



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

Judgment No. 2021-UNAT-1083

**Shanthi Hejamadi
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case No.:	2020-1407
Date:	19 March 2021
Registrar:	Weicheng Lin

Counsel for Appellant:	Dorota Banaszewska, OSLA
Counsel for Respondent:	André Luiz Pereira de Oliveira

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Shanthi Hejamadi (Appellant) was unsuccessful in her application for a Finance and Budget Officer position at the P-3 level with the United Nations Environment Programme (UNEP). She was excluded from the selection process for failing to confirm her availability to participate in a written exercise, within a 24-hour deadline imposed by the Administration. She disputes the exclusion on the basis that the Administration acted unreasonably and unjustly by providing such a short deadline for response, without prior notification and in violation of Section 7.5 of Administrative Instruction ST/AI/2010/3 (Staff selection system).
2. In its Judgment, the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) dismissed her application and held the Appellant had not shown that the Administration denied her full and fair consideration.¹
3. For reasons set out below, we allow the appeal and vacate the Dispute Tribunal's Judgment.

Facts and Procedure

4. The facts as found by the Dispute Tribunal are not disputed.
5. The Appellant is a Finance and Budget Officer at the P-2 level on a permanent appointment at the Office for the Coordination of Humanitarian Affairs (OCHA) in New York. She applied for a Finance and Budget Officer post at the P-3 level (P3 Post) at the UNEP in Nairobi.
6. The P3 Post was advertised from 14 August 2019 to 27 September 2019.
7. On Friday, 1 November 2019 at 1:44 a.m., the Appellant received an e-mail inviting her to participate in a written exercise as part of the evaluation process for the P3 Post (Invitation E-mail). The exercise was scheduled for 7 November 2019. The candidates were requested to confirm their availability by clicking on a link in the Invitation E-mail within 24 hours. The Invitation E-mail provided that if the information in the link was not

¹ *Hejamadi v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/o68 dated 5 May 2020 (Impugned Judgment).

completed within the 24 hours, the Organization would “assume” the job candidate would not be taking the exercise and would not move on to the second stage of assessment.

8. On Monday, 4 November 2019 at 9:56 a.m., (the next working day) the Appellant replied to the Invitation E-mail confirming her continued interest in the position and stating that the confirmation link was not functioning. As she received no response, the Appellant sent subsequent e-mails to different officials at UNEP asking to be allowed to participate in the written exercise.

9. But having failed to confirm her participation in the written exercise within the prescribed 24 hours, the Administration excluded Appellant from participating further in the recruitment process (Contested Decision).

10. On 22 November 2019, the Appellant requested management evaluation of the decision to exclude her from further steps in the selection process for the P3 Post.

11. On 14 January 2020, the Management Evaluation Unit (MEU) upheld the Contested Decision, noting that given there was no outcome in the selection process at the time of the Appellant’s filing, the management request was premature and not receivable.

12. However, had the request been receivable, the MEU concluded that the Administration acted fairly, justly and transparently in the Appellant’s case as it treated her candidature the same as others, and it enforced the same time limit as it did in respect of all of the other candidates.

13. On 12 March 2020, the Appellant filed an application with the Dispute Tribunal challenging the decision to exclude her from the selection process for the appointment of the P3 Post.

14. On 5 May 2020, the Dispute Tribunal held that “being excluded from participating in the written exercise carried immediate effects for the Applicant’s conditions of service” and that whether the failure to be further considered was the result of the Applicant’s actions is a “matter of merit,” and as such the application was receivable.²

² Impugned Judgment, para. 20.

15. However, the Dispute Tribunal dismissed the application on its merits and concluded that:³

[I]t can reasonably be expected from a candidate to a job opening to diligently monitor the email provided in the job application for notification purposes to ensure a timely response to any such notification. The Tribunal further noted that the Applicant does not show, or even allege, any exceptional circumstances which may have precluded her from timely accessing the invitation email. Accordingly, the Applicant has not shown that the Administration denied her full and fair consideration.

16. On 1 July 2020, the Appellant appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal), and on 28 August 2020, the Secretary-General filed his answer.

Submissions

Appellant's Appeal

17. First, the Appellant submits that the Dispute Tribunal erred in law by concluding that the Administration had acted reasonably and had given her full and fair consideration when it imposed a 24-hour deadline to confirm participation in the written exercise.

18. The Appellant argues that the Dispute Tribunal failed to recognize and address in its Judgment that a 24-hour deadline without direction to candidates to check or monitor their e-mail account during a certain period of time is profoundly and manifestly unreasonable.

19. Additionally, the Appellant submits the Dispute Tribunal failed to explain why she did not act according to the standard of diligence when she responded on the *next* business day. After not receiving a response on the following business day, she contacted several UNEP officials to be provided with a valid link to the written exercise. She did so prior to the scheduled exercise date, and the Administration could have easily, and without prejudice to the fairness of the proceedings, provided her with access to the valid link.

³ Impugned Judgment, para. 27.

20. Therefore, the Administration denied her full and fair consideration as a candidate in the selection procedure by having set a too short, and hence manifestly unreasonable, deadline and, subsequently, by having ignored her immediate response on the next working day as well as her numerous requests to allow her to participate in the written exercise.

21. Second, the Appellant argues that the Dispute Tribunal erred in law by holding that she was obliged to show exceptional circumstances. Because of the “manifestly and profoundly unreasonable” 24-hour deadline, she did not need to raise any “exceptional” circumstances to justify why she did not respond to the Invitation E-mail immediately.

22. In any event, she says she proved to be a diligent candidate by responding to the Invitation E-mail on the morning of the next working day and by contacting several UNEP officials to request a link to the written exercise before the date of the assessment.

23. The Appellant requests the Appeals Tribunal to vacate the Dispute Tribunal’s Judgment and rescind the Contested Decision that excluded her from the selection procedure for the P3 Post and order a new recruitment process to remedy the deficiencies highlighted in this appeal. In the alternative, she requests the Appeals Tribunal to award her an adequate amount for compensation that the Tribunal deems appropriate.

The Secretary-General’s Answer

24. The Secretary-General submits that the Dispute Tribunal did not err when it held that the Appellant’s candidacy was given full and fair consideration. The Dispute Tribunal’s findings and conclusion are in accordance with relevant jurisprudence and evidence, including Section 7.5 of ST/AI/2010/3 and Chapter 9 of the Recruiter’s Manual (Instructional Manual for the Recruiter on the Staff Selection System (Inspira)), 2015 (the Manual).

25. The Secretary-General has broad discretion in staff selection and appointment matters, and there is a rebuttable presumption that official acts are regularly performed if the management can “minimally show” that the candidature was given full and fair consideration, which it has here.⁴

⁴ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 26.

26. In the present case, the Secretary-General submits that the Appellant has failed to rebut this presumption with clear and convincing evidence. The Appellant failed to follow the instructions provided in the Invitation E-mail and therefore the Dispute Tribunal was correct in finding that the Appellant did not diligently monitor her e-mail and that she did not provide any exceptional circumstances that prevented her from accessing her e-mail on that day.

27. Citing ST/AI/2010/3, the Secretary-General says the Administration is not required to provide candidates with notice of the invitation to take the written exercise. Additionally, the Administration purportedly followed good practice, set out in Chapter 7.5 of the Manual in providing five days' notice of the scheduled written exercise to all candidates.

28. The Secretary-General submits that the Appellant did not show she was a diligent candidate like other candidates since she did not respond to the Invitation E-mail within the prescribed 24-hour deadline. She did not provide the Dispute Tribunal with any real or compelling reason to justify her failure to comply with the instruction to confirm her participation in the exercise, instead relying on the assertion that such deadline was against "International Administrative Law" and contrary to common life and work experience.

Considerations

29. The issue for determination is whether the Dispute Tribunal erred in finding the Appellant failed to show the Administration denied her full and fair consideration for this posting, specifically, whether her exclusion from further participation in the selection process, due to a failure to respond within 24 hours of receipt of the Invitation E-mail, was unreasonable.

30. Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion to appoint staff. The Appeals Tribunal's jurisprudence establishes that the following factors are to be considered when reviewing non-selection decisions:⁵

⁵ *Savadogo v. Registrar of the International Tribunal for the Law of the Sea*, Judgment No. 2016-UNAT-642, para. 40, citing *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 23; *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30.

(1) [W]hether the procedure as laid down in the Staff Regulations and Rules was followed; (2) whether the staff member was given fair and adequate consideration,[] and (3) whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner. The Tribunal's role is not to substitute its decision for that of the Administration.

31. In reviewing whether the procedure laid down in the Staff Regulations and Rules were followed or applied, we do not accept that they were properly followed in this instance and as such, we find the Secretary-General's exercise of discretionary authority in excluding the Appellant was not "legal, rational, procedurally correct, and proportionate".⁶

32. Section 7.5 of ST/AI/2010/3 sets out the process for job openings that includes an assessment to determine whether candidates meet the technical requirements and competencies of the job opening. The Administrative Instruction provides that such assessment "may include a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written exercises, work sample exercises or assessment centres."

33. The Manual outlines the process for recruiting, posting, assessing, and selecting for job postings within the Administration. Under Chapter 9.4 of the Manual, the relevant provision states: "[A]fter the deadline date of the job opening, the Hiring Manager, together with the assessment panel conducts the assessment exercise as stated in the job opening. Based on the outcome, the most promising applicants are subsequently invited for a competency-based interview." Further, under Chapter 9.3(4) of the Manual, the directive is: "When inviting the applicants to participate in an assessment process, the Hiring Manager informs them in advance (at least 5 working days) of the anticipated date of the assessment exercises and provides them with sufficient information on the exercises ..."

34. At 1:44 a.m. on Friday, 1 November 2019, the Appellant was provided with the invitation to participate in the written assessment exercise scheduled for Thursday, 7 November 2019, and was requested to confirm her participation within 24 hours.

⁶ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

35. As a side matter, the assessment was scheduled four working days after the Invitation E-mail and less than the five minimum working days indicated in the Manual. The Dispute Tribunal erred when it stated that the Invitation E-mail “respected” the advance notice provided for in the Manual.

36. First, the Manual requires at least five “working” days as advance notice of the assessment exercise. Second, we find it is unreasonable to count the November 1, 2019 e-mail in calculating the required minimum five working days. In the absence of a specific statutory provision on calculation of the deadline for notification of the assessment exercise, the general rule of computation of time in civil matters is applicable, namely the first day or the date of service/notification is excluded from the calculation of a deadline. In other words, if there must be “at least 5 working days” between the invitation and the date of the assessment exercise, the date of the invitation should be excluded in the calculating “at least 5 working days”. Although not on point, an example of this is codified in Article 29 of the Appeals Tribunal Rules of Procedure (Rules) that provides that the time limits prescribed in the Rules referring to calendar days “shall not include the day of the event from which the period runs”. Therefore, the earliest the written assessment exercise could occur in this instance to allow for “at least 5 working days” is Friday, 8 November 2019, but the exercise was improperly scheduled for 7 November.

37. Nevertheless, the Appellant’s exclusion from further participation in the selection process resulted from the failure to confirm her participation within the 24-hour deadline imposed in the Invitation E-mail.

38. Although the Staff Rules and Regulations (including ST/AI/2010/3 and the Manual) do not provide for when and how a deadline for confirmation to participate in an assessment exercise should be imposed, we find the Dispute Tribunal erred when it held the 24-hour deadline to confirm availability was reasonable. In *Sanwidi*, this Tribunal held that the Secretary-General has a broad discretion in the selection of staff however the exercise of this discretion can be reviewed to determine whether it was unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate.⁷ In the instant case, we find such exercise of discretion was unreasonable.

⁷ *Ibid*, para 42.

39. The Administration imposed the deadline arbitrarily, without advance notice and without consideration for any exceptional circumstances. The 24-hour deadline extended into non-working hours when it is not reasonable to assume candidates would monitor work e-mails and respond. There was no advance notice given to candidates that a strict deadline for confirming availability was to be imposed and the consequences for failing to meet that deadline. Further, the Invitation E-mail provided no alternate process in the event a candidate could not meet the 24-hour deadline. The Appellant attempted to respond within one working day. She then went further and attempted to contact UNEP officials on the next working day when the link did not work. We find her attempts to confirm her availability for the assessment exercise were reasonable and diligent.

40. By instilling an unreasonable deadline to confirm participation in the assessment exercise and excluding the Appellant without further consideration, the Administration acted arbitrarily and unfairly. For these reasons, the Administration's decision to exclude the Appellant from further participation in the selection process was unreasonable.

41. As a result of this unreasonable exclusion, we are not satisfied that that the presumption of regularity had been met. Rather, we find the Secretary-General has failed to minimally show that the Appellant's candidature was given adequate and fair consideration. We find the Contested Decision was not legal, rational, procedurally correct, and proportionate. Due to this illegality, the Appellant is entitled to an appropriate remedy.

42. The Appellant requests the rescission of the Contested Decision and the institution of a new selection process. Given these events occurred more than one year ago, and the selection has been in place for some time, we find the most appropriate and fair relief to the Appellant is to award her appropriate compensation for harm pursuant to Article 9(1)(b) of the Appeals Tribunal Statute (Statute).

43. When awarding compensation for pecuniary damage emanating from the Contested Decision, the actual economic loss or loss of chance is considered.⁸ There is no exact formula for how to quantify such a loss.⁹ The Appellant, along with 77 other candidates, had been approved to proceed to the assessment exercise, and only 40 candidates actually completed

⁸ See *Andersson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-379.

⁹ See *Lutta v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-117; *Hastings v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-109.

the assessment exercise. The loss of chance can be determined by a percentage based on the remaining candidates in the process, which here would be 1 in 40.¹⁰

44. However, in order to more accurately determine the Appellant's loss of chance, more evidence would be required, such as evidence of the other candidates' competencies and qualifications and the marking matrix of the exercise, which could eliminate a certain number of candidates. This would more accurately determine the quantum of the Appellant's loss.

45. Considering this compensation is hypothetical and in the absence of better evidence, we find the sum of USD 5000 as appropriate compensation for pecuniary damages. There is no award for non-pecuniary damages as the Appellant has not provided sufficient evidence to support such a claim.

¹⁰ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-496, para. 31. See also *Lutta; Hastings*, *supra* note 9.

Judgment

46. We vacate the Dispute Tribunal's Judgment and award the Appellant the sum of USD 5000 as pecuniary damages.

Original and Authoritative Version: English

Dated this 19th day of March 2021.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 8th day of April 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar