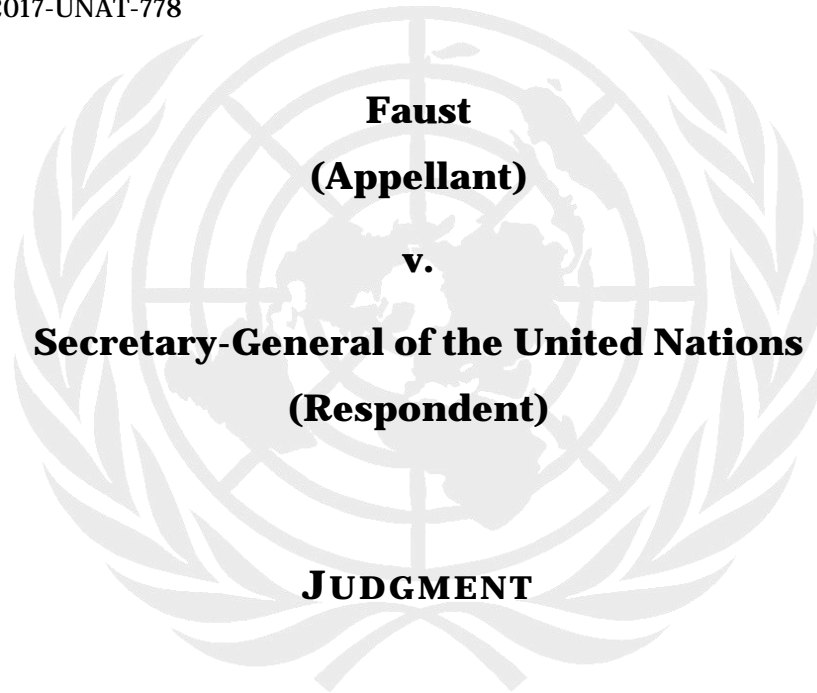




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-778



Before:	Judge Richard Lussick, Presiding Judge Deborah Thomas-Felix Judge Martha Halfeld
Case No.:	2017-1059
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Ms. Faust:	Self-represented
Counsel for Secretary-General:	Rupa Mitra

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/213, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 6 December 2016, in the case of *Faust v. Secretary-General of the United Nations*. Ms. Christin Faust filed the appeal on 2 February 2017, and the Secretary-General filed his answer on 7 April 2017.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant joined the [United Nations Framework Convention on Climate Change (UNFCCC)] on 1 September 2010, as Programme Administrative Assistant (G-5) with the Information Technology Services (“ITS”), under a fixed-term appointment (“FTA”), through 30 November 2012.

... On 8 October 2012, the Applicant was informed that her temporary assignment to the post of Associate Programme Management Officer (P-2), in the Interim Secretariat of the Green Climate Fund (“ISGCF”), UNFCCC, had been accepted for an initial period of six months. The Applicant accepted the temporary assignment on 9 October 2012 and received a special post allowance (“SPA”) at the P-2 level effective 1 November 2012. She remained on an FTA with the UNFCCC, and initially retained a lien on the G-5 position with the UNFCCC, which she released on 22 August 2013.

... The ISGCF became independent and moved to the Republic of Korea on 1 January 2014. On 10 January 2014, the Applicant was offered a temporary assignment with the Sustainable Development Mechanism (“SDM”), UNFCCC, as Administrative Assistant (G-5), effective 1 January 2014. That assignment was successively extended on three occasions until 31 December 2014.

... On 4 July 2014, SDM internally advertised the post of Associate Programme Officer (P-2) within the SDM Finance Team, UNFCCC. The Applicant and three other internal candidates applied to the post. Three candidates, including the Applicant, were found eligible by the Human Resources Unit (“HRU”), UNFCCC and were forwarded to the direct supervisor of the position, Ms. Camay Ho, Programme Management Officer (P-3), SDM. The latter determined that all three candidates be invited to take the written test. The test had been prepared by Ms. Ho and approved by HRU.

¹ Impugned Judgment, paras. 3-13.

... Each test was color-coded, without the names, for each candidate, and sent to Ms. Ho for assessment/scoring. She returned the results of the written test/assessment to HRU, UNFCCC, on 11 September 2014. Thereafter, HRU, UNFCCC, notified Ms. Ho of the names of the candidates associated with each color-coded test. On the basis of the results of the written test, the three candidates—including the Applicant—were invited for a competency-based interview, since they all passed the 50% threshold for the test. The Applicant's score in the test was 55%, whereas that of the two other candidates was 67% and 97%.

... The Applicant and the two other candidates who had taken the test were invited for a competency-based interview, with the following interview members:

- a. Ms. Sharon Taylor, Programme Officer, SDM/Programme Support and Coordination ("PSC") Team Leader (P-4), Panel Chair and Hiring Manager;
- b. Ms. Camay Ho (Programme Management Officer (P-3), SDM/PSC/Finance);
- c. Mr. Alexander Saier (Public Information Officer (P-3), Communications and Outreach Programme);
- d. Ms. Karen Milka (Associate Programme Management Officer (P-2), Executive Direction and Management and Legal Affairs Programmes);
- e. Ms. Catherina Denoo (Human Resources Officer (P-3), HRU), as *ex officio* member of the Panel);
- f. Ms. Addis Assefa, rapporteur.

... The Applicant was interviewed on 1 October 2014. The minutes of the interview show that the Panel found that she only fully demonstrated one of the four competencies for the post. As a result of this, it did not recommend her for the post. The Panel also found that the two other candidates met all of the competencies for the post, and recommended one of them for selection.

... On 9 October 2014, Ms. Taylor, the Hiring Manager, prepared a record of the evaluation of the candidates against the applicable evaluation criteria, which was sent to all the members of the Panel for their comments and approval and which they later provided. On the basis of that assessment, the Panel recommended that the Head of Programme, Director, SDM, consider the recommended candidate for selection.

... On 31 October 2014, the Director, SDM, recommended said candidate for selection to the Executive Secretary who, in turn, submitted the selection process for evaluation to the UNFCCC Review Board on 3 November 2014. This evaluation was completed on 18 November 2014, finding that "the evaluation criteria [had been] properly applied and the applicable procedures [had been] followed". The recommendation was approved by the Deputy Executive Secretary, UNFCCC,

on 19 November 2014, and the Executive Director, UNFCCC, appointed the recommended candidate to the position.

... The Applicant was informed that she had not been selected for the advertised position by memorandum dated 25 November 2014.

... On 18 January 2015, the Applicant filed a complaint for harassment and abuse of authority against Ms. Taylor and the Director, SDM. On 4 December 2015, upon the completion of an investigation, the Executive Secretary, UNFCCC, informed the Applicant that she had concluded that the reported conduct did not constitute a violation of the provisions of ST/SGB/2008/5, and that she had decided to close the case. The Applicant filed an appeal against this decision, which the [Dispute] Tribunal rejected as not receivable in Judgment *Faust* UNDT/2016/018. The Appeals Tribunal dismissed the appeal and affirmed the UNDT judgment during its 21st session in New York from 17 to 28 October 2016.^[2]

3. On 13 June 2015, Ms. Faust filed an application with the UNDT contesting the decision not to select her for the P-2 post of Associate Programme Officer at the UNFCCC on the ground that she was not afforded a full, fair and objective assessment in the selection procedure. The Secretary-General filed his reply on 16 July 2015.

4. On 6 December 2016, the UNDT issued its Judgment. The UNDT concluded that the contested decision not to select Ms. Faust had been lawfully taken.

5. The UNDT held that in the contested selection process, the design, conduct and evaluation of the written test, did not constitute a violation of Ms. Faust's right to full and fair consideration. The Dispute Tribunal noted that, under the UNFCCC Secretariat Recruitment and Selection Standard Operating Procedure, the Hiring Manager is responsible for designing questions for technical assessment but that the direct supervisor of the position had designed the written test and it was not clear whether the Hiring Manager had formally delegated that task to her. However, the UNDT ultimately found that the question of who had prepared the written test was not linked to the non-selection decision.

6. Turning to Ms. Faust's contention that the interview panel was improperly constituted because its members were not experts in finance, the UNDT in particular considered the qualifications of two of the panel members who had been deemed subject-matter experts for the purpose of the interviews. The UNDT recalled that under the jurisprudence of the UNDT and the Appeals Tribunal, the Administration has considerable discretion in determining who is an

² [*Faust v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-695.]

expert for the purposes of an interview panel. Against this standard, and having considered the panel members' qualifications, the UNDT was satisfied that the subject-matter experts were properly present on the panel. The UNDT also rejected Ms. Faust's contention that the composition of the panel showed bias against her. In reaching its conclusion, the UNDT took note of the fact that, although Ms. Faust had claimed that there were personal issues among her and both the Hiring Manager and the direct supervisor of the position, she did not contest the composition of the panel or filed for recusal when she learned of it.

7. Finally, with regard to the conduct of the interview itself, the UNDT held that the panel's evaluation of Ms. Faust's technical expertise was made in accordance with its mandate. The UNDT noted that the relevant legal framework provided for an assessment that could focus on the competencies required for the vacancy as well as technical expertise.

8. The UNDT rejected Ms. Faust's request for compensation and dismissed her application in its entirety.

Submissions

Ms. Faust's Appeal

9. The UNDT erred in fact and law and failed to exercise its jurisdiction in reaching its Judgment.

10. Ms. Faust challenges the UNDT's findings regarding the design, conduct and assessment of the written test. She contends that the UNDT based its Judgment on "a hypothetical situation and not on actual facts", i.e. that the Hiring Manager did not fulfil her role and responsibilities, and concluded that, since it did not matter who the Hiring Manager was, Ms. Faust was afforded full and fair consideration. She also submits that the UNDT failed to address and consider that the test "was not designed in accordance with applicable rules"; "was not comprehensive as required by the applicable rules"; the "[t]est schedule was advantageous to one candidate"; and, the "[t]est was not evaluated in accordance with the applicable rules". The UNDT incorrectly found that "the above matters are basically not appealable, because of the very broad discretion the Administration has in a recruitment process".

11. As to the UNDT's conclusions on the composition of the interview panel, Ms. Faust *inter alia* contends that the UNDT failed to consider that at the time of the recruitment process, the SDM/finance team, including Ms. Faust, was undergoing "team counseling with a board-certified [p]sychotherapist" and the resulting conflict of interest in the direct supervisor of the position being a panelist in Ms. Faust's interview; that the UNDT erred in finding that the panel was correctly established given the "broad discretion" of the Administration in establishing panels; that the UNDT erred in suggesting that Ms. Faust should have asked for the recusal of the panel members, despite the fact that Ms. Faust was not aware of the panel composition prior to the interview; and that the UNDT contradicted itself by stating that the presence at the interview of "experts in the same field of work" was not required, but that it was acceptable that two "non-finance, non-expert panelists" and one panelist with a conflict of interest could make an "expert judgement" that Ms. Faust had no expert knowledge in finance. The UNDT also failed to consider that the panel did not consider her performance appraisals in its assessment of her suitability for the post.

12. Ms. Faust makes a number of other contentions, including that the UNDT failed to consider the UNFCCC Review Board's failure to "intervene or at least question this recruitment process"; that the UNDT reached the conclusion that no harassment against her existed while she did not raise any harassment claims before the UNDT and, in accordance with the Appeals Tribunal's jurisprudence, the UNDT is not competent to make any findings on harassment; and that the UNDT failed to "review and consider the letter by the UNFCCC Executive Secretary dated 4 December 2015 in which substantial issues in the team, as a result of Ms. Ho's behavior and actions, were admitted" and "which supported and further evidenced [her] case and arguments".

13. Ms. Faust requests compensation in the amount of 24 months' net base salary.

The Secretary-General's Answer

14. The UNDT correctly upheld the contested decision not to select Ms. Faust. The UNDT considered the applicable legal framework, including Administrative Guideline AG/2011/3 (UNFCCC Staff Selection System), as well as the evidence regarding the selection process, including the evaluation methods used, the composition of the interview panel, the role of the Hiring Manager, and the role of the Review Board in a selection process.

15. The UNDT properly found that the written test had no impact on the non-selection decision. In her appeal, Ms. Faust merely repeats a number of her claims with regard to the written test and fails to identify any error in the UNDT's conclusions. Her claims are irrelevant in light of the fact that she passed the written test and was invited to an interview on that basis. She was ultimately not recommended because the interview panel found that she had not fully demonstrated all of the four competencies required for the position, a reason that had nothing to do with the written test.

16. The UNDT correctly found that the interview panel had been properly composed. Ms. Faust simply disagrees with the UNDT regarding the qualifications of the experts, asserting that "the panel only consisted of one person with some relevant technical knowledge" without providing any supporting detail as to why the UNDT's reasoning was in error. She further asserts on appeal that the UNDT failed to consider that at the time of the selection process, she and her SDM/finance team had met with the Staff Counsellor. However, contrary to Ms. Faust's claim, such counselling sessions do not, in and of themselves, establish a conflict of interest between the direct supervisor of the position and herself. Ms. Faust has also failed to explain why she did not contest the composition of the panel before the interview, when she might at least have had a chance at getting a panel without the presence of those she considered to be biased against her.

17. Contrary to Ms. Faust's contention that the UNDT took note of her claim of harassment although she had not raised the issue in this case, in the context of her claims of bias she clearly makes reference to the fact that she had filed a harassment claim against both the Hiring Manager and the direct supervisor of the position. Moreover, the UNDT did not, as Ms. Faust asserts, conclude that there was no harassment present in the instant case. On the contrary, the UNDT noted that it could not enter into a substantive consideration of the closure of her harassment case. Rather, the UNDT simply held that Ms. Faust had not shown that the Hiring Manager or the direct supervisor had harassed her.

18. The UNDT correctly ruled that the interview had been appropriately conducted. While Ms. Faust argues that the UNDT failed to address the fact that the panel did not assess certain elements of her profile, such as her performance appraisals, she fails to cite any law or jurisprudence that shows any requirement to consider those elements during the selection process. As the Appeals Tribunal held, a staff member cannot substitute his own evaluation method for that of the Administration in a selection process.

19. In light of the above, the UNDT correctly dismissed Ms. Faust's application, finding that she had not only failed to show that the selection process was unlawful, but also provided no relevant evidence of harm as required by Article 10(5)(b) of the UNDT Statute. The Secretary-General therefore requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal.

Considerations

20. Ms. Faust appeals the UNDT's Judgment affirming the decision not to select her for the P-2 post of Associate Programme Officer at the UNFCCC. She claims that the UNDT erred in fact and in law, and failed to exercise the jurisdiction vested in it.

21. As part of the selection process for the post, Ms. Faust undertook a written test. She passed the test along with two other candidates, although she scored the lowest at 55 per cent, whereas the other two candidates scored 67 per cent and 97 per cent, respectively.

22. The three candidates then took part in a competency-based interview. The interview panel found that Ms. Faust only fully demonstrated one of the four competencies for the post, whereas the other two candidates, one of whom was recommended for selection, met all of the competencies. The Hiring Manager prepared a record of the evaluation of the candidates against the applicable evaluation criteria which was approved by all the members of the panel. On the basis of that assessment, the panel recommended that the Head of Programme, Director, SDM, consider the recommended candidate for selection.

23. On 31 October 2014, the Director, SDM, recommended the said candidate for selection to the Executive Secretary who, in turn, submitted the selection process for evaluation to the UNFCCC Review Board, which subsequently found that the evaluation criteria had been properly applied and the applicable procedures had been followed.

24. By memorandum dated 25 November 2014, Ms. Faust was informed that she had not been selected for the position. On 18 January 2015, she filed a complaint against the Hiring Manager (Ms. Sharon Taylor) and the Director, SDM, alleging harassment and abuse of authority. After an investigation was completed, the Executive Secretary, UNFCCC, informed her that the reported conduct did not constitute a violation of the relevant

administrative issuance and that she had therefore decided to close the case. Ms. Faust filed an application to the UNDT contesting that decision. The UNDT found that her application was not receivable, as she had failed to request management evaluation. She appealed to the Appeals Tribunal, which affirmed the decision of the UNDT.³

25. In her present appeal, Ms. Faust repeats an argument that she put to the UNDT, namely, that the written test should have been prepared by the Hiring Manager, but instead was prepared by Ms. Ho, who was the direct supervisor of the position. She claims that the UNDT failed to consider that the test was not prepared in accordance with the applicable rules and that she was therefore not afforded a full and fair consideration for the post.

26. We reject this argument. The UNDT did not fail to consider the circumstances surrounding the written test. It took into account Ms. Faust's statement, filed following the Dispute Tribunal's inquiry, "that the question of who acted as Hiring Manager ... was not determinant for the final outcome of the selection process since, as she put it, 'both Ms. Taylor and Ms. Ho were biased against [her]'".⁴ Indeed, in her appeal she makes reference to "[t]he UNDT requesting me to answer whether it would have made difference as to who was the Hiring Manager and me answering that, theoretically, it would most likely not have made a difference".

27. The UNDT found that, while the relevant rules did not seem to provide for the possibility of the Hiring Manager seeking assistance from Ms. Ho to design the test, Ms. Faust was not able to establish any link between Ms. Ho's intervention in the preparation of the written test and her non-selection for the contested post. The UNDT stated:⁵

... Indeed, the [Dispute] Tribunal noted that despite the allegations of bias against her, both with respect to Ms. Ho and Ms. Taylor, the Applicant successfully passed the test and was, consequently, invited for the interview. She was, however, eliminated by the Interview Panel, on the basis of her performance at the interview. Thus, the question whether Ms. Ho could legally design and correct the test, on behalf of Ms. Taylor who was the hiring manager, was not determinant on the outcome of the present selection process. The Tribunal also emphasizes that the test was anonymous to safeguard the identity of the applicants and ensure an impartial evaluation.

³ *Ibid.*

⁴ Impugned Judgment, para. 35.

⁵ *Ibid.*, para. 38.

28. We agree with the UNDT's conclusion that Ms. Faust had failed to show that Ms. Ho's intervention in the preparation of the written test resulted in her non-selection for the contested post.

29. Her claim was fully and fairly considered by the UNDT. We find no fault in the UNDT's finding that, in the contested selection process, the design, conduct and evaluation of the written test did not constitute a violation of Ms. Faust's right to full and fair consideration.

30. The facts of the case clearly establish that her non-selection was due to her poor performance at the interview and had nothing to do with the written test, which she passed.

31. Ms. Faust also challenges the UNDT's finding that the interview panel was properly composed. She claims that "the panel only consisted of one person with some relevant technical knowledge". This is merely an opinion which she does not expand upon, nor does she put forward any argument as to how the UNDT fell into error. The UNDT was cognizant of the Administration's discretion in determining who is an expert for the purposes of an interview panel and found that the panel included two experts in the selection process for the contested post. It further held that Ms. Faust had failed to prove a lack of competency in any of the panel members. Ms. Faust has failed to establish any error by the UNDT in arriving at its findings, and we therefore reject her submission.

32. Ms. Faust further alleges that the UNDT failed to consider that at the time of the recruitment process, the SDM/finance team, including herself, was undergoing "team counselling with a board-certified Psychotherapist" and that this resulted in a conflict of interest in that the direct supervisor of the position was a panellist in her interview. There is no merit in this submission. Such a circumstance does not, of itself, constitute a conflict of interest. The UNDT also gave proper consideration to the question of whether or not Ms. Faust had been the victim of harassment or bias. It found that Ms. Faust had not proved any facts that could amount to harassment. It also dismissed the argument of bias, noting that the other panel members, against whom she did not raise any bias, agreed to the interview report concluding that she was not to be recommended for the post. We find no reason to interfere with that finding.

33. Ms. Faust's appeal raises a number of other assertions alleging errors by the UNDT without providing any grounds for saying so. Such assertions by themselves are not capable of persuading us that the UNDT's Judgment was erroneous in any way.

34. We find that the UNDT was fully supported by the law and the facts when it concluded:⁶

... In the present case, the Applicant did not show that the procedure was biased against her, or that her right to full and fair consideration was violated through any procedural flaws.

.. On the contrary, the [Dispute] Tribunal is satisfied that the panel was composed of experienced experts, that technical skills were evaluated through an anonymous test and that the interview bore in mind a relevant set of skills that it found the Applicant didn't possess.

35. It follows that the appeal must fail.

⁶ *Ibid.*, paras. 58 and 59.

Judgment

36. The appeal is dismissed and Judgment No. UNDT/2016/213 is affirmed.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Halfeld

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

(Signed)

Weicheng Lin, Registrar