument. We note that a written test and an interview were requirements in the vacancy announcement.

40. Mr. Wang disagrees with the evaluation method and his personal grade and purports to substitute his own evaluation method for that of the Administration.

41. In considering this ground, we recall our jurisprudence that a staff member has a right to be fully and fairly considered for promotion through a competitive selection process untainted by improper motives like bias, discrimination.⁸ Generally, it is not for the UNDT to substitute its own assessment for that of the interview panel, but may examine whether the selection process was carried out in an improper, irregular or otherwise flawed manner and assess whether the resulting decision was tainted by undue considerations or was manifestly unreasonable.⁹

42. In applying the above principle, we find that the mere fact that Mr. Wang disagrees with the evaluation method and his personal grade does not mean that the evaluation method applied by the interview panel was unreasonable and unfair. Mr. Wang cannot substitute his

⁸ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 20.

⁹ *Charles v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-242; *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141.

own evaluation method for that of the Administration. Furthermore, Mr. Wang merely repeats his arguments before the UNDT and he has not been able to explain in what respect the UNDT, by rejecting those arguments as being unfounded, exceeded, or failed to exercise its jurisdiction, or committed errors of law or fact.

43. The UNDT indicated that:

In the absence of a guiding mechanism for the conduct of written test, the Hiring Manager had, indeed, the discretion to prepare a standard for the written test assessment. From the above discussion and evaluation of the evidence, the [Dispute] Tribunal finds that the evaluation method used was reasonable and that the Applicant and other candidates for the advertised posts were accorded full and fair consideration during the conduct of the written test.¹⁰

44. The UNDT properly declined to assume the role of deciding which alternate evaluation method should have been used.

45. Mr. Wang further claims the Comparative Analysis Report was biased in favor of the two selected candidates and he used the selection panel notes to argue that the UNDT ought to have found him to be the only qualified candidate for the post.

46. This Tribunal has held in *Fröhler*:

it is not the function of the Dispute Tribunal, or indeed of this Tribunal, to take on the substantive role with which the interview panel was charged, even in situations where elements of that procedure have been impugned. The jurisdiction vested in the Dispute Tribunal is to review alleged procedural deficiencies, and if same are established then, by the application of the statutory remedy it deems appropriate in all the circumstances, rectify such irregularity or deficiency as may have been found.¹¹

In the present case none of the elements in the procedure was impugned. We therefore hold that the UNDT did not err in that respect.

47. The UNDT subsequently observed that:

Additionally, despite his allegations regarding the written test, the Applicant was successful in the test and was invited to a competency[-]based interview. This, however, should not be interpreted to mean that the fact of being invited to a

¹⁰ Judgment No. UNDT/2013/099, para. 44.

¹¹ *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141, para. 32.

competency-based interview after a successful written test would prevail over any flaws that may have been detected concerning the written test.¹²

48. Mr. Wang finds the above statement by the UNDT as contradictory. The Secretary-General has rightly responded that the statement is merely an *obiter dictum* and does not constitute a finding of a flawed written examination in the present case.¹³

Other alleged errors

49. Mr. Wang has raised issues relating to previous proceedings in the case and complains that the UNDT failed to address several facts including its judgment on suspension of action where the UNDT found the selection decision to be *prima facie* unlawful. We find no substance in this complaint as the standard of proof required for a suspension of action order is relatively low, compared with the standard applied by the UNDT when determining the merits of the case.

Conclusion

50. In the circumstances of this case, we do not find any error of law or fact, errors of procedure, manifest or otherwise, or failure to exercise jurisdiction on the part of the UNDT.

Judgment

51. The appeal is dismissed and the UNDT Judgment is upheld.

¹² Judgment No. UNDT/2013/099, para. 45.

¹³ See *Abboud v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-103.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Chapman

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar