



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

Judgment No. 2020-UNAT-1014

**Virendra Singh Chhikara
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No.:	2019-1342
Date:	26 June 2020
Registrar:	Weicheng Lin

Counsel for Mr. Chhikara:	Self-represented
Counsel for Secretary-General:	Noam Wiener

JUDGE MARTHA HALFELD, PRESIDING.

1. Mr. Virendra Singh Chhikara, a Chief Aviation Safety Officer with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) at the P-5 level, filed an application before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting his non-selection to a D-1 position of Chief Aviation Section at the United Nations Headquarters (“the Post”). The UNDT issued Judgment No. UNDT/2019/150, granting the application in part and ordering the Secretary-General to pay Mr. Chhikara an amount for loss of opportunity, which is equivalent to 50 percent of the difference between his salary at the P-5 level and the salary he would have obtained at the D-1 level for two years, and USD 3,000 in costs for having manifestly abused the process.
2. On appeal, the Appeals Tribunal modifies the UNDT’s award of compensation for income loss to an amount equivalent to three-month net base salary at the D-1 level, affirms the UNDT’s decision in respect of costs, but refers the case for accountability.

Facts and Procedure

3. The UNDT established the following facts:¹

... The Post was advertised on Inspira (the United Nations online job site) from 20 April 2015 to 18 June 2015 and the Applicant applied for it.

... Fourteen job candidates, including the Applicant, were shortlisted and invited to a written assessment, but two of them decided not to participate. The written assessment consisted of two parts: twenty-five [situational judgment (STJ)] questions (part 1) and an essay (part 2). The grading methodology was set out in a marking guide, which had been prepared prior to the administration of the written test and, according to this guide, only candidates who received a 60 out of 100 points (or 60 percent) in part 1 would be further assessed for part 2.

... After the written test was completed, all the job candidates’ responses to the twenty-five questions and the essay were graded. Based on the twenty-five STJ questions, the Applicant scored the highest marks of all job candidates, namely 28 percent (or, as also indicated in the Excel spreadsheet produced by the Respondent in response to Order No. 110 (NY/2019) dated 22 July 2019: 0.277714467). None of the job candidates managed to reach the passing score of 60 percent (due to the

¹ Impugned Judgment, paras. 10-16.

applied methodology, only six candidates appear to have received positive scores, while the remaining six candidates got negative scores, i.e., below zero).

... Subsequently, it was decided to eliminate SJT questions 6, 7, 10, 11 and 20 from overall rating as they (...)displayed “poor reliability and validity of psychometric properties”.

... By excluding these questions, the scores of the job candidates significantly changed—now six candidates scored more than 60 percent, but not the Applicant, who was only deemed to have scored 55 percent. Based on the Excel spreadsheets produced by the Respondent in response to Order No. 110 (NY/2019), even this information cannot be verified—the Applicant’s grade of 55 percent simply does not appear to be stated in the spreadsheets; the spreadsheets are extremely difficult to read. Instead, this information follows from *Chhikara* 2017-UNAT-792, para. 39, and the Respondent’s response to Order No. 246 (NY/2016), including the interoffice memorandum dated 11 April 2016 from the Executive Officer of the former Department of Peacekeeping Operations and Department of Field Support to the Chief, Management Evaluation Unit.

... Regarding the responses to part 2, although the members of the selection panel had already graded the essay answers, it was then decided to disregard the results of this test and instead invite all job candidates who had successfully passed part 1 to the interview round (one candidate was not invited as it turned out that for other reasons, this person was not suitable for the Post at all). From the information provided by the Respondent (appended to his response to Order No. 123 (NY/2019) dated 29 August 2019) follows that the grades provided ranged from an average of 16.00 to 52.67 points, but it is nowhere stated what is the significance of these grades and the Applicant’s grade is not even indicated even though it was apparently graded. After the interviews, two job candidates were found suitable and recommended to the Post, and one of them was eventually selected; a decision that was apparently made sometime towards the end of 2015 or in the beginning of 2016.

... Although in the reply the Respondent stated otherwise, he now admits in his response to Order No. 110 (NY/2019) that “[t]he Hiring Manager has confirmed that she became aware of the job applicants’ identifying information prior to scoring the job applicants’ answers”. In the Respondent’s closing statement, it is further explained that, “[A]t the time of [Department of Field Support’s (“DFS”)] calculation of the final scores, the job applicants’ identity was known to DFS. [The Examination and Testing Section in the Office of Human Resources] (“ETS/OHRM”) had inadvertently transmitted the scores to DFS on 25 September 2015 without removing the job applicants’ identifying information from the scoring matrix”.

4. The first UNDT Judgment (No. UNDT/2017/012) acknowledged the illegality of the decision, but did not order rescission of the non-selection decision on the grounds that this would have been disproportionate. It awarded Mr. Chhikara compensation in the amount of USD 4,000 for procedural violations.

5. Both parties appealed Judgment No. UNDT/2017/012. The Secretary-General produced new evidence, whose production had been ordered before. As a consequence, by means of Judgment 2017-UNAT-792, the Appeals Tribunal remanded the case for additional findings of fact. This Tribunal stated:²

... This evidence was considered relevant by the Dispute Tribunal, such that it compelled its production, and as potentially relevant by the Appeals Tribunal when it also ordered its production. It is relevant evidence and should have been presented to the UNDT, in accordance with the two-tier system of administration of justice. The UNDT erred when it considered that it did not need this missing evidence to decide the case; indeed, the UNDT might have decided the case differently had it had access to this evidence which was at the core of the dispute as it related to the specific part of the test which Mr. Chhikara failed. (...)

.... Now that this evidence has been finally produced, we consider that, in light of the Organization's two-tier system and the fact that both parties make submissions on appeal regarding its relevance and bearing on the outcome of the case, this new evidence should be assessed by the UNDT, before being appealed to the Appeals Tribunal. Since the Appeals Tribunal is a tribunal of final instance, the facts shall normally be established before the UNDT.

... Pursuant to Article 2(4)(b) of the Statute, the case is therefore remanded to the UNDT, for additional findings of fact and to be judged anew by the same Judge, after affording the parties an opportunity to comment on this new evidence.

6. On 15 October 2019, the Dispute Tribunal in New York issued the new Judgment No. UNDT/2019/150 in the case of *Chhikara v. Secretary-General of the United Nations*. The UNDT disposed of the application submitted by Mr. Chhikara, namely, Case No. UNDT/NY/2016/045-RI against the decision not to select him for the Post.

² *Chhikara v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-792, paras. 41-43. (Internal citations omitted.)

7. The UNDT granted the application in part as it found that Mr. Chhikara had not been given full and fair consideration in the selection exercise and that, since the rescission of the decision was no longer feasible, the correct legal basis for the compensation would be Art. 10.5(b) of the UNDT Statute (compensation for harm), in the amount of 50 percent of the difference between the two posts (the post Mr. Chhikara encumbered and the post he applied for) for two years for loss of chance. The UNDT also awarded costs in the amount of USD 3,000.

8. On 16 December 2019, Mr. Chhikara filed an appeal against the impugned UNDT Judgment. But his appeal exceeded the page limit. On 28 January 2020, he refiled his appeal in compliance with the page limit and Order No. 360 (2020), which denied his motion seeking leave to file a supplementary briefing document to his appeal brief. On 30 March 2020, the Secretary-General filed his answer. The case was registered as Case No. 2019-1342.

Submissions

Mr. Chhikara's Appeal

9. In his appeal, Mr. Chhikara submits that the UNDT erred on a question of facts, resulting in a manifestly unreasonable decision, and failed to exercise jurisdiction vested in the UNDT. He states that the facts, since the first UNDT judgment was issued, have changed substantially and that the UNDT was misled by the Respondent's submissions.

10. Mr. Chhikara maintains that, while the candidates believed that part two of the written test in the selection process was more important than part one, given the recommendations to allocate more time to this, they were not informed that only those who had passed in part one of the written test would be graded with regard to part two. According to the recruitment strategy, candidates were to be evaluated anonymously. Mr. Chhikara points out a number of irregularities in the written assessment, and maintains that the Respondent conveyed misleading information to the Tribunals.

11. Later in his appeal, Mr. Chhikara comments on some of the paragraphs of the UNDT Judgment, pointing out some inaccuracies in the "factual background" part of the Judgment. He contends that the UNDT based its conclusions on incorrect factual background when it

considered that the hiring manager's actions were only grossly negligent, rather than were taken in bad faith.

12. Mr. Chhikara then claims that the UNDT failed to exercise jurisdiction when it did not order rescission of the selection decision, arguing that the case had been pending since 2016 only because of the Administration's reprehensible attitude during the procedure and that this cannot be allowed to result in denying him justice under the pretext of "fait accompli".

13. He further argues that the UNDT failed to exercise jurisdiction when it did not refer the case to the Secretary-General for accountability.

The Secretary-General's Answer

14. The Secretary-General submits that the UNDT did not err when it did not rescind the decision not to select Mr. Chhikara for the Post and, instead, ordered the payment of compensation, citing the Appeals Tribunal's decision in *Ross* as a precedent.³ The Secretary-General maintains that the previous UNDT Judgment in *Chhikara* does not support the Applicant's claim and *Bofill*⁴ does not apply to the present case, since Mr. Chhikara is considered to have had the chance of being selected, which was not the case in *Bofill*. The Secretary-General asserts that the UNDT has discretion to order rescission or compensation for damages. In the event that rescission is ordered, the Secretary-General requests the compensation for harm awarded in the UNDT Judgment be vacated, since there would no longer be loss of opportunity. Regarding the compensation for costs, the UNDT correctly exercised its jurisdiction and Mr. Chhikara confuses the damage resulting from the contested decision with the damage arising from the inaccurate submissions in the case, with costs only applying to the latter. Mr. Chhikara fails to provide a compelling argument to reverse the UNDT decision.

15. Moreover, the Secretary-General asserts that the UNDT properly exercised its jurisdiction when it determined not to refer the case for possible action to enforce accountability, since it found that there was no evidence of bad faith or bias against Mr. Chhikara, this having been concluded in light of the entirety of the evidence.

³ *Ross v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-926, para. 49.

⁴ *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174.

16. Lastly, the Secretary-General asserts that some of the factual findings, thought to have been inaccurate, are either inconsequential to the outcome of the case, or are actually correct. The Secretary-General requests that the Appeals Tribunal affirm the impugned Judgment and dismiss Mr. Chhikara's appeal in its entirety.

Considerations

Preliminary remarks

17. This is the second time that the Appeals Tribunal has examined the present case. In our first Judgment No. 2017-UNAT-792, the Appeals Tribunal ordered a remand of the case to the UNDT "for additional findings of fact ... after affording the parties an opportunity to comment on the new evidence".⁵ The new evidence, whose submission had been ordered by the UNDT, but was only presented to the Appeals Tribunal, related to the specific part of the test in which Mr. Chhikara had failed, and as such was at the very core of the dispute over the decision not to select him.

18. The Appeals Tribunal acknowledges the remarkable work of the UNDT in this case, particularly in setting out the basic minimum standards that must apply when administering a written test, in light of the applicable legal framework. They are as follows:⁶

a. Generally, while the Administration enjoys a broad discretion on how to administer a written test, it must nevertheless do so in a reasonable, just and transparent manner; otherwise, a job candidacy would not receive full and fair consideration;

b. As also stated in the Manual, any assessment must be undertaken on the basis of a "prescribed performance scale and response guide" and on a "predetermined passing grade". Accordingly, before a written test is administered, a proper and reasonable grading methodology must be adopted and shared with the graders;

c. If subsequent to the administration of the test, it becomes clear that mistakes were made in this methodology, or the written test turned out to be pointless in that no job candidates managed to pass it in accordance with the predetermined passing grade, then (a) a new written test must either be administered or (b) variations must be made to the assessment methodology that do not prejudice any specific job candidates (the reverse impact of "the no difference principle").

⁵ *Chhikara v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-792, para. 46.

⁶ Impugned Judgment, para. 24.

d. Records of the grading must be developed that clearly describe how each job candidate was assessed, which would allow a third party, such as the [Dispute] Tribunal, to review and verify that the entire process was handled in a proper manner.

19. To avoid the process being perceived as biased, the assessment of the written tests must be conducted on a confidential and anonymous manner where no person with influence over the selection process has access to the names of the job candidates while the grading is pending. In his new appeal now under consideration, Mr. Chhikara sets out a number of factual arguments about the manner in which the selection exercise was organised and the way in which the Administration acted in the present case. However, even if the UNDT Judgment had any of the inaccuracies pointed out by Mr. Chhikara in his appeal, most of them do not relate to the “Consideration” part of the UNDT Judgment, but rather to the general context mentioned in the “Factual background”. They are thus not directly related to the essence of the Judgment itself. More importantly, in light of the findings of the UNDT, whose judgment the Secretary General did not appeal, it is undeniable that there had indeed been irregularities in the selection exercise and that Mr. Chhikara’s candidacy had not been given full and fair consideration such as to justify an award of compensation for harm.

20. These findings, which are in Mr. Chhikara’s favour, render a great part of the arguments in the appeal inconsequential, since they would have no bearing on the outcome of this judgment. Moreover, Mr. Chhikara fails to convince the Appeals Tribunal that these possible errors of fact in the UNDT Judgment have led to a manifestly unreasonable decision. Mr. Chhikara’s arguments in this regard are thus not relevant to the desired purpose of his appeal, which is mainly to i) rescind the decision, ii) refer the case for accountability, and iii) claim higher costs.

21. The only issue where Mr. Chhikara’s arguments in this regard could have an impact on this judgment is when they relate to bad faith in the attitudes of the decision-maker(s) during the selection exercise. However, as found below in the present Judgment, the UNDT’s findings in the present case are enough to justify the matter be referred to the Secretary-General for possible action to enforce accountability, possibly engendering another administrative decision which could in turn be challenged, depending on the circumstances of the situation in the future.

22. Having said that, the main issues for consideration and determination are whether the UNDT erred in fact or in law when it did not rescind the decision found to be illegal and did not refer the case for accountability. In addition, Mr. Chhikara questions the amount of the costs awarded.

Rescission of the decision and compensation in lieu thereof

23. The UNDT issued its new Judgment, acknowledging the illegality of the decision. The UNDT Judgment found that Mr. Chhikara had not been given full and fair consideration during the selection process and that the Administration had failed to comply with “even the most very basic standards to be expected from such exercise”, because the administration of the written test had been so irregular.⁷ However, the UNDT found that a rescission would not be feasible due to the time which had elapsed between the contested administrative decision and the date of the Judgment (around four years). Instead, the UNDT ordered payment of compensation for harm, after having allowed Mr. Chhikara to amend his claim in order to add this particular remedy.⁸

24. Mr. Chhikara appeals against the decision, arguing that the UNDT erred when it did not rescind the decision that was deemed unlawful. He therefore requests i) rescission of the decision or an in-lieu compensation, ii) costs for abuse of the process and for the harm caused to him, and iii) referral for accountability.

25. In its reasoning not to rescind the non-selection decision which was considered to be illegal, the UNDT stated that it made no sense at the time of the Judgment (October 2019) to rescind a decision which had been taken in late 2015 or early 2016 and had been contested in the present case since June 2016. For this reason alone, “since rescission [was] no longer a feasible option”,⁹ the UNDT awarded compensation on the basis of Article 10.5(b) of its Statute (compensation for harm).

26. This reason, i.e. the lapse of time, however reasonable it might be, was insufficient to justify the UNDT’s decision not to rescind the contested decision. The Appeals Tribunal understands that the UNDT’s conclusion not to rescind might well have some underlying practical reasons, assuming that the advertised position had been occupied by the selected

⁷ Impugned Judgment, para. 31.

⁸ *Ibid.*, para. 32.

⁹ *Ibid.*

candidate at the time. Nevertheless, given the particular circumstances of the case and the “grossly negligent” illegalities in which the selection process was conducted, as found by the UNDT,¹⁰ the Appeals Tribunal finds that rescission of the contested decision is mandatory and cannot be avoided on the basis of the excessive length of time between the filing of the application and the issuance of the first instance decision.

27. To reason otherwise would be tantamount to imposing only on Mr. Chhikara most of the responsibility for the excessive time taken before a final decision was taken, whereas he acted with due diligence by having filed his application, which was essentially granted in what was considered by the UNDT as a grave situation, namely the flawed selection exercise.¹¹ An illegality of this order requires not only rescission of the contested decision, but also referral for accountability, as we will set out the reasoning below in this Judgment. In addition, not rescinding such an illegal decision could send a false signal to some managers, who might be tempted not to comply with the rules and regulations in the future, in a hope that an elapsed time would legitimize any mismanagement.

28. Under these circumstances, allowing the decision not to select Mr. Chhikara to remain in effect as if it were correct, despite its clear illegality, is not consistent with the idea of fair justice and reliability of selection processes within the Organisation, nor does it go in harmony with the good practices and the high standards of the Organisation. For these reasons, while we acknowledge the logical and practical reasoning of the UNDT in its Judgment, we find that it exercised its discretion on a wrong principle and, therefore, erred in law when it did not rescind the decision, which it itself had deemed illegal. Therefore, we uphold the appeal in this particular claim and rescind the decision not to select Mr. Chhikara for the Post advertised.

29. In compliance with Article 9(1)(a) of its Statute, as the rescinded decision is related to promotion, the Appeals Tribunal must set an amount for an in-lieu compensation which the Secretary-General may elect to pay as an alternative to the rescission of the contested administrative decision. Given the particular circumstances of the case and the fact that some compensation for harm has already been set, which took into account Mr. Chhikara’s loss of opportunity in the selection exercise (50 percent of the difference between the salaries for the P-5 post and the D-1 post, for two years), we find it reasonable to

¹⁰ *Ibid.*, para. 30.

¹¹ *Ibid.*, para. 51.

determine the in-lieu compensation in the amount equivalent to three-months' netbase salary at the D-1 level. This in-lieu compensation is without any prejudice to the amount of compensation for harm set by the UNDT.

Costs

30. In this matter, the UNDT observed that, if a party

provides the Tribunal with decisive information that is wrong and misleading, this amounts to a manifest abuse of process of very serious nature (...) Basically, such action puts the entire integrity of the judicial system at risk—it may not only lead to undue and costly delays, but also lead to straightforwardly incorrect decisions. However, the fact that the Respondent in this case, albeit extremely late in the process, admits to, at least some of, the irregularities, is a mitigating factor, which the Tribunal must take into account when determining a possible amount for the abuse.¹²

31. Mr. Chhikara claims that the false submissions misled the Tribunals and caused him harm and, therefore, the UNDT erred when it referred only to the “delays” caused by the Administration’s actions, when awarding costs for abuse of the process to be paid in his favour. He contends that the Administration's behaviour led not only to delays, but also to a completely irregular selection, permanently and irretrievably damaging his career and that the Administration's last submission did not apologise for its earlier half-truths.

32. Although there is no explicit request for increasing the amount awarded as costs in the appeal, the Appeals Tribunal understands Mr. Chhikara’s appeal as containing such a claim. Some sort of allowance has to be made for the interpretation of the requests when the appellant is self-represented, as is the case at hand.

33. Nevertheless, Mr. Chhikara appears to be confused by two different and unambiguous legal terms, namely costs and compensation for harm. The former occurs “(w)here the Appeals Tribunal determines that a party has manifestly abused the appeals process” and then “it may award costs against that party”. In the present case, the behaviour to be sanctioned is related to the proceedings before the Tribunal. On the other hand, the latter aims to compensate the aggrieved party for the damage it has incurred due to the illegal action/decision on the Administration’s part during the contract or appointment. In brief,

¹² *Ibid.*, para. 46.

whilst costs relate to a procedural abuse, compensation for harm is based on non-compliance with the terms of appointment or the contract of employment.¹³

34. Regarding the adequacy of the costs awarded, much will depend on the circumstances of the case. In matters of compensation, our jurisprudence has also established that due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach.¹⁴ There is more than one method by which the trial court can assess damages, and it is for that court to determine the method to employ in each case.¹⁵

35. On this particular issue, although the Appeals Tribunal finds it unacceptable and regrettable that the Secretary-General submitted misleading or incomplete information to the Tribunals, the Appeals Tribunal agrees with the Dispute Tribunal that the later submission admitting some of the irregularities must be considered as a mitigating factor, such as to impact on the determination of the amount of costs. In this context, the Appeals Tribunal finds that Mr. Chhikara has failed to establish any error of law or of fact warranting an increase in the amount awarded by the UNDT. The appeal thus fails.

Referral for accountability

36. Mr. Chhikara asserts that the UNDT failed to exercise the jurisdiction vested in it with regard to the referral for accountability. He insists that the case be referred to the Secretary-General for “possible action to enforce accountability”, pursuant to Article 9(5) of the Statute of the United Nations Appeals Tribunal.

37. On the present issue, the UNDT gave little consideration to this specific matter, simply concluding that owing to “the findings made in the present Judgment, the [Dispute] Tribunal, however, sees no need to do so”.¹⁶

¹³ Reference is made to Article 2(1)(a) of the UNDT Statute.

¹⁴ *Ho v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-791, para. 34; *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-712, para. 16; *Flores v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-525, para. 26.

¹⁵ *Appleton v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-347, para. 21.

¹⁶ Impugned Judgment, para. 52.

38. The Appeals Tribunal is well aware of the sparingly used statutory power of referral for accountability by both Tribunals in the internal justice system. However, the findings of the UNDT were that, while there was no evidence that the decision-maker(s) had acted in bad faith,¹⁷ there was clear evidence “that someone intended to manipulate the test results and therefore also the selection process”, with regard to the lack of anonymity of candidates when grading the test responses.¹⁸ Furthermore, not all the results of the written test were taken into account when deciding which candidates were to be interviewed, and finally, the spreadsheets (records of the written test results) were “close to unreadable and made very little sense, if any, at all”.¹⁹ Negligence, to say the least, appears to have occurred in the manipulation of the selection exercise²⁰ and this alone may warrant some sort of accountability.

39. These findings are serious and troubling and warrant an investigation. Given their gravity, particularly in light of the serious irregularities in the conduct of the selection exercise as found by the UNDT itself, the Appeals Tribunal, therefore, refers the matter of the hiring manager’s conduct to the Secretary-General for review and possible accountability, pursuant to Article 9(5) of the Appeals Tribunal Statute.

¹⁷ See *Ibid.*, paragraphs 27 and 29-30.

¹⁸ *Ibid.*, para. 27.

¹⁹ *Ibid.*, para. 29.

²⁰ See *Ibid.*, para. 30.

Judgment

40. The appeal is partially upheld and Judgment No. UNDT/2019/150 is modified, insofar as the administrative decision not to select Mr. Chhikara is hereby rescinded. The Secretary-General may elect to pay compensation in lieu in the amount equivalent to three months' net-base salary at the D-1 level. The case is referred to the Secretary-General for possible action to enforce accountability. The costs and the compensation for harm awarded by the UNDT are maintained.

Dated this 26th day of June 2020.

(Signed)

Judge Halfeld, Presiding
Bournemouth, United Kingdom

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 10th day of July 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar