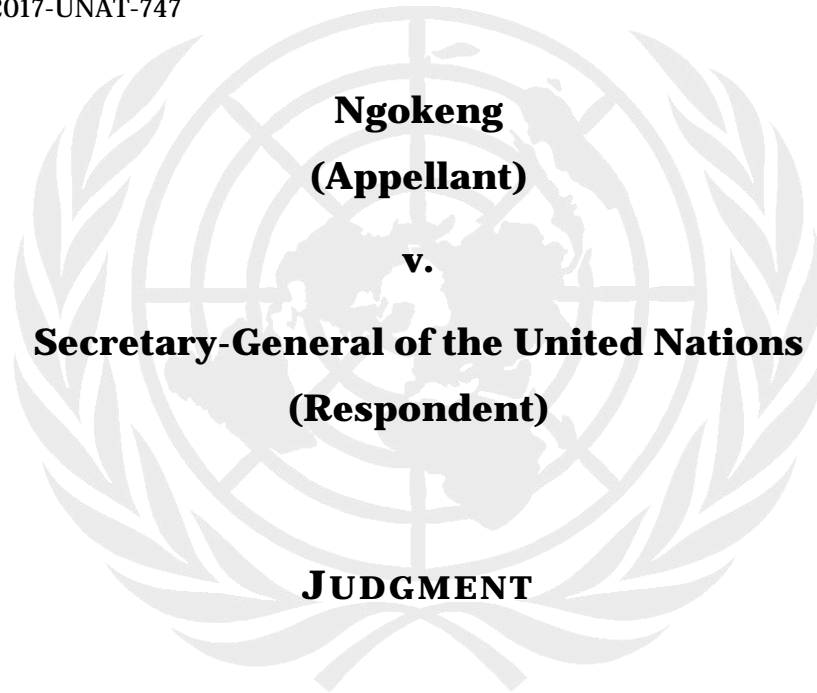




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-747



**Ngokeng
(Appellant)**

v.

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

JUDGMENT

Before:	Judge John Murphy, Presiding Judge Rosalyn Chapman Judge Sabine Knierim
Case No.:	2016-960
Date:	31 March 2017
Registrar:	Weicheng Lin

Counsel for Mr. Ngokeng:	Self-represented
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/088, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 22 June 2016, in the case of *Ngokeng v. Secretary-General of the United Nations*. Mr. Noel Ngokeng filed the appeal on 21 August 2016, and the Secretary-General filed his answer on 21 October 2016.

Facts and Procedure

2. On 3 January 2014, Mr. Ngokeng filed an application before the UNDT in Nairobi challenging the decision of the Registrar of the International Criminal Tribunal for Rwanda (ICTR) not to select him for the position of Chief of the Language Services Section (LSS) at the ICTR.

3. Mr. Ngokeng was a Reviser in the LSS at the ICTR. He served on a fixed-term appointment at the P-4/13 level. On 16 February 2012, job opening No. 12-ADM-ICTR-21952-R-ARUSHA (O) was published on Inspira for the position of Chief of LSS at the ICTR (the first vacancy). It required candidates to have the following competencies:¹

(1) an Advanced University Degree (Master's or equivalent) in relevant modern languages or law and a Translation or an Interpretation Degree, Certificate from a recognized Translation or Interpretation Training School;

(2) a minimum of twelve years of experience in translation and revision in the languages services of an international organization, a national administration or a large-scale private organization, with at least five years within the United Nations;

(3) sound experience in the planning, coordination and supervision of translation services; and

(4) demonstrated ability to interpret.

4. The vacancy announcement also added that training skills and experience would be an asset.

¹ Impugned Judgment, para. 10.

5. Mr. Ngokeng applied for the position on 16 March 2012. The hiring manager, Mr. Pascal Besnier, rejected his application on grounds that he lacked the required ability to interpret.

6. This job opening for the first vacancy was then cancelled on the ground that none of the candidates met all the eligibility criteria. This resulted in the appointment of the incumbent Chief LSS being extended beyond the mandatory retirement age. On 5 December 2012, Mr. Ngokeng filed an application before the UNDT (the first application) challenging both the decision not to select him for the position No. 12-ADM-ICTR-21952-R-ARUSHA (O) and the extension of the incumbent Chief LSS beyond the mandatory retirement age. The UNDT rendered judgment on the first application on 6 August 2013 and awarded Mr. Ngokeng compensation. That decision was reversed on appeal by this Tribunal in *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-460.

7. On 24 August 2012, the ICTR published in Inspira a new vacancy announcement, 12-ADM-ICTR-23993-R-ARUSHA (R), for the same position, that is, Chief of LSS (the second vacancy). This new announcement required candidates for the second vacancy to have the same competencies spelt out in the first three requirements of the first vacancy. However, whereas the first vacancy required a candidate to have “demonstrated ability to interpret,” the second vacancy listed the “demonstrated ability to interpret” as being “desirable”. The second vacancy also added that training skills and experience would be an asset. Thus, the demonstrated ability to interpret was no longer a mandatory requirement for the second vacancy.

8. Mr. Ngokeng applied for the second vacancy on 14 September 2012.

9. The interviews for the second vacancy were scheduled for 8 and 9 April 2013. Five candidates, including Mr. Ngokeng, were short-listed for the position.

10. A few weeks earlier, before the interviews had been scheduled, on 18 March 2013, in the absence of both the Chief of LSS and Mr. Viateur Rwabukwisi, the officer-in-charge (OIC) designated by the Chief of LSS, Mr. Oscar Tanifum, Head of the Interpretation Unit, circulated by e-mail an interoffice memorandum announcing his designation as acting OIC.

Mr. Ngokeng maintained before the UNDT that this “self-designation” was related to the selection process, caused him harm and effectively gave Mr. Tanifum an unfair advantage.²

11. The candidates were interviewed for the post on 8 and 9 April 2013. The interview panel (Panel), comprised of five senior officials of the ICTR, produced a report of the interviews dated 23 April 2013. All five short-listed candidates were informed about the competency based interviews to be held on 8 and 9 April 2013 by an e-mail sent on 2 April 2013.

12. Prior to the interviews, the members of the Panel agreed upon the process to evaluate the candidates. The Panel considered that the advertised position was at a very senior managerial level dealing with strict deadlines in a high-pressure environment, given the completion strategy of the ICTR and the imminent conclusion of the mandate. The Panel accordingly decided to assess the candidates by using the competencies of professionalism/accountability; teamwork; and planning and organising. In addition to the two managerial competencies of leadership/vision and managing performance, it was also agreed that such competencies as client-orientation, creativity and judgement-decision making were subsumed under the above broader competencies, with the communication competency to be assessed through the entire interview process.

13. The Panel then formulated questions in relation to the different identified competencies and agreed that the same questions would be posed to all the candidates. The maximum number of points that could be awarded was set at 100 per cent and the threshold for recommendation for selection was set at 60 per cent.

14. The Panel scored Mr. Ngokeng as follows: Overall rating: 48.6 per cent; Professionalism/Accountability: 9.4/20; Teamwork: 9.8/20; Planning and Organising: 9/20; Leadership/Vision: 8.4/20; and Managing Performance: 12/20. With regard to Mr. Ngokeng’s oral communication, the Panel noted that he “could have done a better job in providing more focused responses with clearer examples”.

² *Ibid.*, paras. 31-32.

15. The Panel's ultimate consideration of the Appellant's competencies read as follows:

... Overall, the Panel noted that Mr. Ngokeng did not have the required competencies needed for this post and did not fully appreciate what was required from the post of Chief of LSS.

... With regard to professionalism and accountability, the Panel did not find the candidate's response to be satisfactory and noted that it was too narrowly focused on operational aspects rather than on the broader strategic and managerial challenges facing the adequate skills by the staff and lack of training. In response to the question as to how he would resolve these challenges, he indicated that he would hold weekly meetings with the translators and quarterly coaching sessions. He stated that this would result in improvement within the Section. The Panel probed further with regard to how he would resolve the challenge of resources, he stated that improving the competence of staff would help mitigate the problem. In response to the second question as to how he balances the need for quality versus time delivery, he explained that the expected quality and time allocation to complete an assignment depended on the nature of the document. In addition, he noted that planning in advance was important.

... Overall, the Panel found that although Mr. Ngokeng cited relevant, if not overarching challenges in response to the first question, he was hard-pressed to provide relevant examples when answering the second question.

... With regards to the question concerning teamwork, Mr. Ngokeng struggled to define the qualities of a good team member but was able to do so after probing from the Panel. In addition, he could not provide an example of a case when he did not agree with a decision of a team. After probing from the Panel, he mentioned that he had never experienced such a situation.

... The candidate's response on planning and organizing struck the Panel as unsatisfactory. He was unable to provide an example of when he had faced an unforeseen event in his career. While he did note the importance of planning, he could have provided details in response.

... The candidate did not provide a satisfactory response to the leadership question. He was not able to give an example of when he had to implement an unpopular decision. His response was generic and vague. He mentioned that such situations rarely occur because the team is obligated to follow the instructions of the leader.

... The Panel agreed that his response to the question on managing performance was his best although he could not give a clear example of when he had to deal with an uncooperative supervisee. However, he mentioned the use of a performance plan and how he had used training to improve his supervisees' skills. He also established a coherent time-frame to measure the employees' improvement.

... The Panel was of the opinion that the candidate's responses in all of the above questions demonstrated that he was not familiar with the requirements of the post.

... Based on an overall assessment (48.6%), the Panel does not find Mr. Ngokeng to be suitable for the advertised position.

16. On 5 July 2013, the hiring manager, Mr. Besnier, issued an interoffice memorandum to inform all ICTR staff members of the appointment of Mr. Tanifum as Chief of LSS with effect from 1 August 2013. Mr. Ngokeng was officially notified that he had not been selected on 10 July 2013.

17. After the management evaluation process failed to resolve the matter, Mr. Ngokeng filed his application with the UNDT challenging the decision of the Registrar of ICTR not to select him for the position of Chief of LSS and the selection of Mr. Tanifum for the position.

18. After the filing of a reply to the application by the Secretary-General and a response to the reply (a replication) by Mr. Ngokeng, the UNDT on 9 April 2014 issued Order No. 071 (NBI/2014) directing the parties to jointly submit the agreed and disputed facts and to define the legal issues in contention. The parties were asked also to indicate whether the matter required an oral hearing. On 2 May 2014, the parties filed their submissions as directed and informed the UNDT that this matter could be decided on the basis of the parties' written submissions so that an oral hearing was not necessary. The joint submission sets out in some detail the agreed and disputed facts and the legal issues for determination by the UNDT. The most important factual issues were:

- Did Mr. Ngokeng fail to demonstrate that he met the competencies required for the position?
- Did the Administration ignore or fail to give due weight to Mr. Ngokeng's qualifications and experience?
- Did the selected candidate lack the requisite experience in revision and other competencies of the post?
- Did the Panel secretly alter the required eligibility criteria to fit the circumstances of the selected candidate and thus violate the principle requiring it to comply with the rules and requirements it had itself created?
- Did the selection of the selected candidate violate Mr. Ngokeng's rights to due process, equal treatment and full and fair consideration?

19. In his application to the UNDT, Mr. Ngokeng declined to address or deal with the assessment of his performance in the interview or the findings of the Panel in relation to his interview, as he believed that the results of the interviews were irrelevant.

20. The UNDT issued its Judgment dismissing the application on 22 June 2016. The UNDT reiterated that in matters of selection of staff, the role of the Tribunal is to review the challenged selection process to determine whether a candidate has received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration. Following a review of the facts as they appeared in the pleadings, and the accompanying documentary evidence, the UNDT concluded that the presumption of regularity in the selection process had not been rebutted. It found nothing to suggest that the Panel or Administration had been biased, unreasonable or procedurally unfair in selecting a candidate. It concluded on the evidence that Mr. Ngokeng was not subjected to any discrimination and the selection exercise was not tainted.

Submissions

Mr. Ngokeng's Appeal

21. In his appeal, Mr. Ngokeng challenges the UNDT's method in resolving the factual disputes pleaded in the joint submissions. He submits that the UNDT, by ignoring the pleaded factual disputes, failed to exercise the jurisdiction vested in it and erred in procedure such as to affect the decision in the case on several grounds.

22. Mr. Ngokeng complains that the UNDT: (i) failed to state the factual and evidentiary basis of its decision; (ii) failed to consider his submissions and evidence on the violation of his rights to full and fair consideration, his due process rights, and right to equal treatment; (iii) rendered judgment without considering his submissions and evidence on the selected candidate's ineligibility and unlawful selection and the nexus between his non-selection and Mr. Tanifum's selection; (iv) only selectively addressed his allegation of discrimination and ignored his allegations of arbitrariness, cronyism, favouritism, bias, prejudice, unfairness, improper motives, extraneous factors, mistakes of law and fact and numerous serious substantive and procedural irregularities; (v) failed to give him the opportunity to make submissions on an un-redacted version of the Panel's report, thereby

preventing the UNDT from making an informed and fair decision on the case; and, (vi) had no factual and evidentiary basis to find that the presumption of regularity had not been rebutted.

23. Mr. Ngokeng explains that he deliberately challenges both the decision to select Mr. Tanifum, and the decision not to select him, because the actual selection revealed the unreasonableness of his non-selection. He argues accordingly that the UNDT was required to consider firstly whether Mr. Tanifum fulfilled the requirements for the post, and secondly whether he was given full and fair consideration in the selection process. He repeats the allegations he made before the UNDT, namely that the selected candidate lacked competence, did not meet the requirement in the vacancy announcement of twelve years of experience in translation and revision, had never been a reviser and was thus ineligible for the position.

24. Mr Ngokeng makes four factual averments in support of his contention that Mr. Tanifum was ineligible for the position, namely: (i) Mr. Tanifum's application for the first vacancy was rejected on the grounds that he had no revision experience; (ii) Mr. Tanifum never participated in any meeting of English revisers at the ICTR; (iii) the ICTR does not consider Mr. Tanifum to be a reviser, as was shown by his non-inclusion in the complete list of ICTR English revisers it filed before the UNDT in Mr. Ngokeng's first application; and, (iv) Mr. Tanifum's translation work produced on 26 March 2013 (shortly before the interview) was still subject to revision months after the deadline for applications - indicating that the ICTR Administration knew that Mr. Tanifum had no experience in revision.

25. Mr. Ngokeng also submits that the UNDT erred in procedure by failing to give him an opportunity to make submissions on the un-redacted version of the Panel's report after he filed a motion "to file concise statement on new developments" some two years after the contested decision.

26. Mr. Ngokeng accordingly submits that the UNDT, in concluding that he had not rebutted the presumption of regularity and that the selection process was fair, erred on the facts and the error resulted in a manifestly unreasonable decision as contemplated in Article 2(1) of the Appeals Tribunal Statute. He requests this Tribunal to reverse the UNDT Judgment in its entirety and award him compensation. In the alternative, he asks that the case be remanded to the UNDT for a *de novo* consideration and a fresh judgment by a different judge.

The Secretary-General's Answer

27. The Secretary-General submits that the UNDT correctly concluded that the selection decision was lawful. The selection decision fully complied with Sections 7 to 9 of Administrative Instruction ST/AI/2010/3 (Staff selection system). The candidates were first pre-screened based on their applications to determine whether they met the minimum requirements. The applications of the seven successful pre-screened candidates were then released to the hiring manager who prepared a shortlist of five candidates who were invited to competency-based interviews. Prior to the interviews, the Panel agreed on an evaluation process for the interviews, including a maximum number of 100 points to be awarded and a passing threshold of 60 per cent. The successful candidate was the only candidate who scored over 60 per cent. Mr. Ngokeng scored 48 per cent and was therefore not recommended.

28. Whatever the eligibility of the selected candidate, Mr. Ngokeng's uncontested shortcomings evidenced before the Panel, the Secretary-General submits, excluded him from appointment. The decision of the Panel did not result in any loss of opportunity to a fair chance of promotion.

29. The Secretary-General submits that Mr. Ngokeng failed to establish that the UNDT erred in law by failing to apply the proper standard of review of selection processes. Mr. Ngokeng's argument regarding the qualifications and the experience of the successful candidate is in effect a request for the UNDT to substitute its decision for that of the Administration. It is, however, not the role of the UNDT to substitute its decision for that of an interview panel or the Administration.

30. The Secretary-General further denies that the UNDT erred by failing to state the factual and evidentiary basis of its findings. He claims that Mr. Ngokeng has not explained which relevant facts or documentary evidence were not taken into consideration or how they would have affected the outcome of the case. Nor did the UNDT err in procedure by failing to give him an opportunity to make submissions on the un-redacted version of the Panel's report. The provision of the redacted version of the interview record is in accordance with the Appeals Tribunal's jurisprudence that information regarding the identity and the assessment of other candidates by an interview panel may be redacted to protect the information of third parties. Mr. Ngokeng had access to all information relevant to his case,

including information on the modalities of the assessment of the interviews, the detailed scoring of each candidate and the full detailed assessment of his own interview.

31. The Secretary-General accordingly requests the Appeals Tribunal to affirm the UNDT Judgment and dismiss the appeal in its entirety.

Considerations

32. This Tribunal has to determine whether the UNDT erred in dismissing the application. The question is whether the UNDT erred on the facts so as to result in a manifestly unreasonable outcome. If the application was rightly dismissed on the objectively established facts of record, the appeal cannot succeed.

33. The primary factual matter for determination in this appeal is the allegation that the interview process was a sham. This invites reflection on the role of the UNDT in promotion cases. A contested decision on selection must be reasonable, lawful and procedurally fair. This Tribunal has consistently recognized the wide discretion vested in the Secretary-General in reaching a decision on staff selection. Promotions and selections are presumed to be regular. However, the presumption is rebuttable. If management is able to show that an applicant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the evidentiary burden of proof shifts to the applicant who must show through clear and convincing evidence that he or she was denied a fair chance of promotion.³ A candidate challenging the denial of promotion therefore must prove that proper grounds of review exist to rebut the presumption of regularity and set aside the decision. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the selection or promotion should be upheld.

34. In its Judgment, the UNDT suggested that the standard of proof required to rebut the presumption should be one of preponderance of evidence. This is not correct. The presumption of regularity advances efficiency, certainty and finality in the administration of the Organisation. While the Secretary-General bears the overall onus to prove the justifiability of the decision on promotion, once the presumption arises the rebuttal of it

³ *Staedler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547; *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122.

should occur only where clear and convincing evidence establishes that an irregularity was highly probable.

35. The Secretary-General overstates the applicable standard of deference in his assertion that the Tribunals must defer in a manner that precludes a non-selected party from ever challenging the selection of the successful party. While the Secretary-General has a broad discretion, the UNDT nonetheless possesses jurisdiction to rescind a selection or promotion on justifiable grounds. A tribunal however should not substitute its decision on the merits of an appointment and should not elevate an unsuccessful candidate to the position because it thinks that person is the better candidate.⁴

36. Mr. Ngokeng seeks to prove inferentially that the selection was unreasonable, and his consideration not fair, primarily on the basis that the selected candidate was ineligible by reason of his lack of experience as a reviser. He essentially alleges that the members of the Panel acted unreasonably and even dishonestly. For that, there must indisputably be clear and convincing evidence. As noted above, Mr. Ngokeng alleged in relation to the selected candidate that: (i) he was rejected for the first vacancy on the grounds that he had no revision experience; (ii) he had not participated in any meeting of English revisers at the ICTR; (iii) he was not included in the complete list of ICTR English revisers; and, (iv) his translation work was assigned to a reviser for revision. The Secretary-General's response to these allegations is not complete or entirely satisfactory; the selected candidate, he admitted, was primarily an interpreter, but had some experience in revision.

37. But Mr. Ngokeng's version does not support an inference of corruption of the process or that he was not fully and fairly considered. Such inferences are not the only legitimate inferences to be drawn. It would be equally legitimate to infer that the Panel found the selected candidate's reviser experience sufficient in light of his other demonstrated strengths. The evidence on this point must be evaluated together with the other evidence. And that brings us to the most important disputed fact: Did Mr. Ngokeng have the competencies for the position?

⁴ *Savadago v. Registrar of the International Tribunal for the Law of the Sea*, Judgment No. 2016-UNAT-642; *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265.

38. Mr. Ngokeng met all the educational, work experience and language requirements of the position. He was shortlisted and interviewed on that basis. However, Mr. Ngokeng opted not to address his performance in the interview or the findings of the Panel in relation to his interview. Instead, he stated that he was contesting the results of the selection process not the results of the interviews. Since the interviews in his view were carried out on the basis of a shortlisting procedure he described as “fatally flawed”, he considered it superfluous or irrelevant to challenge the results of the interview. The stance he has taken means that the evidence of the Panel’s consideration of his application for the position, and its conclusion that he lacked the required competencies, stands unchallenged. We are hence obliged to accept that Mr. Ngokeng’s uncontested shortcomings evidenced before the Panel excluded him from appointment. Consequently, the decision to appoint the selected candidate did not result in a loss to Mr. Ngokeng of a fair chance of promotion.

39. As Mr. Ngokeng has no entitlement to a job which the evidence establishes he was not competent to perform, his exclusion from appointment has caused him no damage or moral injury. The appeal must accordingly fail.

Judgment

40. The appeal is dismissed and Judgment No. UNDT/2016/088 is hereby upheld.

Original and Authoritative Version: English

Dated this 31st day of March 2017 in Nairobi, Kenya.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Knierim

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

(Signed)

Weicheng Lin, Registrar