



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

Judgment No. 2016-UNAT-652

**Nikolarakis
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Deborah Thomas-Felix
Judge Luis María Simón

Case No.: 2016-859

Date: 30 June 2016

Registrar: Weicheng Lin

Counsel for Mr. Nikolarakis: Jiries Saadeh, OSLA

Counsel for Secretary-General: Rupa Mitra

JUDGE SOPHIA ADINYIRA, 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/2015/071, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 6 August 2015, in the case of *Nikolarakis v. Secretary-General of the United Nations*. On 5 October 2015, the Secretary-General filed the appeal and, on 4 December 2015, Mr. George Nikolarakis filed his answer to the appeal.

Facts and Procedure

2. At the material time, Mr. Nikolarakis was a Security Officer at the S-2 level in the Security and Safety Service (SSS), Department of Safety and Security (DSS) at Headquarters.

3. On 3 November 2010, 37 Senior Security Officer positions at the S-3 level were advertised by Job Opening No. 10-SEC-DSS-NY-16958-R-NEW YORK (Job Opening). The deadline for applications was 3 December 2010, which were later extended to 31 December 2010. The Job Opening listed three required core competencies: Professionalism, Communication and Teamwork. It provided the following information on the Teamwork competency:

Teamwork:

Works collaboratively with colleagues to achieve organizational goals; solicits input by genuinely valuing others' ideas and expertise; is willing to learn from others; places team agenda before personal agenda; supports and acts in accordance with final group decision even when such decisions may not entirely reflect own position; shares credit for team accomplishments and accepts joint responsibility for team shortcomings.

4. The following day, the SSS/DSS issued an administrative bulletin announcing the launch of the "long awaited 'S' category promotion exercise" and providing the following information:

Security Officers will be evaluated based upon a completed application (including meeting the required education and work experience), performance record, a written assessment test, and a competency-based interview. Recommended candidates who demonstrate that they meet all requirements will either be selected for the post or their names will be placed upon a roster of candidates for future vacancies.

5. An SSS administrative bulletin dated 7 December 2010 repeated the same information.
6. Mr. Nikolarakis passed the written assessment. Subsequently, by e-mail dated 17 August 2011, he was invited to an interview to take place on 19 August 2011 from 9:30 am to 10:00 am. But the interview was rescheduled to 18 August 2011.
7. The interview panel found that Mr. Nikolarakis had successfully demonstrated the competencies of Professionalism and Communication, but had failed to adequately demonstrate that of Teamwork.
8. The interview panel determined that 46 candidates met all of the evaluation criteria for the Job Opening and should be placed on the recommended list. Mr. Nikolarakis was not recommended because the panel found that he did not adequately demonstrate the competency of Teamwork during the interview.
9. The hiring manager, the Chief of SSS/DSS, in accordance with section 7.7 of ST/AI/2010/3 (Staff Selection System), was then responsible for transmitting his proposal of qualified candidates to the Central Review Committee (CRC). Following the CRC's review and approval of the proposal, the then Under-Secretary-General for DSS, as head of the department, selected the recommended candidates for the vacant positions. He promoted 37 officers to the rank of Senior Security Officer at the S-3 level, with effect from 1 December 2011.
10. On 6 December 2011, Mr. Nikolarakis was notified that he had not been recommended for a promotion to any of the 37 advertised positions at the S-3 level.
11. On 16 January 2012, Mr. Nikolarakis requested management evaluation of the decision not to promote him to the S-3 level and, on 23 February 2012, he was informed that the decision had been upheld.
12. On 22 May 2012, Mr. Nikolarakis filed an application with the UNDT.
13. In Judgment No. UNDT/2015/071 now under appeal, the UNDT found that those within the SSS/DSS who designed and implemented the promotion exercise had acted in good faith. However, the UNDT concluded:¹

¹ Impugned Judgment, para. 58.

The hiring manager acted on the basis of a flawed understanding of the role of competency-based interviews under ST/AI/2010/3 when he fettered his discretion by declining to recommend [Mr. Nikolarakis] for promotion based solely on the result of his competency-based interview. Further, the hiring manager ignored relevant material when he did not take into account [Mr. Nikolarakis'] performance assessment reports, which would have provided a fuller picture of his ability to demonstrate the competency of Teamwork in his day-to-day work. [Mr. Nikolarakis] was therefore denied the right to full and fair consideration of his candidacy for promotion.

14. The UNDT awarded Mr. Nikolarakis moral damages in the amount of USD 3,000 with interest, as compensation for the procedural error and unfairness to which he was subjected.

Submissions

The Secretary-General's Appeal

15. First, the UNDT erred on a question of fact in finding that the Administration failed to take into account Mr. Nikolarakis' performance records prior to submitting the list of recommended candidates to the CRC. The evidence showed that the records of all candidates, including their performance reports, were fully reviewed before the list of proposed candidates was sent to the CRC.

16. Secondly, the UNDT erred on a question of law in substituting its own judgment for that of the Administration regarding how the selection process should be conducted. Specifically, the UNDT held that the hiring manager was required to review Mr. Nikolarakis' performance appraisal (e-PAS) ratings from the previous two reporting cycles in relation to the Teamwork competency, to make up for his failure to demonstrate that competency at his interview.

17. The UNDT improperly relied on "logic" to insert a step into the assessment process that is not required under the relevant laws. It also erroneously conflated the performance management and development system and the staff selection system. The UNDT's findings in this regard would likely create uncertainty and unfairness in selection processes.

18. Lastly, the UNDT erred in awarding Mr. Nikolarakis moral damages. Even if the Appeals Tribunal were to find that he was denied full and fair consideration for promotion, he should not be compensated. Mr. Nikolarakis' testimony that he was distressed and felt undervalued was not sufficient to justify an award of compensation for moral damages, particularly in light of the General Assembly's amendments to the Statutes of both the UNDT and the Appeals Tribunal, which require compensation for moral harm to be supported by evidence.

19. The Secretary-General respectfully requests that the Appeals Tribunal vacate the UNDT Judgment, except for its finding that those who designed and implemented the selection process for the Job Opening had acted in good faith.

Mr. Nikolarakis' Answer

20. The appeal should be dismissed. The Administration effectively invites the Appeals Tribunal to substantially retry the case.

21. The Secretary-General's assertion that the UNDT made a factual error in finding that the Administration had failed to take into account Mr. Nikolarakis' performance records prior to submitting the list to the CRC is unsubstantiated. Nor has he demonstrated how the supposed error of fact has led to "a manifestly unreasonable decision" within the meaning of Article 2(1)(e) of the Appeals Tribunal Statute (Statute).

22. The UNDT did not find that hiring managers must always consider e-PAS reports at the recommendation stage of the recruitment exercise. Rather, it found that the hiring manager in this case ignored the e-PAS reports, which were relevant evidence of Mr. Nikolarakis' competency, and placed weight on the competency-based interviews only, thereby "fetter[ing] his discretion".

23. The Secretary-General has wrongly attempted to imply that the UNDT's reliance on logic was "somehow *ultra vires* or unwarranted". Rather, "[i]t is a fundamental principle of administrative law that illogical or irrational decisions warrant vitiation". The UNDT found that the ultimate obligation of any panel was to recruit the best candidate. A diligent panel would have provided full and fair consideration to Mr. Nikolarakis by at least considering his e-PAS reports. None of the case law cited by the Secretary-General undercuts these findings.

24. The Secretary-General is essentially arguing that only a candidate's "overall rating" in an e-PAS may be considered within a selection process. This amounts to asking recruiters "willfully to turn a blind eye to important evidence" by ignoring the other parts of the performance reports. This is inconsistent with previous case law of the Appeals Tribunal.

25. The UNDT's findings do not create uncertainty or unfairness in selection processes as they relate only to the case at hand and the Administration's failure to give Mr. Nikolarakis full and fair consideration.

26. The award of moral damages was based on the oral evidence provided by Mr. Nikolarakis and meets the test laid down in *Asariotis*² and the revised Statutes of the UNDT and the Appeals Tribunal. However, Mr. Nikolarakis contests the application of such amendments given that the application was filed before the amendments took effect. He also respectfully invites the Appeals Tribunal to defer to the opinion of the UNDT in exercising the discretion to award damages.

Considerations

Did the UNDT err in substituting its own judgment for that of the Administration regarding how the selection process should have been conducted?

27. The Secretary-General submits that the UNDT erred on a question of law in substituting its own judgment for that of the Administration regarding how the selection process should have been conducted.

28. We find much weight in this submission as our jurisprudence is clear that in matters of staff selection, the Secretary-General has broad discretion.³ We have clarified that this discretion is not unfettered and is subject to judicial review.⁴ We have clarified further in *Ljungdell*:⁵

Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The

² *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36.

³ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-506, para. 48, citing, *inter alia*, *Simmons v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-425.

⁴ *Ibid.*, para 49.

⁵ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30.

jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.

29. In *Abbasi*, we also emphasised that:⁶

... 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.

... 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.

30. We are satisfied that the same applies insofar as substituting the Tribunal's own views as to the pertinent job criteria for a given post. In the instant case, the UNDT improperly relied on "logic" to insert a step into the assessment process that is not required under the staff selection system established under the Staff Regulations and Rules.

31. The UNDT clearly erred on a matter of law and exceeded its competence by deciding that the DSS/SSS management lacked discretion to require all candidates to pass the competency-based interview; and, by ruling that additional weight had to be given to Mr. Nikolarakis' individual competency ratings in his performance evaluations even after he had failed the interview.

32. From the foregoing, the appeal succeeds.

Judgment

33. The appeal is allowed. Judgment No. UNDT/2015/071 is vacated.

⁶ *Abassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, paras. 23 and 24.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Simón

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar