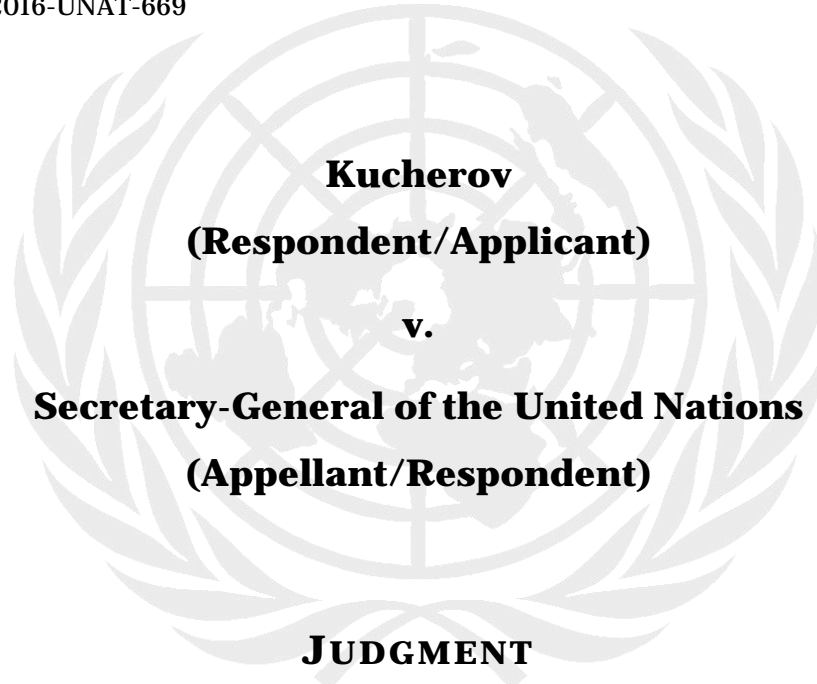




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-669



Before: Judge Luis María Simón, Presiding
Judge Deborah Thomas-Felix
Judge Inés Weinberg de Roca

Case No.: 2015-880

Date: 30 June 2016

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 January 2016, and Mr. Yuri Kucherov filed his answer on 12 February 2016.

Facts and Procedure

2. The facts as presented by the Dispute Tribunal are as follows:¹

... [Mr. Kucherov] contest[ed] the selection decision for the post of Chief, Russian Verbatim Reporting Section, at the P-5 level (“the Post”), in the Verbatim Reporting Service (“VRS”), Meetings and Publishing Division (“MPD”), Department of General Assembly and Conference Management (“DGACM”).

...

... On 27 July 2012, job opening number 12-LAN-DGACM-24475-R-NEW YORK (“the JO”) was issued through Inspira (the online United Nations jobsite). The deadline to apply for the JO was 2 October 2012.

... The JO included the following requirements:

Education

A first-level degree from a university or institution of equivalent status. Must have passed the United Nations Competitive Examination for Russian Verbatim Reporters.

Work Experience

A minimum of ten years of experience in verbatim reporting, revision of verbatim records or related area, of which at least eight should have been in the United Nations system.

Languages

Must have a perfect command of Russian, which must be his/her main language, and an excellent knowledge of English and another official United Nations Language.

¹ Impugned Judgment, paras. 4-20.

... Under “Assessment Method” the JO stated:

Evaluation of qualified candidates may include an assessment exercise which may be followed by competency-based interview.

... Four candidates were released by the Office of Human Resources Management (“OHRM”) after passing the pre-screening process. After the closing of the posting for the JO, the Hiring Manager evaluated these four candidates, including their performance appraisals, and determined that two of them, [Mr. Kucherov] and the selected candidate, were suitable for further consideration.

... During a preliminary evaluation, the two candidates were assessed against the education, work experience, and language requirements of the Post and allocated points for each requirement based on a four-point grading system: 1-unsatisfactory; 2-partially satisfactory; 3-satisfactory; and 4-outstanding. Both candidates received an overall score of 10 points out of 12. [Mr. Kucherov] was rated satisfactory for education and work experience and outstanding for languages. The selected candidate was rated satisfactory for work experience and languages and outstanding for education.

... [Mr. Kucherov] was invited to an interview by email dated 28 November 2012. He was notified of the composition of the interview panel and advised that the interview would last approximately 90 minutes. Both [Mr. Kucherov] and the selected candidate were interviewed for the Post on 4 December 2012.

... The competency-based interview tested five competencies: Professionalism, Planning and Organizing, Technological Awareness, Leadership, and Managing Performance. The panel assessed the candidates’ answers using a four-point scale, and the five members were instructed to use not only full points-1, 2, 3, 4-but also halfpoints-0.50 (1.5, 2.5, 3.5).

... [Mr. Kucherov] received an overall score of 15 points out of 20 for the interview. He received a rating of satisfactory for all five competencies. The selected candidate received an overall score of 18 points out of 20. She received a rating of satisfactory for two competencies—Technological Awareness and Leadership, and a rating of outstanding for three competencies—Professionalism, Managing Performance, and Planning and Organizing.

... Both [Mr. Kucherov] and the selected candidate were found to meet the competencies of the Post and were recommended for consideration for selection.

... In a two-page document addressed to the Acting Head of DGACM on 7 January 2013, the Hiring Manager presented the overall scores of the two recommended candidates from the preliminary evaluation and the competency-based interview. [Mr. Kucherov] received an overall score of 25 points out of 32 (10 points from the preliminary evaluation and 15 points from the interview); the selected candidate received an overall score of 28 out of 32 (10 points from the preliminary evaluation and 18 points from the interview). As follows from the first page of the document, both candidates were recommended “subject to the successful review of the appropriate Central Review body” as indicated by

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 candidate] be selected for the above-mentioned post” (emphasis in original). The first page of the document is signed by the Acting Head of DGACM under an unmarked section titled “Approved/Not Approved” and dated 14 January 2013.

... A document titled “Final Transmittal Memorandum to the Central Review Body”, and dated 17 January 2013, summarized the recruitment process for the Post and stated that the assessment panel had determined that both [Mr. Kucherov] and the selected candidate had met all of the evaluation criteria for the JO and been placed on the recommended list.

... In an email to the Acting Head of DGACM dated 4 February 2013, the Chief of the Central Review Bodies Secretariat stated that the Central Review Board had “endorsed the proposal for filling the [Post]”.

... On 5 February 2013, [Mr. Kucherov] was informed that he had been placed on a roster of pre-approved candidates for potential consideration for future job openings with similar functions at the same level (P-5).

... On 27 February 2013, [Mr. Kucherov] was informed via email that the selected candidate had been selected for the Post.

... On 28 March 2013, [Mr. Kucherov] requested management evaluation of the decision not to select him for the Post.

... By letter dated 29 April 2013, [Mr. Kucherov] was informed by the Under-Secretary-General for Management that the Secretary-General ha[d] decided to endorse the findings and recommendations of the Management Evaluation Unit and uphold the selection decision.

3. On 25 July 2013, Mr. Kucherov filed his application before the UNDT, requesting rescission of the contested decision and an order that a new recruitment process be initiated or, alternatively, that he be awarded two years’ net base salary as compensation for the violation of his rights, for stress and suffering as well as for the loss in salary and pension benefits caused by his non-selection.

4. The UNDT held a hearing on the merits at which six witnesses gave evidence. The UNDT also instructed the parties to submit additional submissions, which they did.²

5. On 5 November 2015, the UNDT issued its Judgment in which it found that Mr. Kucherov’s right to be fully and fairly considered for the Post was not respected, having found the following procedural irregularities:³

² *Ibid.*, paras. 21-39.

... The JO did not identify the specific assessment method to be used for the evaluation of the technical skills during the selection as part of the evaluation criteria;

... The panel did not include an expert on Russian language and a nonvoting member representing ASG/OHRM;

... The panel did not assess the short-listed candidates through an assessment exercise (written test) to evaluate their substantive knowledge against the requirements for the Post;

... The scoring system used by the panel did not accurately reflect the candidates' performance during the interview, which determined an inaccurate conversion to the ratings of satisfactory and outstanding;

... The selection decision was made before the CRB's mandatory review based on a different note than the transmittal memorandum sent later to the CRB and [did] not contain the reasons of the Acting Head of DGACM for the selection.

6. In reaching its decision, the UNDT made the following determinations, amongst others:

a) The special amended mandatory provisions from ST/AI/1998/7 (Competitive examinations for recruitment and placement in posts requiring specific language skills in the professional category) together with the amended provisions of ST/AI/2010/3 (Staff selection system) "are applicable to any competitive selection process for language posts at the Professional level, including posts at the P-5 level requiring, like in the present case, specific language skills in the professional category".⁴

b) The guidelines provided in the staff selection system manuals, which must be in accordance with ST/AI/2010/3, establish in detail the steps to be followed in the selection process and "must be respected during the entire staff selection process".⁵

c) After the publication of the JO, the Hiring Manager had no discretion to intervene and modify the announced assessment methods, which in this case had been announced as two: "an assessment exercise and an interview".⁶

³ *Ibid.*, para. 152.

⁴ *Ibid.*, para. 59.

⁵ *Ibid.*, paras. 63 and 65.

⁶ *Ibid.*, paras. 68-69.

d) In order to respect Section 7.5 of ST/AI/2010/3, at least two different assessment methods must be used by the panel, and the assessment panel “cannot exercise any discretion to decide that only one of the two elements (technical requirements and competencies) will be assessed and determined. On the contrary, the same panel must assess and determine both of them using the appropriate assessment methods”.⁷ The UNDT went on to state that this rule also applied to the Professional language posts at the P-5 level.⁸

7. The UNDT rejected Mr. Kucherov’s request for rescission. The UNDT noted that, although he had a significant chance for promotion, Mr. Kucherov had been placed on a roster of pre-approved candidates and had moved to a different unit shortly after the selection decision was made. The UNDT considered that rescinding the decision would result in Mr. Kucherov losing his rights as a roster applicant, which would “breach ... an old principle of procedural law, according to which the use of an appeal cannot create, for the party that exercised it, a worse situation than the one from the decision under appeal”.⁹ The UNDT further noted that, “even if some of the irregularities in the selection process may have contributed to [Mr. Kucherov’s] decision to accept the invitation to work in another unit, ultimately a non-promotion decision has no such legal effect as forcing the non-selected candidate to work in a different unit”.¹⁰ The UNDT also denied Mr. Kucherov’s request for alternative relief, stating that he did not have a right to be selected and, therefore, was not entitled to receive compensation for the violation of his right to be fully and fairly considered.

8. The UNDT awarded Mr. Kucherov USD 3,000 in moral damages. In its view, the award, “together with this judgment, represent[ed] a reasonable and sufficient compensation for the moral damages resulting from substantial procedural errors”.¹¹ The UNDT had noted Mr. Kucherov’s testimony “that, after the selection decision [had been] made, he was stressed and depressed because he [had not been] selected and it [had not been] easy for him to continue to work [where he had been working]”.¹²

⁷ *Ibid.*, para. 104.

⁸ *Ibid.*, para. 105.

⁹ *Ibid.*, para. 157.

¹⁰ *Ibid.*, paras. 156-159.

¹¹ *Ibid.*, para. 163.

¹² *Ibid.*, para 161.

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" of the technical skills is mandatory. In this instance, no such assessment took place.

21. The Secretary-General seeks to sidestep a variety of problems identified by the UNDT. His claim that the timing of the head of office's recommendation is immaterial has no merit. A plain reading of ST/AI/2010/3 is clear. The CRB must review the list of qualified candidates first and only after that the selection decision may be made.

22. The Secretary-General's discretion in recruitment matters is certainly broad, but it is not so broad as to allow the Secretary-General the latitude to rewrite the rules at will.

23. The UNDT made no error in awarding moral damages and Mr. Kucherov is entitled to retain the damages awarded. Although evidence is not necessary for the award of moral damages in this case, Mr. Kucherov provided evidence upon which the UNDT based its award. Should the Appeals Tribunal determine that additional evidence is necessary, Mr. Kucherov stands ready to present it.

24. The appeal should be dismissed in its entirety.

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

34. The Secretary-General's appeal is granted, and Judgment No. UNDT/2015/106 is vacated.

¹⁵ *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40, citing *Bastet v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-511, para. 59.

Original and Authoritative Version: English

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

(Signed)

Judge Simón, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Weinberg

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

(Signed)

Weicheng Lin, Registrar