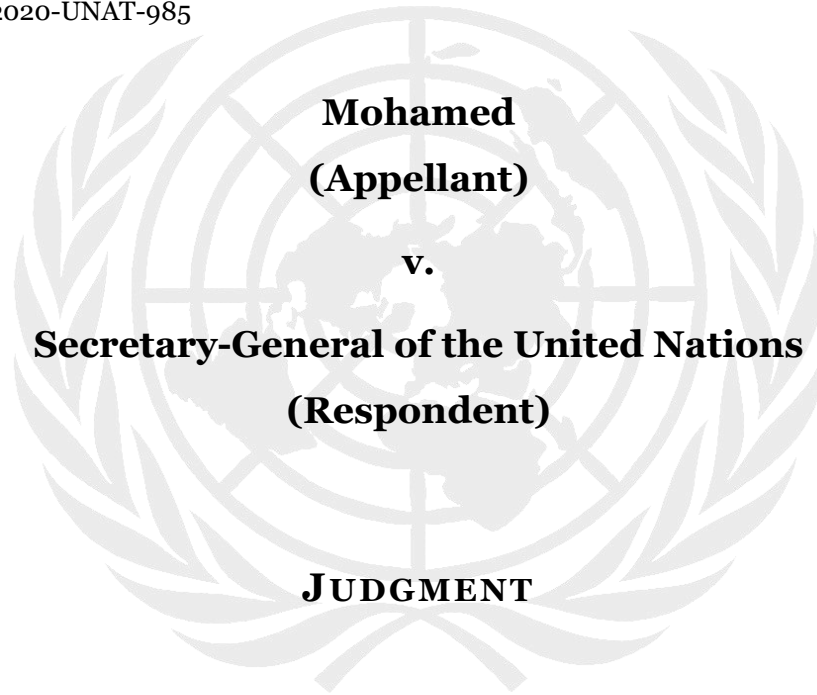




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-985



**Mohamed
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Martha Halfeld Judge Kanwaldeep Sandhu
Case No.:	2019-1287
Date:	27 March 2020
Registrar:	Weicheng Lin

Counsel for Ms. Mohamed: Joseph Grinblat

Counsel for Secretary-General: Noam Wiener

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. Ms. Shihana Mohamed, a staff member at the International Civil Service Commission (ICSC), contested her non-selection to a position within the ICSC before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal). The UNDT dismissed her application on grounds that the Secretary-General had discretion in interpreting the meaning of “extensive experience” as required by the Job Opening and he was therefore reasonable in his determination that the selected candidate met the work and education requirements. It also held that any procedural insufficiencies in the recruitment process had not impacted Ms. Mohamed’s chances of promotion, and that she did not demonstrate that the interview panel had inappropriately favored the selected candidate. Ms. Mohamed appealed to the United Nations Appeals Tribunal (Appeals Tribunal). We affirm the Dispute Tribunal’s Judgment and dismiss Ms. Mohamed’s appeal for the reasons set forth herein.

Facts and Procedure

2. Ms. Mohamed, a Human Resources Policies Officer at the P-4, Step 12 level serving at the ICSC, contested before the UNDT her non-selection to the position of Senior Human Resources Policies Officer at the P-5 level, which had been advertised as Vacancy Announcement No. ICSC/01/2015 (Job Opening).

3. The Job Opening required an “Advanced [u]niversity degree in human resources management, public administration, social sciences or a related field”. The Job Opening stated that “[a] first level university degree in combination with extensive experience in a related field may be accepted in lieu of the advanced university degree”. With regard to work experience, the Job Opening required “a minimum of ten years of varied professional and managerial experience across the broad spectrum of global human resources management functions in an international setting”. On 20 January 2016, an external consultancy firm administered a written assessment for 22 candidates who were considered to possess the relevant experience. Thereafter, 11 candidates were short-listed for the next phase of the process including Ms. Mohamed who had scored 17 out of 20 on the assessment. Ms. Mohamed was one of seven candidates to participate in a competency-based interview conducted by an interview panel. The interview panel consisted of the Chairman of the ICSC, the Vice-Chairman of the ICSC, the Executive Secretary of the ICSC, the Chief of the Human

Resources Policy Division of the ICSC, the Chief of the Salaries and Allowances Division of the ICSC, and the Director of Human Resources of the United Nations Population Fund.

4. On 22 June 2016, the Chairman of the ICSC recommended the selected candidate. The selection was thereafter approved by the Secretary-General. On 11 August 2016, Ms. Mohamed was informed of her non-selection and on 2 September 2016 she filed a request for management evaluation with the Management Evaluation Unit (MEU). Ms. Mohamed thereafter filed an application with the UNDT on 12 January 2017.

5. On 23 October 2017 and 15 March 2018, the UNDT held hearings. On 26 March 2019, the UNDT issued Judgment No. UNDT/2019/047 on receivability, wherein it held that Ms. Mohamed's claim that the selection process was tainted by ulterior motives since she had rejected sexual advances from the Chairman of the ICSC was not receivable because she had not previously set forth this claim in connection with her non-selection in her request for management evaluation as required by Staff Rule 11.2.

6. On 20 May 2019, the UNDT addressed the remaining issues relating to her non-selection in Judgment No. UNDT/NY/2019/088 (the Impugned Judgment). The UNDT dismissed Ms. Mohamed's application holding that the selected candidate held a first-level university degree and that the Administration's determination of what constituted "extensive experience" in various fields of human resources was a reasonable determination. Thus, the UNDT held that the selected candidate met the requirements of the Job Opening. The UNDT also held that Ms. Mohamed had failed to establish that she was substantively more qualified for the position than the selected candidate. The UNDT found that Ms. Mohamed did not establish convincing evidence to support her claim that the ICSC Chairman inappropriately favoured the selected candidate. Ms. Mohamed scored the same on the assessment as the selected candidate but scored less than the selected candidate on the interview. The UNDT noted that there was a lack of written record for the written assessment and the interview, but this had not impacted Ms. Mohamed's chances of selection as the interview panellists had not appeared to collude regarding the scoring of the interview.

7. On 8 July 2019, Ms. Mohamed filed an appeal, and on 10 September 2019, the Secretary-General filed his answer.

8. On 4 November 2019, Ms. Mohamed filed a motion for leave to file additional pleadings and on 11 November 2019, the Secretary-General filed his response to the motion.

9. On 14 February 2020 Ms. Mohamed filed a second motion seeking leave to file additional pleadings and on 21 February 2020 the Secretary-General filed his response to the motion.

Submissions

Ms. Mohamed's Appeal

10. Ms. Mohamed requests the Appeals Tribunal to vacate the impugned Judgment. In support, she argues that the UNDT erred on the facts when it concluded that the selected candidate possessed the minimum education requirements. The UNDT stated, at paragraph 25 of the Impugned Judgment, that the condition set forth in the Job Opening that the first-level university degree in combination with extensive experience in a related field may be accepted in lieu of the advanced university degree meant that the subject of the first-level degree was not important to this Job Opening. The sentence while ambiguous should be construed to mean that the "related field" applied to both experience and to the requisite degree. The degree whether advanced or first level must be in a related field. The first level degree, obviously in a related field, was acceptable instead of an advanced degree, if there was extensive experience, also in a related field. The Secretary-General recognized that it was necessary for a first level degree to be in a related field but espoused that a degree in computer sciences was a related field. At paragraph 29 of the Impugned Judgment, the UNDT agreed that computer science was not a related field.

11. The UNDT erred in fact and law in finding the selected candidate possessed the requisite experience. The UNDT erred in finding that the selected candidate had experience beginning in 1992, however, this experience was as a general service staff member and not as a professional staff member, which could not be considered as professional experience for the purpose of applying to an advertised professional post. Furthermore, the UNDT erred in finding that Ms. Mohamed did not prove that the selected candidate had not possessed extensive experience, as the minimum for someone with an advanced university degree was ten years but for someone with a first level university degree the minimum years of required experience should be more than ten years. The UNDT considered the selected candidate only

had ten years of experience. He therefore did not have extensive experience to be counted in lieu of the advanced degree. The UNDT also erred when it stated that Ms. Mohamed did not support her claim that the ICSC standard practice was to require a minimum of twelve years of relevant work experience. This was not true as Ms. Mohamed had provided the UNDT with ICSC/83/R.6.

12. Ms. Mohamed has proven that the recruitment process was flawed. It is abundantly clear that the members of the selection panel knew that the selected candidate did not possess the minimum requirement for the post but went along with the request of the ICSC Chairman. The UNDT erred further in stating, at paragraph 43 of the Impugned Judgment, that Ms. Mohamed did not question the veracity of the assessments. She did question the veracity in her joint statement to the UNDT as she stated “it does not say how the scores were computed nor when. It could very well have been done after the decision of selecting the unqualified candidate, in order to justify it.” The UNDT erred also in stating that the panel considered the selected candidate who had extensive experience and was already in a P-5 position would be a good candidate. This was an erroneous statement by the UNDT as the panel was actually referring to an outside candidate who withdrew his candidacy and not the selected candidate.

13. The UNDT has made numerous errors including the dates of the hearings, which were not held in 2017, but rather in 2018. In addition, at paragraph 50 of the Impugned Judgment, the UNDT stated that the motivation of the decision maker often needed to be proven by circumstantial evidence; yet it did not mention that Ms. Mohamed had explained that the ICSC Chairman’s motivation to not select her to the position was that she had repeatedly rejected his sexual advances. That matter was investigated and proved by the ICSC, leading to the ICSC Chairman’s resignation.

The Secretary-General’s Answer

14. The Secretary-General requests the Appeals Tribunal to affirm the Impugned Judgment and dismiss the appeal. In support, the Secretary-General argues that the UNDT correctly found that the selected candidate met the educational and work requirements for the Job Opening. The UNDT correctly deferred to the Organization when it declined to determine whether Ms. Mohamed or the selected candidate was more qualified, as it is not the role of the Tribunals to substitute their own decision for that of the Secretary-General.

The UNDT correctly held that the insufficient documentation by the panel members did not alter the fact that the scores granted to each candidate by each member were documented and that the variations in scores by the panel members indicated it was unlikely that the members had colluded to award high scores to the selected candidate. The UNDT was consequently correct in holding that any such procedural irregularity did not affect Ms. Mohamed's chance of selection.

Considerations

Motions for additional pleadings

15. On 4 November 2019, Ms. Mohamed filed a motion for "Comments on Respondent's Answer". On 14 February 2020, she filed another motion "For Appellant's Reply to Respondent's Comments".

16. Section II.A of the Appeals Tribunal's Practice Direction identifies four types of motions: (1) General motions seeking orders from the Appeals Tribunal; (2) Motions requesting suspension, waiver or extension of time limits; (3) Motions requesting the permission of the Appeals Tribunal to file a pleading after the answer to the appeal or, where applicable, the answer to the cross-appeal; and (4) Motions requesting interim relief under Article 9(4) of the Statute of the Appeals Tribunal.

17. The motions for "Comments on Respondent's Answer" and "For Appellant's Reply to Respondent's Comments" must be understood as motions requesting the permission of the Appeals Tribunal to file a pleading after the answer to the appeal.

18. Apart from the fact that there is no provision in our Statute to justify the filing of additional pleadings, our jurisprudence has established that this could only occur in exceptional circumstances as follows: ¹

There is no provision under the Rules for additional pleadings to be submitted by the parties after the answer. Under Article 31(1) of its Rules of Procedure, the Appeals Tribunal may allow additional pleadings in exceptional circumstances. [The

¹ *Chrichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035, para. 27. See also *Khisa v. Secretary-General of the United Nations*, Order No. 329 (2018); *He v. Secretary-General of the United Nations*, Order No. 312 (2018); *Koumoin v. Secretary-General of the United Nations*, Order No. 305 (2017); *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044, para. 13.

Appellant] has not demonstrated any exceptional circumstances justifying the need to file a reply to the Secretary-General's answer. Accordingly, the Appeals Tribunal decides to strike [Appellant's] additional submission and not to take it into consideration.

19. Our jurisprudence has established that there are no exceptional circumstances where an additional pleading would merely intend to express disagreement with the statements made by a party in its answer or reiterate the arguments already contained in the appeal.²

20. In the present case, the Appellant does not identify any exceptional circumstances justifying the need to file a reply to the Secretary-General's answer and/or comments. Her motions aim only at rearguing certain legal or factual aspects of her appeal.

21. The motions are dismissed.

Merits

22. The Appellant alleges that the UNDT did not properly apply the education and work experience requirements set out in the Job Opening, ignored the fact that she was substantially more qualified than the selected candidate, underestimated the various flaws in the selection process and made factual errors.

Legal framework

23. The United Nations Charter, Article 101, states that “[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly” and “[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.”

24. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first sessions establishing that:³

² *Koumoin v. Secretary-General of the United Nations*, Order No. 305 (2017).

³ *Cobarrubias v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-510, para. 19, quoting *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

[w]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

25. Our jurisprudence has further established that:⁴

[a]n irregularity in promotion procedures will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.

Did the UNDT err regarding the “minimum educational requirements” or the “professional and managerial experience” of the selected candidate?

26. Article 2(1)(e) of our Statute provides that the Appeals Tribunal is competent to hear and pass judgment on an appeal that asserts that the UNDT has “erred on a question of fact, resulting in a manifestly unreasonable decision”. It is the duty of an appellant to demonstrate that the UNDT Judgment is defective.

27. The Appellant claims that the UNDT erred in fact in deciding that the selected candidate met the educational requirements for the post.

28. The Job Opening included the following educational requirements:

Advanced university degree in human resources management, public administration, social sciences or a related field. A first level university degree in combination with extensive experience in a related field may be accepted in lieu of the advanced university degree.

⁴ *Vangelova v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-172, para. 1; see also *Dualeh v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-175; *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174 .

29. The Appellant alleges that for a candidate who does not have an advanced university degree, the reference in the Job Opening to a “related field” concerns both the “extensive experience” and the “first-level university degree” required. She therefore claims that the first-level university degree should have been obtained in the field of human resources management, public administration or social sciences and that the selected candidate’s university degree in computer science should not be taken into consideration.

30. The UNDT decided that a first-level university degree could be taken into consideration, instead of an advanced university degree, if it was combined with extensive experience in a related field and that “from a plain reading of the vacancy announcement”, such first-level university degree did not have to be in a related field. The UNDT then decided that, although a first-level university degree in computer science was not in a related field, it could be taken into consideration.

31. We find that, in taking this decision, the UNDT paid attention to the literal terms of the Job Opening and to the fact that the experience specifically required for a candidate with a first-level university degree was intended to replace the lack of a degree in the field of human resources management and not only to compensate for the difference in the level of studies completed in this field.

32. Turning to the required additional “extensive experience”, we note that the Administration has a broad discretion to assess whether and to what extent the “experience in a related field” of the selected candidate is sufficiently extensive. In the present case, the Job Opening did not specify what was meant by either “extensive” or “experience”. In those circumstances, the required “extensive experience” had not necessarily to be acquired in a professional position, and the UNDT could decide that the contention of the Administration that “the selected candidate’s work experience with various fields of Human Resources from 1992 and his advance[d] certificate in strategic human resources management equaled ‘extensive experience’”⁵ was not manifestly unreasonable or arbitrary.

33. Furthermore, the Appellant alleges that the UNDT erred in finding that the selected candidate possessed the required professional and managerial experience. With regard to professional experience, the Job Opening required “a minimum of ten years of varied professional and managerial experience across the broad spectrum of global human

⁵ Impugned Judgment, para. 26.

resources management functions in an international setting”. It is undisputed that the selected candidate started working, as a professional, in the Human Resources (HR) field in May 2005, and that his professional experience in the HR field exceeded ten years at the beginning of the selection process. He therefore also had the required ten years of professional and managerial experience.

34. Consequently, the Appellant did not demonstrate that the UNDT Judgment was defective, or that the UNDT erred in considering that the selected candidate met the “minimum educational requirements” and the “work experience” required for the post.

Did the UNDT err in considering that it was not proven that Ms. Mohamed was substantively more qualified than the selected candidate?

35. The Appellant affirms, without providing any evidentiary basis, that “any person who looks objectively” at her curriculum vitae and at that of the selected candidate may find that “she was more qualified”. As raised by the UNDT, such an argument is based on the premise that the content of a curriculum vitae should be dispositive and fails to reflect the reality that an assessment of the candidates’ qualifications for the position is not limited to a review of the past experience of the candidates.

36. In the present case, it is not seriously challenged that the selected candidate was the candidate with the highest score in the written test and the competency-based interview.

37. Considering the Secretary-General has broad discretion in making decisions regarding promotions and appointments and that in reviewing such decisions, it is not the role of the UNDT to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process,⁶ the UNDT was not manifestly unreasonable in deciding that the recommendation approved by the Secretary-General was based on an entire process including assessment of both the performance at the written test and the competency-based interview, and the candidates’ experiences as stated in their curriculum vitae.

⁶ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 24.

Was the selection process flawed and did the UNDT make factual errors, justifying the overturning of the Judgment?

38. Regarding the regularity of the selection process, our jurisprudence has established that:⁷

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

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

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

39. If the applicant's candidature was given full and fair consideration, the evidentiary burden of proof shifts to the applicant who must show through clear and convincing evidence that he or she was denied a fair chance of promotion.⁸

40. In this case, the Appellant questions the veracity of the assessment by the panel and states that "the members of the selection panel, who were all specialists of the field, knew that the selected candidate did not possess the minimum requirement for the post but went along with the request of the Chairman" whose "motivation to not select (the Appellant) to the position was because she had repeatedly rejected his sexual advances".

⁷ *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, paras. 31 and 32 (internal citations omitted).

⁸ See *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-747, para. 33; *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547; *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122.

41. The Appellant's allegations are not based on evidence and we must confirm that there is no clear and convincing evidence that the selection process was flawed and a fair chance of promotion was denied. The complaint filed with the Office of Internal Oversight Services (OIOS) against the Chairman of the ICSC in November 2017, more than a year after the recommendation of the panel to select another candidate is not evidence that the Appellant was the victim of discrimination on the part of the ICSC Chairman, because she had repeatedly rejected his sexual advances.

42. Furthermore, even if it mentioned a lack of documentation, by the panel members, of the considerations that informed their scoring of the candidates, the Dispute Tribunal explained, on reasonable grounds, why the allegations of collusion were to be excluded in the present case. The UNDT held that the scores granted to each candidate by each member of the panel were documented and that the significant variation between the scores awarded by each member of the panel to the different candidates suggested that it was unlikely that the panel members had all colluded to award high scores to the selected candidate.

43. Finally, it is not established that the minor errors made by the UNDT concerning, among others, the dates of the hearings had an impact on the UNDT Judgment.

44. In conclusion, it is not established that Ms. Mohamed was deprived of a fair process and a fair chance of promotion.

Judgment

45. The appeal is dismissed and Judgment No. UNDT/2019/088 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27th day of March 2020.

(Signed)

Judge Neven, Presiding
New York, United States

(Signed)

Judge Halfeld
Bournemouth, United Kingdom

(Signed)

Judge Sandhu
Vancouver, Canada

Entered in the Register on this 19th day of June 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar