



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

Judgment No. 2017-UNAT-762

**Lemonnier
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge John Murphy Judge Sabine Knierim
Case No.:	2016-1039
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Mr. Lemonnier:	Daniel Trup, OSLA
Counsel for Secretary-General:	Ernesto Bondikov

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/187, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 14 October 2016, in the case of *Lemonnier v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 13 December 2016. On 27 December 2016, Mr. Emmanuel Lemonnier filed his answer which was considered filed on 9 January 2017.¹

Facts and Procedure

2. The Appeals Tribunal, effective 30 June 2016, issued *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-679 which remanded to the Dispute Tribunal for consideration on the merits Mr. Lemonnier's case challenging the Administration's decision not to select him for the position of Chief, Integrated Support Services (CISS), of the United Nations Stabilization Mission in Haiti (MINUSTAH).

3. The UNDT Registry assigned Case No. UNDT/NY/2015/011/R1 to the matter upon remand. In the impugned Judgment, the Dispute Tribunal made the following factual findings,² which the parties do not dispute:

... The Applicant joined the Organization in 2001 as a P-2 level staff member. By 2010, he was rostered for P-4 and P-5 level positions in the area of information and communication technology resources.

... Effective 20 December 2010, the Applicant joined MINUSTAH as Chief Telecommunications and Information Technology Officer at the P-4 level on a fixed-term appointment. Effective 1 January 2011, he was promoted to the P-5 level.

... On 1 July 2012, the post used to finance the Applicant's appointment was abolished. The Applicant is not disputing the decision to abolish his post in July 2012. The Applicant was thereafter moved to the post of Chief of Administrative Services, which was vacant.

... On 1 July 2013, the General Assembly abolished the post of Chief, Administrative Services, following its approval of MINUSTAH's 2013–2014 budget.

¹ Order No. 273 (2016).

² Impugned Judgment, paras. 11-16 and 18.

... From 1 July 2013, the Applicant was placed against the post of Chief Budget Officer, with the functional title of Umoja Site Coordinator. This post was subsequently reclassified downwards to the P-4 level under MINUSTAH's 2015–2016 budget.

... In January 2014, MINUSTAH announced a retrenchment exercise.

...

... By letter dated 1 October 2014, the Applicant was notified that he had been granted a continuing appointment effective 30 September 2014.

4. On 17 April 2014, MINUSTAH advertised “Recruit from Roster” job opening 34579 “open to roster applicants who are already placed on pre-approved rosters” for the position of CISS, at the P-5 level. The job opening further stated that “[o]nly roster applicants who were placed on rosters with similar functions at the same level are considered to be eligible candidates”. At the time, Mr. Lemonnier was on several rosters, including the roster for the position CISS, level P-5; thus, he was considered eligible for the job opening.

5. Job opening 34579 set forth the location; identified to whom the selectee would report, the responsibilities of the job, educational requirements, work experience requirements, and language requirements; explained that “[e]valuation of qualified candidates may include an assessment exercise which may be followed by a competency-based interview”; and, indicated Organizational considerations, such as gender equality.

6. The “work experience” requirements for job opening 34579 were:

A minimum of ten (10) years of progressively responsible experience managing diverse logistics operations in military, commercial or international organizations, both in the field and at headquarters is required. Experience in managing logistics in an international environment is desirable.

7. Mr. Lemonnier was considered eligible to apply for job opening 34579 based on his placement on the pre-approved roster for CISS (P-5) and was one of ten candidates considered for the position. In reviewing Mr. Lemonnier's qualifications for job opening 34579, his application and Personal History Profile (PHP) were considered. Mr. Lemonnier was determined unqualified for the position, as he “did not meet one of the basic work

requirements”³ in the job opening. In particular, it was decided that he “had no experience in any of the requisite areas at Headquarters (or experience at Headquarters generally)”.⁴ Thus, he was not selected to fill job opening 34579 as CISS (P-5).

8. On 1 December 2014, the hiring manager made a recommendation to the Director of Mission Support (DMS), MINUSTAH, to select the successful candidate for job opening 34579 for CISS (P-5), stating, in part:

Having considered the recommended candidates [which did not include Mr. Lemonnier], I confirm that [the selected candidate] is the most suitable candidate for the position, on the basis of her relevant experience in field missions and at the [Headquarters (HQ)] level. I also confirm that ... I have taken into consideration MINUSTAH's human resources objectives and targets, especially with regard to geography and gender

9. On the same date, the DMS approved the recommendation.

10. On or about 2 December 2014, Mr. Lemonnier made a request to management to review the decision not to select him for the CISS position. On 5 February 2015, Mr. Lemonnier was advised that the decision not to select him for the CISS position was affirmed since he was not qualified for the CISS position.

11. On 14 October 2016, the UNDT issued Judgment No. UNDT/2016/187 concluding: (i) the decision finding Mr. Lemonnier was not qualified for the CISS position was unlawful in that it was arbitrary; (ii) the decision not to select Mr. Lemonnier for the CISS position violated Staff Rule 9.6(e); and (iii) there was insufficient evidence to show bias against Mr. Lemonnier in the selection process for the CISS position. In short, the UNDT determined that Mr. Lemonnier's challenge to the decision not to select him for the CISS position “succeeds”. The UNDT did not award Mr. Lemonnier moral damages or compensatory damages for “pecuniary loss”, noting that such an award would duplicate an award in a companion case.⁵

³ Annex 3.1 to Mr. Lemonnier's application (5 February 2015 letter to Mr. Lemonnier from the Under-Secretary-General for Management, in response to his request for management evaluation).

⁴ *Ibid.*

⁵ On 14 October 2016, the UNDT issued Judgment No. UNDT/2016/186 in Case No. UNDT/NY/2016/007, concluding that the Administration, in terminating Mr. Lemonnier's appointment with MINUSTAH, had breached his rights under Staff Rule 9.6(e) and paternity leave

12. On 13 December 2016, the Secretary-General filed the appeal and on 27 December 2016, Mr. Lemonnier filed his answer.

Submissions

The Secretary-General's Appeal

13. The appeal is receivable because the merits of the UNDT Judgment are in Mr. Lemonnier's favour although he was not awarded damages. "[B]ut for the award in Judgment UNDT/2016/186 [a companion case], [Mr. Lemonnier] would have been awarded compensation in the present case."

14. The Dispute Tribunal overstepped its authority by putting itself in the position of the Administration and erred in law and fact in substantively considering Mr. Lemonnier's qualifications. More specifically, the UNDT erred in law by failing to apply the correct "clear and convincing" standard of review; rather, it applied an incorrect standard of review which the UNDT characterized as "the balance of evidence" and improperly relied solely upon Mr. Lemonnier's "reasonable argument".

15. Additionally, the UNDT improperly failed to defer to the Administration's discretion in interpreting the qualifications for the CISS position and instead placed itself in the Administration's role and weighed the substantive qualifications of Mr. Lemonnier against other candidates. In doing so, the UNDT improperly considered unauthenticated evidence that was not before the Administration.

16. The Dispute Tribunal erred in law by finding the Administration failed to properly apply Staff Rule 9.6(e) to Mr. Lemonnier due to his continuing appointment. Staff Rule 9.6(e) applies to a staff member vis-à-vis the availability of suitable posts. Thus, the staff member must be found *suitable* for the position in question, pursuant to Section 7.1 of Administrative Instruction ST/AI/2010/3 (Staff selection system), before Staff Rule 9.6(e) can apply. Mr. Lemonnier was not found suitable for the CISS position since he did not meet the mandatory minimum requirement of "headquarters experience"; thus, Staff Rule 9.6(e) did not apply to him.

and awarded Mr. Lemonnier eight months' net base salary as compensatory damages and USD 5,000 as moral damages. The Secretary-General did not appeal Judgment No. UNDT/2016/186.

Mr. Lemonnier's Answer

17. The appeal is not receivable under the Appeals Tribunal's jurisprudence because the Administration has suffered no direct consequence of the outcome of the impugned Judgment, as no damages were awarded in favour of Mr. Lemonnier. Thus, any errors of law or fact by the UNDT are merely academic.

18. The UNDT did not err in considering the relevant qualifications of Mr. Lemonnier and the lack of experience of the selected candidate. The Administration did not define the term "headquarters experience" in the job opening. The UNDT impliedly found that the Administration did not afford Mr. Lemonnier full and fair consideration for the CISS position when it failed to define "headquarters experience" and failed to explain how it applied the requirement to Mr. Lemonnier. By raising this issue, Mr. Lemonnier has rebutted the presumption of regularity that would otherwise attach to the Administration's decision.

19. Mr. Lemonnier also showed that the Administration inconsistently and arbitrarily interpreted the "headquarters experience" requirement when he produced evidence regarding the successful candidate's background and compared that evidence to his background. This evidence supported the UNDT's implied conclusion that the Administration did not afford Mr. Lemonnier full and fair consideration for the CISS position.

20. The UNDT did not err in applying an incorrect standard for review. Although the UNDT did not specifically refer to the "clear and convincing" standard, that should not void the judgment *ab initio*. The clear and convincing standard requires more than a preponderance of the evidence, and equates to the "balance of evidence" cited by the Dispute Tribunal.

21. The UNDT did not err in finding that the Administration failed to properly apply Staff Rule 9.6(e). By being on an existing roster, it is clear that Mr. Lemonnier is eligible for any post or position in which members of the roster are considered. In light of his continuing or permanent appointment, and his place on the roster, he should have been given priority over non-continuing candidates, such as the successful candidate.

22. Mr. Lemonnier requests that the appeal be dismissed.

Considerations

Receivability of Appeal

23. Mr. Lemonnier contends that the Secretary-General's appeal is not receivable because the impugned Judgment did not award him any damages and was merely "a moral victory". To support this contention, Mr. Lemonnier relies on *Saffir and Ginivan v. Secretary-General of the United Nations*,⁶ in which the Appeals Tribunal held that the Secretary-General could not bring an appeal of a judgment in which the "outcome" was in his favour or he was "the successful party".

24. The impugned Judgment clearly adjudges that Mr. Lemonnier's "application succeeds". There is little doubt that Mr. Lemonnier – the staff member – is the prevailing party before the Dispute Tribunal. Success before the Dispute Tribunal depends on whether the staff member's application is granted, in whole or in part; not on the remedy afforded to the staff member. A staff member may prevail or succeed on his claim(s) without receiving an award of damages.

25. As the losing party before the Dispute Tribunal, the Secretary-General has a real or concrete interest in assuring that the impugned Judgment does not remain valid. The Dispute Tribunal sustained Mr. Lemonnier's claim that the Administration unlawfully decided he was not eligible for the CISS position and the Secretary-General alleges that the impugned Judgment establishes an incorrect legal standard for review of appointments. For these reasons, the Appeals Tribunal determines that the Secretary-General's appeal is receivable.

⁶ *Saffir and Ginivan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-466, para. 15.

*Merits of Appeal**Qualification Decision*

26. The Appeals Tribunal has explained that a “roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office who are available for selection against a vacant post”.⁷

27. Section 9.5 of ST/AI/2010/3/Amend.1 describes how a roster for a generic job opening, such as job opening 34579, is created:⁸

... Qualified candidates for generic job openings are placed on the relevant occupational roster after review by a central review body and may be selected for job openings in entities with approval for roster-based recruitment. The roster candidate shall be retained on an occupational roster indefinitely or until such time the present administrative instruction is amended. Should an eligible roster candidate be *suitable* for the job opening, the hiring manager may recommend his/her immediate selection to the head of department/office/mission without reference to the central review body.

28. Generally, a “job opening ... reflect[s] the functions and the location of the position and include[s] the qualifications, skills and competencies required”.⁹ This means that qualifications or requirements for a position may change over time, depending upon an unlimited number of factors which reflect the realities of the position at the time the job is open.

29. This also means that a staff member on a roster for a generic job opening for a position (such as CISS (P-5)) may not necessarily possess the qualifications or requirements for the position as listed in the specific job opening (34579). In other words, there may be a difference between a staff member on a roster being *eligible* for a position and the staff member on the roster being *qualified* for the position, as described in the job opening. Thus, a staff member on a roster may be determined to be unqualified for a roster-related job opening due to his failure to meet particular requirements or competencies described in the

⁷ *Charles v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-416, para. 28.

⁸ Emphasis added.

⁹ ST/AI/2010/3, Section 4.5.

job opening.¹⁰ As we have noted in another context, “[t]he mere fact of being on the roster does not guarantee a promotion”.¹¹

30. Initially, the Secretary-General has “broad discretion” in staff selection decisions under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1.¹² However, the Secretary-General’s “discretion is not unfettered and is subject to judicial review”.¹³

31. Judicial review of a staff selection decision is not for the purpose of substituting the Dispute Tribunal’s selection decision for that of the Administration.¹⁴ Rather, as we stated in *Abassi*,¹⁵ the Dispute Tribunal’s role in reviewing an administrative decision regarding an appointment is to examine: “(1) whether the procedure laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration”. The role of the UNDT is “to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner”.¹⁶

32. As the Appeals Tribunal has explained, the starting point for judicial review is a presumption that official acts have been regularly performed:¹⁷

... But this presumption is a rebuttable one. If the management is able to even minimally show that the [staff member’s] candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the [staff member] who must show through clear and convincing evidence that [h]e was denied a fair chance of promotion.

¹⁰ ST/AI/2010/3, Section 7.

¹¹ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-707, para. 29.

¹² *Nikolarakis v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-652, para. 28, citing *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-506, paras. 48-49, and *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30.

¹³ *Ibid.*

¹⁴ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30; *Abassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, paras. 23-24.

¹⁵ *Abassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 23.

¹⁶ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30.

¹⁷ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 5.

33. Before the UNDT, Mr. Lemonnier claimed that:¹⁸

... [H]e was incorrectly deemed ineligible [for the CISS position] on the basis that he lacked Headquarter Logistics experience, despite having logistics experience at the United Nations Logistics Base in Brindisi, Italy, and having been on frequent logistics missions to the United Nations Headquarters in New York. He also submits that the selected candidate did not have any Logistics experience.

34. The UNDT found merit to Mr. Lemonnier's claims, stating:¹⁹

... Firstly, the Applicant placed before the Tribunal a copy of the *selected* candidate's publicly-accessible employment profile (LinkedIn page), which indicates that she had never held any positions in the United Nations Headquarters in New York. The accuracy of this information has not been contested by the [Secretary-General]. Secondly, the memorandum dated 1 December 2014 stated that the *selected* candidate had "relevant experience in field missions and at the HQ level." However, the memorandum provides no specifics regarding the *selected* candidate's employment profile as submitted by the Applicant. Further, the Applicant has raised *reasonable argument* that his experience in Brindisi, where the United Nations has its main Logistics Base used for peacekeeping operations, and his frequent work visits to New York, should have been given due weight.

... Accordingly, as [the Secretary-General] has *not* challenged the Applicant's submission regarding the selected candidate's lack of Headquarters experience or the publicly-accessible records provided by the Applicant, the Tribunal accepts them as accurate. It follows that the vacancy requirement of "Headquarters experience" was applied arbitrarily and inconsistently.

... The Tribunal finds that, *on the balance of the evidence* before it, the decision to deem the Applicant *ineligible* for the CISS post was vitiated by the arbitrary and inconsistent application of the requirement of "Headquarters experience".

35. The Dispute Tribunal made several errors of law in reaching the foregoing conclusions, apart from confusing eligibility for a position (being on the roster) with having the qualifications for the position advertised (job opening 34579). First, the UNDT applied the wrong standard of proof in weighing the evidence. At all times, it was the staff member's burden to prove by clear and convincing evidence that the Administration did not give his candidacy full and fair consideration for the CISS position when it decided he did not meet the headquarters experience requirement. However, as quoted above, the Dispute Tribunal

¹⁸ Impugned Judgment, para. 27.

¹⁹ *Ibid.*, paras. 28-30 (emphases added).

concluded that the Administration's decision that Mr. Lemonnier was "ineligible" for the CISS position was unlawful "on the balance of evidence".²⁰

36. The "balance of evidence" standard is a *lesser* standard of proof than clear and convincing evidence. This error alone is grounds to reverse the Dispute Tribunal's conclusion that the Administration's decision was unlawful. Moreover, a review of the evidence before the Dispute Tribunal shows that Mr. Lemonnier did *not* meet his burden to show by clear and convincing evidence that the Administration's decision that he was unqualified for the position was unlawful or that the Administration did not give full and fair consideration to his candidacy for the CISS position. In fact, it is fair to say that Mr. Lemonnier did not meet even the lesser preponderance of the evidence standard.

37. Second, the UNDT erroneously concluded that Mr. Lemonnier had rebutted the presumption of regularity, and shifted the burden back to the Administration to respond. To rebut the presumption of regularity which attaches to the selection process, Mr. Lemonnier presented *inter alia* the *selected* candidate's LinkedIn page. Under Article 18(1) of the Dispute Tribunal's Rules of Procedure, the UNDT has broad discretion to determine the admissibility of evidence and the weight to accord evidence before it.²¹ Nevertheless, the UNDT made an error of law in concluding that the LinkedIn page, which was evidence *outside* the record considered by the Administration in making the impugned decision – and which did not pertain to Mr. Lemonnier – was of sufficient weight to rebut the presumption of regularity and to shift the burden back to the Administration, as the UNDT erroneously stated:²²

... [A]s the [Secretary-General] has not challenged the Applicant's submission regarding the selected candidates' lack of Headquarters experience or the publicly-accessible records provided by the Applicant, the Tribunal accepts them as accurate. It follows that the vacancy requirement of "Headquarters experience" was applied arbitrarily and inconsistently.

38. Whether a non-selected candidate can meet his burden to show that he did not receive full and fair consideration for a job opening depends for the most part on the evidence the Administration reviewed in making the non-selection decision; not evidence

²⁰ *Ibid.*, para. 30.

²¹ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 26.

²² Impugned Judgment, para. 29.

outside the administrative record of which the Administration was not aware. And certainly not evidence outside the record relating to the qualifications of the *selected* candidate. Of course, this does not mean that a staff member cannot present evidence outside the administrative record to show bias or ill motive against him or her or in favour of the selected candidate.²³ That is a different matter. And in fact, Mr. Lemonnier presented such evidence, which the Dispute Tribunal found was “insufficient evidence ... to establish that the contested decision ... was motivated by bias against [him]”.²⁴

39. If the Dispute Tribunal was frustrated by the Administration’s apparent unwillingness to clearly explain in its papers the meaning of the “headquarters experience” requirement, the Dispute Tribunal could have required the Administration to provide additional documentary evidence solely addressing that issue, such as declarations, or set the matter for a hearing to examine witnesses, pursuant to Articles 9(1) and 9(2) of the UNDT Statute. It did neither.

40. Finally, the Dispute Tribunal improperly replaced the Administration in the selection process. The UNDT redefined the “headquarters experience” requirement; it applied its own definition of the “headquarters experience” requirement to *both* Mr. Lemonnier and the *selected* candidate; and it *compared* the qualifications of the *selected* candidate to Mr. Lemonnier’s qualifications, based on evidence *outside* the administrative record. This is not the role of the Dispute Tribunal; its role is to determine whether the Administration afforded the staff member who applied for the position full and fair consideration to be selected.

41. As further indication that the Dispute Tribunal lost sight of its role, the UNDT created its own standard for the Administration’s selection process, which is not found in ST/AI/2010/3 or any other legal framework for staff selections, when it criticized the 1 December 2014 memorandum for “provid[ing] no specifics regarding the selected candidate’s experience at the Headquarters level”.²⁵ By assuming the role of the

²³ *Savado v. Registrar of the International Tribunal for the Law of the Sea*, Judgment No. 2016-UNAT-642, paras. 29-33; *Kacan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-582, paras. 21-25; *Hepworth v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-503, paras. 4 and 43-44. See also *Survo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-595, para. 51, citing *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 35 and citations therein.

²⁴ Impugned Judgment, para. 37.

²⁵ *Ibid.*, para. 28.

Administration, the UNDT *inter alia* failed to consider either geography or gender, as the hiring manager was required to consider – and did consider, as stated in the 1 December 2014 memorandum.

42. For all these reasons, the Appeals Tribunal determines that the Dispute Tribunal erred in law and fact when it concluded that the Administration unlawfully found Mr. Lemonnier was not eligible, and did not select him, for the CISS position.

Staff Rule 9.6(e)

42. The Dispute Tribunal held that Mr. Lemonnier “was not afforded proper priority consideration for the CISS position under the framework established by [S]taff [R]ule 9.6(e) [and] ... therefore lost a fair chance of being selected for the CISS post”.²⁶ Staff Rule 9.6(e) addresses termination for abolishment of posts and reduction of staff:²⁷

(e) ... if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of *suitable posts* in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the order of preference:

- (i) Staff members holding continuing appointments;
- (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
- (iii) Staff members holding fixed-term appointments.

43. The UNDT’s conclusion that Mr. Lemonnier was not afforded proper priority consideration under Staff Rule 9.6(e) for the CISS position is premised upon the UNDT’s factual finding that Mr. Lemonnier was qualified for the position, i.e., had the requisite “headquarters experience”. As the UNDT’s factual finding was erroneous – not based on clear and convincing evidence – Staff Rule 9.6(e) did not apply to Mr. Lemonnier, for whom the position of CISS was *not* a suitable post as the Administration determined, and the conclusion that the Administration unlawfully failed to apply Staff Rule 9.6(e) to his candidacy for the CISS position is manifestly unreasonable.

²⁶ *Ibid.*, para. 35.

²⁷ Emphasis added.

Judgment

44. The appeal is granted; Judgment No. UNDT/2016/187 is reversed.

Original and Authoritative Version: English

Dated this 14 July 2017 in Vienna, Austria.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Knierim

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

(Signed)

Weicheng Lin, Registrar