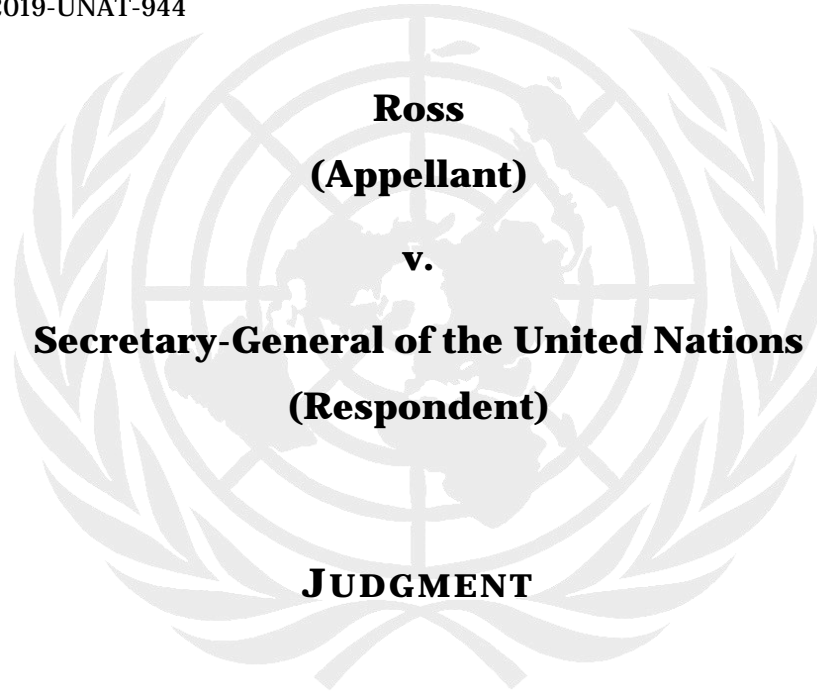




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-944



Before: Judge Deborah Thomas-Felix, Presiding
Judge Sabine Knierim
Judge John Raymond Murphy

Case No.: 2019-1242

Date: 28 June 2019

Registrar: Weicheng Lin

Counsel for Mr. Ross: Self-represented

Counsel for Secretary-General: Nathalie Defrasne

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2019/005, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 16 January 2019 in the case of *Ross v. Secretary-General of the United Nations*. Mr. Felix Ross filed the appeal on 13 March 2019 and the Secretary-General filed his answer on 13 May 2019.

Facts and Procedure

2. The following facts are uncontested:¹

... On 3 November 2008, the Applicant joined [the United Nations High Commissioner for Refugees (UNHCR)] in the Legal Affairs Service as a Legal Officer at the P-3 level. On 1 November 2010, he was selected for the position of Senior Protection Officer in Sudan. On 1 January 2013, he was temporarily reassigned as Legal Officer Nairobi, Kenya, in Private Sector Fundraising (PSFR).

... From 1 July 2013 to 1 July 2015, the Applicant was on special leave without pay.

... On 1 July 2015, the Applicant returned from special leave without pay and accepted a temporary assignment to a Senior Protection Officer's post at the P-4 level in Rabat.

... On 6 November 2015, the High Commissioner promoted the Applicant to the P-4 level. Subsequently, a controversy ensued as to whether this promotion took effect only upon the Applicant being successful in a selection for a P-4 position or independent of it. This issue was resolved in March 2016 through confirmation that the promotion was unconditional and in effect.

... The position the Applicant was temporarily encumbering was advertised as part of the September 2015 compendium as a regular post and the Applicant applied for it.

... The Division of Human Resources Management (DHRM) sought from the Hiring Manager his views on all of the candidates in accordance with the UNHCR *Revised Policy and Procedures on Assignments (RPPA)*. The Hiring Manager for this particular post was Mr. Jean-Paul Cavalieri, who had supervised the Applicant from 1 July 2015. Mr. Cavalieri expressed his strongest preference for a female candidate. As an alternative, he had also expressed his preference for two male candidates. In his views concerning the Applicant's candidacy, Mr. Cavalieri provided reasons for not recommending the Applicant, this being lack of demonstrated leadership skills and

¹ Impugned Judgment, paras. 7-21 and 25 (original emphasis; footnotes omitted).

sufficient experience in Refugee Status Determination (RSD). At the time, the Applicant's promotion had not yet taken place.

... On 30 November 2015, DHRM reviewed all the candidacies for the position as well as the manager's views relating to these applicants and recommended to the High Commissioner, Mr. Madjora, a candidate who had received the third highest recommendation from Mr. Cavalieri. At this point the DHRM already had information of the Applicant's promotion, albeit considered it conditional upon the Applicant's actually being recruited for a P 4 position.

... On 23 December 2015, the Applicant received a notification informing him that the High Commissioner had selected Mr. Madjora for the position of Senior Protection Officer.

... On 8 January 2016, the Applicant obtained from DHRM the Manager's views pertaining to his candidacy. Dissatisfied with their contents, on 14 January 2016 the Applicant complained to the UNHCR Deputy Director, Africa Bureau, against Mr. Cavalieri for not recommending him for the position. The subsequent investigation into the matter did not find grounds to impugn the conduct of Mr. Cavalieri.

... In mid-January 2016, the Applicant took annual leave followed by special leave without pay and returned to Nairobi. The Applicant remained in Nairobi until the expiration of his fixed term appointment on 31 March 2016.

... On 28 January 2016, while away from his temporary duty station in Rabat, the Applicant had a telephone conversation with Ms. Shoko Shimozawa, Deputy Director of Middle East and North Africa Bureau. During this conversation, Ms. Shimozawa informed the Applicant that the selected candidate – Mr. Madjora – was no longer available to take up the assignment. Therefore, Ms. Shimozawa informed the Applicant that Mr. Cavalieri and Ms. Farkas, Director of DHRM, were both prepared to recommend him for the position. In an email dated 29 January 2016, the Applicant thanked Ms. Shimozawa and requested time to consider the offer.

... In an email dated 31 January 2016, the Applicant informed Ms. Shimozawa that he was no longer interested in the assignment:

We discussed it at length this weekend and came to the conclusion that Rabat is not an option for us anymore. I hope you understand. I nevertheless would like to thank you for your efforts in this regard.

... On 1 February 2016, after the Applicant had declined the offer to be recommended for the position, the Respondent re-advertised the vacancy announcement. [Mr. Ross did not apply for the re-advertised position. Also on 1 February 2016, Mr. Ross requested management evaluation of the decision not to select him for the position of Senior Protection Officer in Rabat.]

... The following day, 2 February 2016, Mr. Cavaliere sent a reconciliatory email to the Applicant explaining his position at the time of the expression of his views as manager as well as why currently he was ready to change his views and recommend the Applicant.

... On 15 February 2016, the offer was reiterated by Ms. Karen Farkas, the Director of DHRM, who wrote the Applicant:

Please also let me know whether you would be interested in the offer for an extension of the temporary assignment and whether you might reconsider being recommended to the position of Senior Protection Officer in Rabat, Morocco.

... (...)

... On 29 March 2016, the Deputy High Commissioner upheld the contested decision.

[On 12 May 2016, the High Commissioner appointed another staff member to the re-advertised position.]

3. On 29 April 2016, Mr. Ross filed his application with the UNDT contesting the High Commissioner's decision received by him on 23 December 2015 not to appoint him to the position of Senior Protection Officer in Rabat, Morocco. The Secretary-General filed a reply on 27 May 2016. A case management discussion was held on 17 October 2017, following which the parties filed amended pleadings and the Respondent provided additional documents. Both parties declared that documentary evidence was sufficient, and they did not deem a hearing necessary. The case was suspended during the period of 20 November 2018 to 31 January 2019 pending mediation, together with four other cases filed by Mr. Ross against UNHCR. On 24 December 2018, the Regional Ombudsman, Office of the Ombudsman for Geneva, informed the Dispute Tribunal that the mediation had failed.

4. On 16 January 2019, the UNDT issued Judgment No. UNDT/2019/UNDT/005 dismissing Mr. Ross' application. The UNDT found that Mr. Ross had no right to be actually promoted, but only to be considered. The UNDT concluded that Mr. Ross had multiple occasions to be considered for the position, including when the Hiring Manager and DHRM offered to recommend him for the position after the originally selected candidate had declined the offer and when the position was re-advertised. The UNDT dismissed Mr. Ross' claim that he could not have been expected to serve under the Hiring Manager because of the views that the latter had initially provided to DHRM regarding his candidacy. The UNDT concluded that Mr. Ross had received full and fair consideration for the position.

5. Regarding Mr. Ross' claim for reinstatement into the service of UNHCR, the UNDT found no causal link between such a claim and the selection process. The UNDT found that Mr. Ross had failed to provide any proof that the Hiring Manager's views were "patently unsound and malicious" and on the contrary, UNHCR had made every effort to offer full and fair consideration to Mr. Ross and to constructively address the consequences of negative views of the Hiring Manager on Mr. Ross' relationship with the Organization. The UNDT concluded that any consequences of the non-selection decision were attributable to Mr. Ross' choices and that there was no basis for an award of moral damages.

6. On 4 June 2019, Mr. Ross filed a "Motion for Additional Pleadings" before this Tribunal and on 12 June 2019, the Secretary-General filed his response to the motion.

Submissions

Mr. Ross' Appeal

7. The UNDT should have considered that it was undisputed that the Hiring Manager had lied about Mr. Ross' performance and experience when the Hiring Manager had submitted his views on the candidates for the position. Furthermore, the UNDT should have concluded that those undisputed facts were strong evidence that the Hiring Manager had acted with improper motive. The UNDT erred in concluding that the Hiring Manager's conduct did not constitute misconduct. The Hiring Manager lied in his views on Mr. Ross' performance and experience and he lied to Mr. Ross. The UNDT should have referred the Hiring Manager for possible action to enforce accountability.

8. The UNDT erred in fact in finding that an investigation had taken place into Mr. Cavalieri's misconduct. The Office of the Inspector General (IGO) never opened an investigation because it considered that management evaluation was the appropriate avenue. It therefore never determined whether or not Mr. Cavalieri's conduct amounted to misconduct. The decision by the IGO was manifestly unlawful because it had to investigate possible misconduct by staff members.

9. DHRM did not recognize Mr. Ross' promotion that had taken place before the matching exercise. It only recognized the promotion much later, in March 2016, when it finally agreed to implement the promotion retroactively as of 1 January 2015. During the matching exercise for the position in November 2015, DHRM did not consider Mr. Ross as at the P-4 level and

therefore failed to provide him with priority consideration in line with paragraph 68h of the UNHCR RPPA.

10. Mr. Ross' right to full and fair consideration in the selection process was violated and a recommendation of Mr. Ross was not an appropriate remedy. The violation of Mr. Ross' rights has therefore not been remedied. The UNDT should have found that the Organization should have extended Mr. Ross' fixed-term appointment and made efforts to find him a new assignment in order to remedy the violation of his rights. The UNDT should have ordered his reinstatement and assignment to a new position and, alternatively, payment of compensation.

11. Mr. Ross requests that the Appeals Tribunal vacate Judgment No. UNDT/2019/005, order Mr. Ross' reinstatement and assignment to a position commensurate with his qualifications and experience and, in the alternative, payment of compensation in the amount of three years' net base salary in addition to his own as well as the Organization's pension fund contributions with interest on each monthly salary and pension fund contributions at the US Prime rate. Additionally, Mr. Ross requests that Mr. Cavalieri's conduct be referred to the Secretary-General for accountability.

The Secretary-General's Answer

12. The UNDT correctly dismissed the application, concluding that UNHCR had provided conditions for full and fair consideration. The evidence on record shows that Mr. Ross was given full and fair consideration for the position. His candidacy was reviewed in accordance with the UNHCR RPPA. Mr. Cavalieri's views were balanced, with both positive and negative comments, and did not differ in style from the views on other candidates whom he did not recommend. Nothing in his comments shows any bias towards Mr. Ross. The Hiring Manager's initial views did not show any improper motive. Rather, the IGO did not find that the Hiring Manager's actions amounted to harassment, abuse of authority or any other form of prohibited conduct.

13. Mr. Ross has not provided any evidence to show any bias on the part of the Hiring Manager against him. He has not discharged his burden of proving improper motive. The evidence shows that UNHCR went to great lengths to ensure that Mr. Ross received full and fair consideration. Mr. Ross had two opportunities to be considered for the position after the first selected candidate was no longer available: he was offered the possibility to be recommended for

the position immediately after the selected candidate declined the offer and he could have applied to the position once it was re-advertised. The Hiring Manager even reached out to Mr. Ross to explain the views he had provided during the initial evaluation of candidates for the position and why his views on Mr. Ross' performance had changed since then in a hope that Mr. Ross would apply for the re-advertised position. Consequently, as found by the UNDT, any consequences of the decision not to select Mr. Ross for the position were attributable to Mr. Ross' choices.

14. Mr. Ross has not shown that the UNDT erred in not referring the Hiring Manager for accountability. There was no evidence that the conduct of the Hiring Manager was inappropriate for a referral to enforce accountability. Since there is no evidence of bias or discrimination in the selection process for the position, there were no grounds for the UNDT to refer the case for enforcement of accountability in accordance with Article 10(8) of its Statute.

15. Mr. Ross has not shown that the UNDT's findings regarding an investigation into the Hiring Manager's conduct resulted in a manifestly unreasonable decision. The evidence shows that after Mr. Ross had obtained the Hiring Manager's views pertaining to his application for the position, he filed a complaint against the Hiring Manager for allegedly lying in his views and for not recommending Mr. Ross for the position. The IGO reviewed the allegations but did not find that the Hiring Manager's actions amounted to harassment, abuse of authority or any other form of prohibited conduct. Consequently, the IGO informed Mr. Ross that his complaint would be more suited for a management evaluation request. Mr. Ross has failed to show how the UNDT's findings regarding the IGO's actions led to an unreasonable decision.

16. Mr. Ross has not shown that the UNDT erred in not ordering his reinstatement. By his own admission, he simply repeats the arguments he presented before the UNDT. The UNDT correctly concluded that reinstatement would not be an appropriate remedy and that an award of compensation for moral damages was not warranted as any consequences of the decision not to select Mr. Ross for the position were attributable to his own choices.

17. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Mr. Ross' Motion for Additional Pleadings

18. The Secretary-General made manifestly false claims in his answer which Mr. Ross seeks to address. The Secretary-General claims in his answer that the IGO had reviewed his claim regarding the Hiring Manager's misconduct and concluded that the Hiring Manager's conduct did not amount to misconduct. The IGO had, however, never assessed whether the allegations amounted to misconduct and never examined whether they were, or were not, true. As such, the Organization was not able to determine whether or not the Hiring Manager had committed misconduct. The fact that the Secretary-General nevertheless now claims that the Hiring Manager's conduct was correct is abusive and frivolous. Since Mr. Ross' appeal is *inter alia* based on the question of whether the Hiring Manager's behaviour constituted misconduct, it is necessary that Mr. Ross correct the Secretary-General's false statements through additional pleadings.

19. The fact that the Secretary-General makes manifestly false statements to establish a false factual basis for his defense would be considered fraud in many national jurisdictions. The production of such manifestly false statements constitutes an abuse of the procedures of the Appeals Tribunal. Mr. Ross therefore requests that the Appeals Tribunal award costs against the Secretary-General in the amount of USD 8,000.

The Secretary-General's Response to Mr. Ross' Motion for Additional Pleadings

20. Mr. Ross' motion fails to satisfy the requirements for additional pleadings or an award of costs. Mr. Ross has failed to identify any exceptional circumstances justifying additional pleadings. He simply disagrees with the Secretary-General's interpretation of the facts and wishes to reiterate his claim that the IGO never investigated his claims and decided not to investigate the matter without providing concrete reasons. Mr. Ross does not provide any evidence or any argument to rebut the evidence presented before the UNDT that on 18 January 2016, the IGO sent him an e-mail in which it informed him that it had "thoroughly reviewed the allegations that [he had] presented to [it], against [its] mandate ... and the formal criteria applicable in assessing misconduct", and it would "not be proceeding with a formal investigation". Mr. Ross has failed to demonstrate any exceptional circumstances that justify the need to file additional pleadings. Finally, Mr. Ross has failed to show any abuse of process in the present case.

Considerations

21. As a preliminary matter, Mr. Ross' motion for leave to file additional pleadings is refused. Neither the Appeals Tribunal Statute (Statute) nor the Appeals Tribunal Rules of Procedure (Rules) provide for an appellant to file an additional pleading after the respondent has filed his or her answer. Article 31(1) of the Rules and Section II.A.3 of Practice Direction No. 1 of the Appeals Tribunal allow the Appeals Tribunal to grant a party's motion to file additional pleadings only if there are exceptional circumstances justifying the motion.² Mr. Ross has not demonstrated any exceptional circumstances which would justify the Appeals Tribunal exercising its discretion to allow him to file additional pleadings.

22. Similarly, Mr. Ross' request for costs cannot be sustained. Article 9(2) of the Statute permits the Appeals Tribunal to award costs only if a party has manifestly abused the appeals process. There are no reasons to believe that the Secretary-General did not make his submissions in good faith and his stance is by no means an abuse of process.

23. We agree with the UNDT's consideration that "a staff member has a right to be fully and fairly considered for promotion through a competitive selection process untainted by improper motives like bias or discrimination. A candidate, however, has no right to a promotion."³ Specifically, in relation to priority or preference in the promotion exercise, the UNDT correctly applied the principle enunciated by the Appeals Tribunal with respect to "priority consideration", and stated that such a consideration "cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for; and that to hold otherwise would compromise the highest standards of efficiency, competency and integrity required in selecting the best candidate for staff positions under Article 101 of the Charter".⁴

24. It follows, therefore, that Mr. Ross does not have a right to promotion but only a right to be considered for promotion. We also uphold the UNDT's finding that Mr. Ross received full and fair consideration for the position.

² *Afawubo v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-863, para. 18, citing *Fayek v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-739, para. 7.

³ Impugned Judgment, para. 46.

⁴ *Ibid.*

25. Allegations of discrimination, improper motive and bias are very serious and ought to be substantiated with evidence; evidence which should have been presented to the UNDT to support the allegations in the instant case. This was not done. Indeed, the investigation into allegations of abuse of authority initiated against Mr. Cavalieri did not confirm any such abuse. Mr. Ross was therefore required to present the evidence which he may have had at the hearing before the UNDT. In the absence of any such evidence to support Mr. Ross' contention of improper motive or discrimination in the selection process for the position, this ground of appeal must fail.

26. The Appeals Tribunal upholds and affirms the UNDT's reasoning with respect to Mr. Ross' claim for reinstatement in the service of UNHCR and agrees that there is no causal link between such a claim and the selection process.

27. We have considered all of the points raised in this appeal and find them to be without merit.

Judgment

28. The appeal is dismissed and Judgment No. UNDT/2019/005 is affirmed.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Knierim

(Signed)

Judge Murphy

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

(Signed)

Weicheng Lin, Registrar