



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

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Judgment No. 2019-UNAT-932

**Kinyanjui  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Dimitrios Raikos, Presiding Judge Sabine Knierim Judge Richard Lussick
Case No.:	2019-1228
Date:	28 June 2019
Registrar:	Weicheng Lin

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Counsel for Mr. Kinyanjui:	Ron Mponda
Counsel for Secretary-General:	Phyllis Hwang

**1 JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/106, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 25 October 2018, in the case of *Kinyanjui v. Secretary-General of the United Nations*. Mr. Boniface Macharia Kinyanjui filed a request for suspension, waiver or extension of the time limit to file an appeal on 22 January 2019, which was granted by the Appeals Tribunal on 24 January 2019, by Order No. 337 (2019). Mr. Kinyanjui filed the appeal on 30 January 2019, and the Secretary-General filed his answer on 1 April 2019.

**Facts and Procedure**

2. The following facts have been established by the UNDT:<sup>1</sup>

... [Mr. Kinyanjui], a staff member of the Office of the High Commissioner for Refugees (“UNHCR”), filed an application [before the Dispute Tribunal] contesting the decision not to select him for position No. 10003235, Deputy Representative, Burundi (P-5).

... The position was advertised on 9 September 2016 under job opening [N]o. 12748 (“JO 12748”) in the UNHCR September 2016 Compendium. JO 12748 included a generic description of the requirements for the post without providing information concerning the operational context. This omission became an issue in the case.

... On 14 October 2016, the Division of Human Resources Management (“DHRM”) shortlisted 11 candidates, including the Applicant. This list was sent to the then Representative, Burundi (“manager”), for his views. After considering the list, the manager nominated the Applicant as his preferred candidate.

... On 7 November 2016, DHRM informed the manager that upon reviewing JO 12748 at a Final Recommendation Meeting it was noted that his comments on one candidate, R., did not appear to match the latter’s experience. DHRM requested the manager to once again review the candidates and to provide his revised views by 9 November 2016.

... On 9 November 2016, the manager provided his revised views but did not change his recommendation that the Applicant was his preferred candidate. In relation to candidate R., he noted that the candidate was not proficient in French, which he considered was required for the post, and that he was a national from a

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<sup>1</sup> Impugned Judgment, paras. 2-19.

member state of the European Union, which would pose difficulties in dealing with the authorities in Burundi.

... DHRM [was] not wholly satisfied with the manager's comments and concluded that pending a discussion with him, JO 12748 was not ready to be presented to the Joint Review Board ("JRB") at its session on 16-18 November 2016 nor on 14-16 December 2016. The Applicant informed the [Dispute] Tribunal that when he became aware of the fact that [JO 12748] was not presented to the JRB he became suspicious as to the motives behind the omission to include the position for which he had been recommended as the preferred candidate.

... During the week of 12 December 2016, the manager travelled to Geneva on mission. Since he was due to retire in 2017 he had a discussion with the Director of the Africa Bureau on staffing matters concerning UNHCR operations in Burundi. The manager also met the Chief, Assignments Management Section (formerly Assignments and Promotions Section) ("Chief, AMS") and her supervisor. The [Dispute] Tribunal was informed that there was no written record of these discussions as none was taken. Both the manager and the Chief, AMS confirmed that these discussions had taken place.

... On 18 December 2016, the manager sent an email to DHRM requesting that the position of Deputy Representative, Burundi, be re-advertised to take into account the changed operational context. The [Dispute] Tribunal finds that the discussions that took place in Geneva caused the manager to review and to revise the requirements for the post thereby attracting a different range of candidates. His recommendation to re-advertise the post was accepted and acted upon by DHRM who decided, in the circumstances, not to consider the candidates who had applied in response to JO 12748.

... On 13 January 2017, the position was re-advertised in Addendum 4 to the September 2016 Compendium under job opening [N]o. 13446 ("JO 13446"), with a specific operational context.

... The Applicant applied for JO 13446 and was shortlisted by DHRM, along with six other internal candidates.

... On 7 March 2017, the manager provided his views on the candidates. On this occasion he did not recommend the Applicant, whom he found was "comparatively more junior than most of the other candidates having been promoted in 2014 to the P-4 level" and less experienced than his preferred candidate, A.

... DHRM met on 10 March 2017 and recommended A. for the position.

... The JRB met from 22 to 24 March 2017 and endorsed DHRM's recommendation that A be appointed.

... On 3 April 2017, the High Commissioner announced his decision to assign A to the position.

... On 28 May 2017, the Applicant requested management evaluation of the decision not to select him for JO 13446.

... On 10 July 2017, the Deputy High Commissioner informed the Applicant that he had decided to uphold the contested decision.

... On 6 August 2017, the Applicant filed his application before the [Dispute] Tribunal and, on 8 September 2017, the Respondent submitted his reply.

... Following a case management discussion on 13 September 2018, the [Dispute] Tribunal held a hearing on the merits on 3 October 2018, and heard evidence from:

- a. the Applicant;
- b. the Chief, AMS; and
- c. the manager.

... The [Dispute] Tribunal had initially scheduled to hear the Director of the Africa Bureau as a witness. However, having heard the two other witnesses both parties agreed that it was no longer necessary to hear evidence from the Director of the Africa Bureau.

3. The UNDT dismissed Mr. Kinyanjui's application. The UNDT found there was a lack of audit trail in the recruitment process for JO 12748 in violation of UNHCR/HCP/2015/2 (Revised Policy and Procedures on Assignments) (the Policy), which clearly required that all steps of the matching exercise be recorded. The UNDT, however, did not find that this procedural flaw rendered the contested decision unlawful because it did not disadvantage Mr. Kinyanjui's candidature as it had no causal link to Mr. Kinyanjui's non-selection. The Policy did not provide a timeline by which a recommendation had to be presented to the JRB, and as such, the fact that JO 12748 had not been presented in the JRB's sessions in November and December 2016 was not a procedural flaw. The reason for not presenting it was that the JRB was concerned about candidate R and the absence of an operational context in the job opening. The addition of an operational context to the job opening was in line with the Policy. The UNDT held that the re-advertisement of the job opening to include the operational context did not constitute a procedural flaw and the explanations provided as to why this was necessary were sufficient for the conclusion that there had been no ulterior motive.

4. The UNDT further found that Mr. Kinyanjui had been given full and fair consideration with regard to his candidature for the re-advertised post. Mr. Kinyanjui did not identify a procedural flaw or irregularity in respect of his candidacy for the new position. Moreover, candidate R was also not recommended, which dispelled any suspicion that DHRM tried to pressure the manager to select candidate R. The UNDT also found that Mr. Kinyanjui had not been disadvantaged by any procedural or substantive error in respect to JO 13446 or JO 12748. After the post had been re-advertised to include an operational context, Mr. Kinyanjui was given full and fair consideration. As a result of such consideration, Mr. Kinyanjui was no longer the recommended candidate as the manager had determined that another candidate with more experience was the best candidate.

### **Submissions**

#### **Mr. Kinyanjui's Appeal**

5. Mr. Kinyanjui requests the Appeals Tribunal to vacate the impugned Judgment and award him compensation for failure to be fully and fairly considered for JO 13446. He argues that the UNDT erred in fact when it determined that JO 12748 did not contain information on the operational context and that the reason his recommendation was not submitted to the JRB was because of concerns about candidate R and the absence of an operational context. The JRB in fact only expressed concerns about candidate R and did not express concerns over information on the operational context. Thus, the manager was supposed to justify his selection over candidate R on the basis of the position as originally advertised. The issue of the changed operational context only came into the picture approximately four months later when UNHCR tried to justify the decision to re-advertise the position. The candidate selected for the position did not satisfy the revised criteria for the post as he lacked a legal background, which further demonstrated that the changes to the operational context in the job opening were a smoke screen to exclude his candidacy.

6. Mr. Kinyanjui further argues that the UNDT erred in failing to find that the Secretary-General ignored Order No. 217 (GVA/2017), dated 21 November 2017, which ordered production of documents related to the meeting in Geneva. At the case management discussion when this was ordered, the Secretary-General did not indicate there were no such documents. Further, the UNDT Judge noted that it would be troubling if an organization did not keep such records. The UNDT should have required the Secretary-General to explain why he did not

comply with the Order. In turn, the UNDT erred in finding that Mr. Kinyanjui did not meet his burden of proof that there were ulterior motives. The UNDT Judge correctly observed that there were discrepancies between the Secretary-General's reply as to what had transpired at the meeting and the oral testimonies and that such inconsistencies might cause suspicion that there had been impermissible considerations at play. The UNDT, however, failed to identify the underlying reasons for the discrepancies. Mr. Kinyanjui met his burden of proof by casting sufficient doubt on the integrity of the selection process and the Secretary-General failed to provide a genuine explanation for the discrepancies or why he did not comply with the Order.

7. The UNDT erred in law when it found that the procedural flaw, namely, the lack of a paper/audit trail regarding the recruitment process for JO 12748, was not a detriment to his candidacy. This flaw, as the UNDT correctly found, violated the Policy requiring all steps to be recorded. This was not a mere technicality but served to rebut the presumption that UNHCR had acted in good faith. The UNDT further erred in not concluding that this procedural flaw constituted a violation of his due process rights. In addition, the Secretary-General has failed to explain why his recommendation was not submitted to the JRB after the initial concern about candidate R had been addressed. The record indicates that the only delay in making the recommendation was about candidate R. Thus, the delay constitutes a breach of Mr. Kinyanjui's due process rights.

### **The Secretary-General's Answer**

8. The Secretary-General requests the Appeals Tribunal to dismiss the appeal in its entirety. Mr. Kinyanjui has not established any errors that warrant a reversal of the impugned Judgment. The UNDT correctly found that concerns about candidate R had led to the issuance of a second job opening that included a proper operational context. Mr. Kinyanjui claims that the UNDT erred in fact in finding that the operational context was an issue, however, he fails to identify how such an alleged error resulted in a manifestly unreasonable decision. The UNDT did not err in fact as the concerns raised over candidate R and for the need to include an operational context in the job opening were inextricably linked.

9. The candidates for the second job opening were properly assessed against the factors identified in the operational context. Mr. Kinyanjui argues that the selected candidate did not have a legal background and that he himself had a solid background in French having passed the United Nations Language Proficiency test in French. These claims are factually incorrect.

The position required both fluency in French and senior-level experience in managing complex operations that had not been highlighted in the first job opening. Thus, it was necessary to reissue the job opening with this operational context included. The requirement for legal background, while it was mentioned in the manager's e-mail to the Director of the Regional Bureau for Africa, was ultimately not included in the operational context. Thus, the fact that the selected candidate did not have a legal background is irrelevant. The reason Mr. Kinyanjui was not selected had nothing to do with his French skills; but rather because the selected candidate had served at the P-4 level longer and had served as the Head of two National Offices.

10. The UNDT properly found that there were no ulterior motives as the Administration provided sufficient evidence supporting its explanation of the meetings and the decision to re-advertise the position. The presumption of regularity of administrative acts is not rebutted simply by casting doubt. It is incumbent on Mr. Kinyanjui to present clear and convincing evidence of an irregularity.

11. UNHCR did not ignore the UNDT's order to produce documents relating to the December meetings. There was no note to file on the meetings; however, UNHCR did produce an e-mail from the manager to the Director of the Regional Bureau for Africa summarizing the steps to be taken in light of their meeting. The UNDT found that the testimonies of the Chief, AMS and the Director of the Regional Bureau of Africa were consistent as to what was discussed during the meetings. The UNDT was in the best position to assess witness credibility and it correctly concluded that there was no improper motive in re-advertising the post.

12. Lastly, the Secretary-General argues that the UNDT's finding of procedural irregularity relating to the first job opening does not constitute a basis to reverse the Judgment. Mr. Kinyanjui argues that the UNDT erred in not finding that the failure to submit the recommendation of his selection to the JRB was violative of his due process rights. If the UNDT had found improper motive, bias, or prejudice against Mr. Kinyanjui in the first job opening that might have been relevant to his non-selection for the second job opening, however, that is not the case here. The UNDT correctly found that the reasons for the re-advertisement were unrelated to Mr. Kinyanjui. In turn, the matching session of the first job opening did not result in the selection of a candidate but a decision to re-advertise. Accordingly, minuting was only required if there had been a resulting short list and final selection by DHRM. The re-advertisement was in accordance with paragraph 70 of the Policy. The Secretary-General, therefore, submits that the UNDT erred in finding that the process of the first job opening violated the Policy.

This error, nonetheless, does not vitiate its conclusion that Mr. Kinyanjui was given full and fair consideration for the second job opening.

### Considerations

13. The central issue in this appeal is whether the UNDT erred on a question of law or fact resulting in a manifestly unreasonable decision in finding that Mr. Kinyanjui's candidacy had been given full and fair consideration.

14. The standard of review of administrative decisions regarding appointments and promotions has been consistently defined. The Administration has broad discretion in matters of staff selection. The jurisprudence of the Appeals Tribunal has clarified that, in reviewing such decisions, it is the role of the Tribunals to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent, and non-discriminatory manner. The Tribunals' role is not to substitute its decision for that of the Administration.<sup>2</sup>

15. We have also stated in *Verma*:<sup>3</sup>

... The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. 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 Dispute Tribunal shall uphold the selection/promotion.

... All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited

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<sup>2</sup> *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 14 citing *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20-21 and 26; *Riecan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-802, para. 13; *Al-Mussader v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-771, para. 15; *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 27, citing *Niedermayr v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-603, para. 21 and citations therein; *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30 and citations therein.

<sup>3</sup> *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 14; *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20-21 and 26; see also *Niedermayr v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-603, para. 23, and *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 27.



bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case. (...)

...

... There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

16. The UNDT correctly applied the foregoing principles in considering Mr. Kinyanjui's challenge to the selection process. As discussed in more detail below, the UNDT did not make any errors of law or fact in dismissing his application.

17. UNHCR's Revised Policy and Procedures on Assignment, which is the applicable law on this matter, is reproduced in relevant part below:

**Appointment and Assignment of staff at the P-1 to P-5 levels**

65. Upon expiration of the deadline stipulated in the vacancy notice, DHRM will carry out a comprehensive matching exercise for appointments and assignments of candidates to the P-1 to P-5 levels (except Representational positions) on the basis of established criteria.

66. The process shall be under the purview of DHRM who will undertake a matching exercise of eligible applicants to vacant positions. This task will be undertaken by staff in CMSS and staff in APS. Relevant input will be provided by SWS and MS. In undertaking the matching exercise DHRM will:

- a. Apply the criteria for matching listed below;
- b. Consult with staff members to determine their preferences based on their applications for positions;
- c. Solicit the interest of suitable staff members in need of a position who have not applied;
- d. Take into consideration managers' specific position profile requirements; and
- e. Solicit and receive assessments from relevant functional units.

...

**Matching Process**

68. The matching process is not a one-off activity but iterative, beginning prior to the publication of the Compendium. The ultimate goal of the process is to identify the most suitable candidates for positions by comparing applicants to each other and to the position profile requirements using the established criteria. The process shall be undertaken as follows:

- a. Prior to issuance of the Compendium or Addendum, managers shall provide DHRM with the written operational context and position profile requirements for the purposes of the matching exercise.
- b. Upon the issuance of a Compendium or Addendum, CMOs, who may be assisted by other DHRM staff, shall contact staff members who are available for regular assignments to inquire as to their application intentions and to assist with information on the application process. DHRM will also maintain regular contacts with Bureau and Divisions to exchange information related to the timely filling of job openings.
- c. Following the closure of the vacancies in a given Compendium or Addendum, APS will establish eligibility for all applicants. If there are few than three eligible applicants for P-2 or P-3 positions and very exceptionally, for P-4 positions, APS may complement the applicant list with functional profile applicants.
- d. CMSS and APS shall compare the list of applications of each staff member and the list of applicants for each job opening and will evaluate whether to approach a staff member to review his or her applications in order to maximize the likelihood of a match. Where it will facilitate a match, late applications will be exceptionally considered and documented in the minutes.
- e. Applicants shall be matched to positions in accordance with the matching criteria to arrive at a short list. DHRM shall provide the short list to the manager who shall give his or her views in respect of suitability in writing no later than 10 days after having received the short list.
- f. If the job opening is subject to functional assessment, the relevant functional unit will assess any short-listed candidate who has not previously obtained functional clearance for a similar position. Functional assessments and tests must be applied in a transparent manner. Once obtained, functional assessment will remain valid for all future applications the staff member makes at the same grade-level and in the same functional area. Shall a staff member wish to apply to a job opening at a different level or in a different functional area s/he may be required to undergo a new functional assessment.

g. Matching sessions shall take place, chaired by the Head of the Assignments and Career Management Service, involving the Chiefs of APS and CMSS, or their delegated alternate, and relevant DHRM staff as appropriate. All sessions shall be minuted.

h. All applicants at the grade level of the position shall be considered individually. If such an applicant is matched, no further consideration of candidates who are at a grade level lower than the position level shall be required. However, if an applicant with a grade level lower than that of the position is considered, then all applicants with that grade level shall be considered. Consequently, in the minutes of the matching, DHRM will document the deliberations of all considered applicants.

i. DHRM will consider the manager's views, make the final selection and minutes its recommendation.

...

70. In instances where a match of a person to the position cannot be made, DHRM will re-advertise the position.

...

72. Minutes of the matching sessions shall record the process of the suitability assessment of all eligible applicants for a particular position resulting in a short list and a final selection by DHRM. The minutes shall contain any and all information on a staff member considered in the process.

73. Minutes of matching meetings concerning all cases will be signed by the Head of the Assignments and Career Management Service, or his/her delegated alternate, and submitted to the JRB together with other documentation as specified in para. 104 prior to being transmitted to the High Commissioner.

18. Mr. Kinyanjui submits that the UNDT erred in fact when it concluded that the absence of the description of the operational context constituted a basis for the concerns raised by DHRM with respect to the first job opening. Firstly, he argues that the operational context was never an issue. It only came into the limelight in the context of the Secretary-General's attempt to justify the re-advertisement of the job opening. There was never an omission in terms of the original job opening. If this had been the case, it would have been open to the Secretary-General to immediately request the manager to provide an operational context. The only request was to consider the credentials of candidate R and no more. Secondly, Mr. Kinyanjui argues that it was merely a pretext for excluding his candidacy from the original job opening, with the reasons for suppressing his candidacy remaining unclear.

19. In the case at bar, as per the evidence on file, the relaunch of the whole recruitment procedure by the Administration, by re-advertising the position in Addendum 4 to the September 2016 Compendium under the JO 13446 with a specific operational context, was prompted by the concerns that candidate R lacked fluency in French and was a national of a Member State of the European Union (EU) as well as that the profile of the Deputy Representative required experience in senior management functions capable of dealing with the high number of returning refugees and the volatile and changing situation in Burundi at the time.

20. To that effect, as established by the UNDT,<sup>4</sup> the Director of the Africa Bureau recommended that the manager discuss the matter with DHRM, which he did, and which resulted in an agreement to re-advertise the position. Following these meetings, the manager submitted a formal request that the position be re-advertised and he provided an operational context in the job opening addressing these concerns. Eventually, as a matter of fact, these factors were reflected as elements in the new operational context added to the second job opening, which stated in relevant part:<sup>5</sup>

The Deputy Representative is the second most senior officer of UNHCR in the country and thus from time to time s/he is expected to assume responsibilities of the senior relations management with government and partners. [...] [S/he] is also responsible for staff welfare.

The Deputy Representative manages field operations and field offices report to her/him. In addition the person will also supervise protection services.

The official language in Burundi is French and all government business is transacted in French. Presently and given the very difficult relations between the European Union and the government, it may not be advisable for UNHCR to assign the most senior officers from the EU member states as government officials would generally impute the EU position on staff members. Ideally the Deputy Representative must be senior staff at the level of the post with proven experience in managing complex operations that would include emergencies and durable solutions. The person must be fluent[,] [having] ability to draft and communicate[,] in French language. Similar proficiency in English would be an added advantage.

Over the past 2 years Burundi has been going through a political landscape that has been marked by election related violence. Relations between Burundi and its neighbors [have] generally been good except for Rwanda which Bujumbura accuses of

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<sup>4</sup> Impugned Judgment, paras. 33-34.

<sup>5</sup> DHRM Shortlisting Matrix Addendum 4 to the September 2016 Compendium for job opening 13466.

destabilizing the country through[,] among other means[,] accepting the members of opposition groups including military personnel who failed in a coup attempt in May 2015. Similarly[,] relations with major western donors [are] strained. Burundi maintains a generous policy towards refugee[s] from the DRC and there are close to 60,000 refugees living in three camps and in urban areas[,] mainly Bujumbura. More than 100,000 IDPs have been identified in the country of whom 60% are conflict related. In 2015 more than 300,000 Burundians fled the country following elections related violence. The majority are in Tanzania and significant numbers in Rwanda, the DRC and Uganda.

21. In the Appeals Tribunal's view, the Administration is not under an obligation to pursue a recruitment procedure once begun, by filling the post which has become vacant. This falls within the discretionary authority of the Administration to terminate a recruitment procedure and/or to initiate a new one. The rule is nonetheless that, in filling the post, the Administration must proceed with the appointment of successful candidates in accordance with the recruitment results. However, it can deviate from that rule for sound reasons, justifying its decision clearly and fully, i.e. on account of irregularities occurred in the recruitment process or for reasons connected with the interests of the service, while providing an adequate statement of the reasons therefor which are subject to the above mentioned jurisprudential principles of judicial review as to their correctness and veracity.

22. In the present case, under these circumstances, the contested administrative decision not to carry through with the recruitment process by presenting the final recommendation of DHRM to the JRB and making an appointment on the basis of the initial JO 12748 and instead to open a fresh recruitment procedure by re-advertising the position, is a valid and thus, lawful exercise of the Administration's discretion. It is based on sound reasons inextricably linked to the interests of the service, namely, the peculiar situation and political landscape in Burundi and the need for the addition of an operational context in the job opening—as opposed to the generic description of the requirements for the post included in the initial job opening—in order for it to factor in the necessary specific skills, to wit, the requirement of the fluency in French and a preference that the selected candidate should be a qualified senior staff member with proven experience in managing complex operations including emergencies and the provision of durable solutions.

23. It was also prompted by the Administration's need to comply with the relevant legal instruments governing the recruitment procedure. As correctly found by the UNDT, the addition of an operational context was also in line with the Policy, which provides in Section 68(a) that "[p]rior to issuance of the Compendium or Addendum, managers shall provide DHRM with the written operational context and position profile requirements for the purposes of the matching exercise". The Chief, AMS further confirmed that it "[wa]s always preferable to include an operational context, so as to tailor the job description to the specific elements of the position. Otherwise the job opening [would remain] generic".<sup>6</sup> The UNDT further noted that:<sup>7</sup>

[g]iven that no operational context was provided in the first place, the addition of one was welcomed by DHRM as it would properly address the specific requirements for the post. Accordingly, the [Dispute] Tribunal finds that the re-advertisement of the contested position including a description of the operational context does not constitute a procedural flaw and the explanations provided are sufficient to conclude that it was not prompted by an ulterior motive.

24. It follows from the foregoing that the contested decision, which impliedly withdrew the initial recruitment procedure by opening a fresh one, is well-founded and justified on grounds valid in law, sufficient to permit the appointing authority to disregard any part of the results of the initial recruitment process and to commence a new recruitment exercise by re-advertising the position. It is irrelevant in this respect whether these needs existed *ab initio* or came into the limelight *ex post facto*. The fact—critical for the consideration of the legality of the contested decision—is that these needs existed and were crucially connected to the interests of the service. Consequently, we reject Mr. Kinyanjui's respective claims to the opposite as baseless.

25. Mr. Kinyanjui further argues in his appeal that the so-called changed operational context in fact required a profile such as his and that the UNDT erred in not finding that the candidate finally selected for the post, after the original job opening had been re-advertised, did not in fact satisfy the revised criteria for the post in that he was not at the P-5 level, and that his strength only lay in public information as he did not have a law degree. Yet, the UNDT considered all the relevant evidentiary material and concluded that Mr. Kinyanjui had not provided any evidence in

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<sup>6</sup> Impugned Judgment, para. 42.

<sup>7</sup> *Ibid.*, para. 43.

support of his allegation that his own candidacy “was suppressed” for unclear reasons or extraneous motives. Moreover, the UNDT found, in terms of the selected candidate, that:<sup>8</sup>

the manager considered that the Applicant was more junior than most of the other candidates since he had been promoted to the P-4 level in 2014 and that he needed to have gained more experience in the management of staff. The candidate whom he recommended on this occasion had served as head of national offices at least twice during the past two years. DHRM endorsed the views of the manager.

26. We are satisfied with this conclusion. Mr. Kinyanjui has not rebutted the presumption of regularity which attaches to the selection process. Besides, the UNDT has broad discretion to determine the admissibility of evidence and the weight to accord to it.<sup>9</sup> The findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision, which is not the case here.

27. Consequently, we hold that the UNDT gave careful and fair consideration to Mr. Kinyanjui’s arguments regarding the legality of the selection exercise. Moreover, Mr. Kinyanjui, contrary to his allegation, has failed to discharge his burden of proving through clear and convincing evidence that he was denied a fair chance of selection. Be that as it may, the High Commissioner had the list of potential candidates for final selection and Mr. Kinyanjui was included in that list. The High Commissioner could have selected any one of these candidates, when he exercised his discretion and made a selection. However, he did not select Mr. Kinyanjui; instead, he selected another candidate, taking into account, *inter alia*, the abovementioned criteria of the selected candidate’s seniority and experience as compared to those of Mr. Kinyanjui. Taking such factors into account falls within the Administration’s discretion. There is no evidence that the exercise of this discretion was abusive, arbitrary, discriminatory, or irregular.

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<sup>8</sup> *Ibid.*, para. 45.

<sup>9</sup> *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 29; *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, para. 37, citing *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 26.

28. Finally, Mr. Kinyanjui submits that the UNDT erred when it accepted that the procedural flaw of a lack of paper/audit trail in respect of the full recruitment process for JO 12748 to include the views of DHRM was not fatal when the UNDT also found that the absence of an audit trail was not compliant with the Policy. The Policy clearly required that all steps of the matching exercise be minuted and he argues this flaw was not a mere technicality. Mr. Kinyanjui also argues that the lack of an audit trail negatively impacted the well-established principle that the Administration is presumed to work in good faith.

29. Nevertheless, as the contested decision to commence a new recruitment exercise by re-advertising the position, was, as determined by the Appeals Tribunal earlier in this Judgment, a valid exercise of the Administration's discretion, the alleged procedural irregularity in the initial recruitment process for JO 12748 would not assist Mr. Kinyanjui. The specific recruitment process was impliedly withdrawn by the Administration through the opening of the fresh one and thus never resulted in the selection of a candidate. Besides, it was found by this Tribunal to be lawful and lacking any flaw of abuse of power or improper motives. Consequently, this irregularity could not, and did not, have any impact on the legality either of the new recruitment process and the final selection of a candidate or of the decision of the Administration to begin a new recruitment exercise. So, the UNDT correctly determined, albeit with a reasoning different than ours, that the above arguments of Mr. Kinyanjui had no merit.

30. From the foregoing, we hold that Mr. Kinyanjui has failed to establish that the UNDT committed errors on questions of fact and law such as to warrant a reversal of its Judgment.

31. Our conclusion that the UNDT did not make any errors of law or fact in dismissing Mr. Kinyanjui's challenge of the decision not to select him precludes Mr. Kinyanjui from seeking compensation. Since no illegality was found, there is no justification for the award of any compensation. As this Tribunal 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".<sup>10</sup>

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<sup>10</sup> *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 33; *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, citing *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 and citations therein; see also *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508; *Oummih v. Secretary-General of the United Nations*,



32. For these reasons, we uphold the decision of the UNDT.

**Judgment**

33. The appeal is dismissed and Judgment No. UNDT/2018/106 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of June 2019 in New York, United States.

*(Signed)*

Judge Raikos, Presiding

*(Signed)*

Judge Knierim

*(Signed)*

Judge Lussick

Entered in the Register on this 19<sup>th</sup> day of August 2019 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar