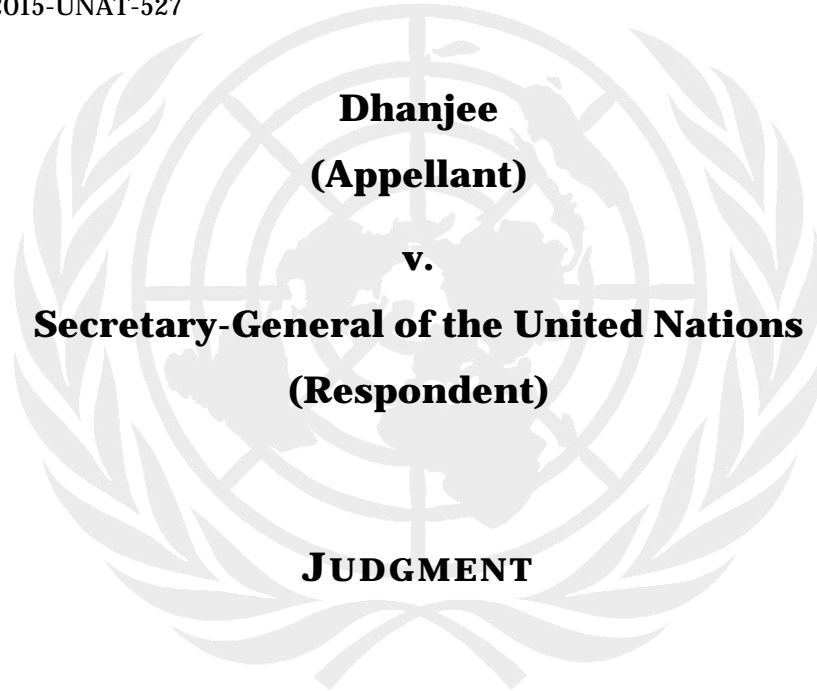




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2015-UNAT-527



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**Before:** Judge Sophia Adinyira, Presiding  
Judge Inés Weinberg de Roca  
Judge Luis María Simón

**Case No:** 2014-604

**Date:** 26 February 2015

**Registrar:** Weicheng Lin

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**Counsel for Appellant:** Self-represented

**Counsel for Respondent:** John Stompor

**JUDGE SOPHIA ADINYIRA, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Rajan Shantilal Dhanjee against Judgment No. UNDT/2014/029, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 13 March 2014 in the case of *Dhanjee v. Secretary-General of the United Nations*. Mr. Dhanjee appealed on 10 May 2014, and the Secretary-General answered on 14 July 2014.

**Facts and Procedure**

2. Mr. Dhanjee is a permanent staff member and a P-4 Legal Affairs Officer at the United Nations Conference on Trade and Development (UNCTAD).

3. On 18 January 2011, Mr. Dhanjee applied for a P-5 post of Senior Economic Affairs Officer, UNCTAD. The Hiring Manager (HM) determined that Mr. Dhanjee only partially satisfied the work requirement and did not include him on the shortlist. Six candidates were shortlisted and one was recommended and eventually selected for the post.

4. On 29 June 2012, the HM informed Mr. Dhanjee by e-mail of the decision to select another candidate for the post. This was confirmed by a generic e-mail of 21 August 2012 from the hiring department informing Mr. Dhanjee that his application would not be considered further.

5. On 24 August 2012, Mr. Dhanjee requested management evaluation of the decision to select another candidate for the contested post. By letter of 9 October 2012, the Under-Secretary-General for Management informed Mr. Dhanjee that the contested decision was upheld.

6. On 28 December 2012, Mr. Dhanjee submitted his application to the Dispute Tribunal challenging the non-selection decision and requested the Dispute Tribunal to order the Secretary-General to provide documents regarding the selection process.

7. By Order No. 19 (GVA/2014) of 28 January 2014, the Dispute Tribunal informed the parties that no witnesses would be heard and that it did not consider it necessary to grant the motion for production and disclosure of documents filed by Mr. Dhanjee.

8. On the merits, the Dispute Tribunal upheld the non-selection decision noting that there was no evidence of procedural irregularities, unreasonableness or bad faith in the exercise of the HM's discretion in not shortlisting Mr. Dhanjee. Accordingly, the Dispute Tribunal considered it unnecessary to hear witnesses in this case, grant Mr. Dhanjee access to documents filed *ex parte* by the Secretary-General or to order production of further evidence. The Dispute Tribunal further considered that given Mr. Dhanjee's exclusion from the selection process at an early stage, he had no legally protected interest which would allow him to contest the selection of the successful candidate. The case was dismissed in its entirety.

### **Submissions**

#### **Mr. Dhanjee's Appeal**

9. The Dispute Tribunal erred on a question of law with respect to the breadth of the HM's discretionary power to conduct a preliminary assessment of applicants. Mr. Dhanjee avers that if a vacancy announcement (VA) does not list desirable qualifications, then the HM must consider all candidates meeting the required qualifications, and does not have the discretion to create a shortlist and exclude any qualified candidate from the interview. The Dispute Tribunal erred in overlooking this limitation on the HM's discretion and by limiting itself just to checking for simple formal errors with respect to the HM's assessment of his work experience.

10. The Dispute Tribunal erred on a question of fact resulting in a manifestly unreasonable decision in finding that the decision not to convoke him for an interview was not unreasonable, improperly motivated or procedurally flawed. The review by the HM was procedurally flawed as the HM did not provide a reasoned record of her decision in *Inspira*. The HM took into consideration irrelevant material and ignored relevant material. Mr. Dhanjee and the successful candidate were treated unequally given that Mr. Dhanjee had answered all pre-screening questions affirmatively, whereas the successful candidate's affirmative answers with respect to two of the questions were false.

11. The Dispute Tribunal erred in procedure in not calling witnesses or ordering production of further evidence given that such information would have affected the decision in the case.

12. The Dispute Tribunal erred on a question of law in finding that he had no legally protected interest in the subsequent steps of the selection exercise. Given that the HM erred in not including him for the interview, it was erroneous of the Dispute Tribunal to prejudge that the interview panel would have found that he did not meet the requirements and competencies of the post.

13. Mr. Dhanjee requests the reversal of the Judgment, moral damages resulting from the failure to receive full and fair consideration, or that the case be remanded for additional findings of fact.

### **The Secretary-General's Answer**

14. The Dispute Tribunal correctly upheld the decision not to select Mr. Dhanjee for the post after review of the procedural steps in the selection exercise. The Administration more than minimally demonstrated that Mr. Dhanjee was given full and fair consideration, as seen in the reasoning provided by the HM in *Inspira* regarding Mr. Dhanjee's candidacy. Mr. Dhanjee, on the contrary, failed to show through clear and convincing evidence that he was denied a fair chance of promotion. He also had the burden of proving that any discrimination occurred.

15. Mr. Dhanjee has not demonstrated that the Dispute Tribunal erred on a question of law with respect to the discretion of hiring managers.

16. Mr. Dhanjee failed to demonstrate that the Dispute Tribunal erred on questions of fact resulting in a manifestly unreasonable decision. As noted above, the HM provided reasoning for her determination and based her review on Mr. Dhanjee's Personal History Profile which included his cover letter, employment history and responses to the pre-screening questions. Further, there was no inconsistency between the qualifications set out in the VA and the criteria used by the HM in assessing Mr. Dhanjee's work experience. Mr. Dhanjee's contentions regarding the selected candidate are irrelevant for the purposes of determining the lawfulness of the decision regarding his candidacy.

17. Mr. Dhanjee failed to establish that the Dispute Tribunal's exercise of discretion in denying his request for the testimony of two witnesses or the production of a letter relating to the successful candidate would have led to different findings of fact and outcome. Such evidence is not relevant to the issue of whether the HM's determination that

Mr. Dhanjee did not satisfy the work requirements of the post was unreasonable or tainted by extraneous motives.

18. The Secretary-General requests the Appeals Tribunal to dismiss Mr. Dhanjee's appeal in its entirety.

### **Considerations**

19. Mr. Dhanjee contested the decision not to include him in the shortlist of candidates interviewed for a P-5 post of Senior Economic Affairs Officer, UNCTAD.

20. Mr. Dhanjee appeals against the decision of the UNDT rejecting his application on the grounds that the UNDT: erred on a question of law; erred on a question of fact resulting in a manifestly unreasonable decision, and erred on a question of procedure.

21. Mr. Dhanjee requests the Appeals Tribunal to reverse the Judgment of the UNDT or to remand the case for additional findings.

#### *Error on a question of law*

22. Mr. Dhanjee submits the decision not to shortlist him for an interview by the HM for the post was improper and based on illegal grounds.

23. In the present case, the applicable administrative provision was Section 7 of Administrative Instruction ST/AI/2010/3 (Staff Selection System) that reads:

#### Section 7

##### Pre-screening and assessment

7.1 Applicants applying to job openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job opening.

7.2 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support will release electronically to the hiring manager (for position-specific job openings) and occupational group manager (for generic job openings), within and/or shortly after the deadline of the job opening, the applications of candidates who have successfully passed the pre-screening process, together with the names of pre-approved eligible candidates, for consideration for selection.

...

7.4 The hiring or occupational group manager shall further evaluate all applicants released to him/her and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation.

24. The Appeals Tribunal, in *Abbassi*, set out the scope of review of appointments and promotions and stressed that:

In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.<sup>1</sup>

25. The Appeals Tribunal further recalls its jurisprudence that:

The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.<sup>2</sup>

26. The UNDT applied these principles at the onset and noted that all the applicable procedures set out in Section 7 of ST/AI/2010/3 had been followed.

27. Thus the UNDT held:

In accordance with these rules, following release of the pre-screened applications to the HM, the latter reviewed the candidates and shortlisted six of them for a competency-based interview. The shortlist did not include the Applicant who was deemed by the HM to only partially meet the work experience required for the post under the terms of the VA.<sup>3</sup>

28. Mr. Dhanjee submits that the Dispute Tribunal erred on a question of law with respect to the breadth of the HM's discretionary power to conduct a preliminary assessment of applicants. In furtherance of this criticism, Mr. Dhanjee argues that if a VA does not list desirable qualifications, then the HM must consider all candidates meeting the required qualifications. According to him, the HM does not have the discretion to create a shortlist and exclude any qualified candidate from the interview.

29. We do not find any merit in this argument as it is not for Mr. Dhanjee to set out his own rules for assessing or selecting candidates for interview. The HM was obliged to follow the procedures set out in Section 7 of ST/AI/2010/3.

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<sup>1</sup> *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para 23.

<sup>2</sup> *Ibid*, para. 24.

<sup>3</sup> Impugned Judgment, para. 29.

30. In *Rolland*, we stated that there is always a presumption that official acts have been regularly performed, but it is a rebuttable presumption. “If the management is able to even minimally show that the appellant’s candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the appellant who must be able to show through clear and convincing evidence that she was denied a fair chance of promotion.”<sup>4</sup>

31. The Secretary-General responds that the HM more than minimally demonstrated that she gave Mr. Dhanjee’s candidature full and fair consideration. The Secretary-General points out that of the seven entries under the category of employment that were listed in Mr. Dhanjee’s application for the post, only one entry was determined by the HM as being relevant to the post. Mr. Dhanjee held that position for one year and 11 months, which obviously fell short of the requirement that applicants have at least 10 years of progressively responsible post graduate experience at the national/international level dealing with analytical work on trade and development issues and international trading system, and trade policy formulation and implementation.

32. We uphold this submission.

33. In the opinion of the Appeals Tribunal, the UNDT properly applied the standard of judicial review to determine whether the HM’s decision that Mr. Dhanjee was not among the most qualified for the post was reasonable. The UNDT held that:

As regards the allegation raised by the Applicant that his work experience was in fact meeting the requirements specified in the VA and that he was wrongly excluded from the shortlist, the Tribunal recalls that sec. 7.4 of ST/AI/2010/3, [...] expressly instructs the HM to “prepare a shortlist of those [released applicants] who appear most qualified for the job opening based on a review of their documentation” (emphasis added). In the same vein, the Instructional Manual for the Hiring Manager on the Staff Selection System (*Inspira*) [...] mentions in its Chapter 9 that the HM invites the “most promising candidates” for a competency-based interview and/or an assessment exercise. It follows from these provisions that the HM has broad discretionary power to exercise a preliminary evaluation of the applicants in order to establish the shortlist of candidates to be invited for further assessment; indeed, such a list, per definition, does not have to include all pre-screened candidates but only the most qualified or promising ones. In order to assess which applicants fall into that category, the HM must exercise his or her judgment and the Tribunal will not easily interfere with the broad discretion of the Administration in these matters and substitute its judgement for that of the competent decision-maker.<sup>5</sup>

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<sup>4</sup> *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 5.

<sup>5</sup> Impugned Judgment, para. 30.

34. We do not find any reasons to reverse these findings. We note that Mr. Dhanjee merely repeats the arguments he made before the UNDT and expresses his disagreement with the findings by the HM that he “partially meets the requirement”.

35. From the foregoing, we hold that the UNDT did not err on a question of law with respect to the discretion of the HM, and the UNDT correctly upheld the decision not to shortlist Mr. Dhanjee for interview for the post.

36. The appeal on this ground fails.

*Error on a question of fact*

37. Mr. Dhanjee submits further that the Dispute Tribunal erred on a question of fact resulting in a manifestly unreasonable decision in finding that the decision not to convoke him for an interview was not unreasonable, improperly motivated or procedurally flawed.

38. According to Mr. Dhanjee, the review by the HM was procedurally flawed as the HM did not provide a reasoned record of her decision in *Inspira*. The HM took into consideration irrelevant material and ignored relevant material. Mr. Dhanjee claims that he and the successful candidate were treated unequally given that he had answered all pre-screening questions affirmatively whereas the successful candidate’s affirmative answers with respect to two of the questions were false.

39. We do not find any merit in these submissions as the HM based her review on the Personal History Profile that Mr. Dhanjee had submitted with his application. In her assessment of Mr. Dhanjee in *Inspira*, the HM set forth her reasoning for not shortlisting Mr. Dhanjee as follows:

Partially meets the requirement. He does not have at least 10 years of progressively responsible post-graduate experience at the national/international level dealing with analytical work on trade and development issues and international trading system, and trade policy formulation and implementation. He has no demonstrated capacity of leadership and responsibility. He has limited experience with trade-related technical cooperation activities and monitoring and evaluation. He has experience of work with governmental officials, in particular with those from developing countries and other intergovernmental organizations. He worked in the government on legal affairs and has worked in UNCTAD and ECE on intellectual property rights, competition and trade facilitation.<sup>6</sup>

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<sup>6</sup> *Ibid*, para. 4.



40. We consider the comparison of his experience with that of the successful candidate irrelevant. As correctly stated by the UNDT, “[Mr. Dhanjee]’s exclusion at such an early stage of the selection process confirms that he had no real chance for being promoted; he therefore has no legally protected interest in the subsequent steps of the selection procedure and his contentions with regard to the qualifications of the successful candidate are of no avail to his own case.”<sup>7</sup>

41. Mr. Dhanjee has not demonstrated that the HM’s decision not to convoke him for an interview was unreasonable, flawed or vitiated by any extraneous motive, bias, discrimination or breach of a procedural rule.

42. The established jurisprudence of the Appeals Tribunal has consistently stressed that the Secretary-General has a broad discretion in matters of promotion and it is not the function of this Tribunal, or the UNDT, in the absence of evidence of bias, discriminatory practices or mala fides, to substitute its judgment for that of the competent decision-maker.<sup>8</sup>

43. The appeal on this ground fails.

*Error in procedure*

44. While Article 17(1) of the UNDT Rules of Procedure permits parties to call witnesses and experts to testify, Article 17(6) gives the Judge the discretion to decide whether the presence of witnesses is required. Under Article 18(5) of the UNDT Rules of Procedure, the Judge may limit oral evidence as he or she deems fit.

45. Mr. Dhanjee submits that the UNDT committed an error in procedure in deciding it to be unnecessary to hear witnesses in the case or to order production of further evidence given that such information would have affected the decision in the case.

46. The UNDT in rejecting Mr. Dhanjee’s application for further oral evidence and production of a document said:

In view of its conclusion that the decision not to select the Applicant for the contested post, by not shortlisting him to be invited for an interview, was legal, the Tribunal considers it unnecessary to hear witnesses in this case, to grant the Applicant

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<sup>7</sup> *Ibid*, para. 33.

<sup>8</sup> *Bofill v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-383, para. 21.

access to the documents filed *ex parte* by the Respondent, or to order production of further evidence.<sup>9</sup>

47. We find no reason to disturb these findings as from the circumstances of the case, the UNDT lawfully exercised its discretion on matters of procedure.

48. The appeal on this ground also fails.

49. From the foregoing we find no merit in the appeal. There was no evidence before the Tribunal that there was any procedural irregularity or that the HM's decision not to select Mr. Dhanjee failed to take into account relevant material or was unreasonable or tainted by extraneous motive, bias or discrimination towards him. Nor was there any evidence that the UNDT exercised its discretion unreasonably in disallowing further testimony and production of evidence.

50. Mr. Dhanjee's request to remand the case to the UNDT is denied.

### **Judgment**

51. The appeal is dismissed. The UNDT Judgment is affirmed.

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<sup>9</sup> *Ibid*, para. 33.

Original and Authoritative Version: English

Dated this 26<sup>th</sup> day of February 2015 in New York, United States.

*(Signed)*

Judge Adinyira, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Simón

Entered in the Register on this 17<sup>th</sup> day of April 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar