



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

Judgment No. 2021-UNAT-1099

**Antonio Ponce-Gonzalez
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Graeme Colgan Judge Dimitrios Raikos
Case No.:	2020-1415
Date:	19 March 2021
Registrar:	Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondent: André Luiz Perreira de Oliveira

JUDGE MARTHA HALFELD, PRESIDING.

1. At the material time, Mr. Ponce-Gonzalez was Chief, Budget and Finance Officer at the P-4 level with the United Nations Interim Security Force for Abyei (UNISFA). He filed an application contesting the failure to afford full and fair consideration to his candidacy for a position, alleging abuse of authority in cancelling the recruitment process, and considering him disqualified before the opening of a new selection exercise.
2. In Judgment on Receivability, the Dispute Tribunal rejected his application as not receivable, considering that the cancellation of the former recruitment exercise was a preparatory step in the selection process, and as such it may be challenged only in the context of an appeal against the outcome of the process.
3. On appeal, the Appeals Tribunal has found that the circumstances of the case warrant allowing Mr. Ponce-Gonzalez to challenge the decision to disqualify him from the selection process, since it cannot be regarded as a mere continuation of the eventually cancelled selection exercise. Mr. Ponce-Gonzalez's appeal is upheld, the UNDT Judgment is set aside and the case is remanded for adjudication on the merits.

Facts and Procedure

4. On 25 September 2018, UNISFA circulated a temporary job opening (TJO 104314) for Chief, Operations and Resource Management (CORM) at the P-5 level. The TJO 104314 was for an initial period of six months and the selected candidate would report directly to the Chief of Mission Support (CMS), UNISFA.
5. According to the Management Evaluation Unit (MEU), which was later to review Mr. Ponce-Gonzalez's request for management evaluation, UNIFSA lacked the delegated authority to select and appoint staff at that time and, upon the advice of the former Field Personnel Division (FPD) at Headquarters, UNIFSA cancelled TJO 104314 and published a recruit from roster job opening (RFR 104637) for the same P-5 CORM position on 9 October 2018. Mr. Gonzalez timeously applied for the RFR position as a rostered candidate.
6. A comparative analysis report raised on 2 December 2018 shows that a total of six rostered applicants including Mr. Ponce-Gonzalez were assessed, but none of them was recommended. In respect of Mr. Ponce-Gonzalez, CMS, as the Hiring Manager, wrote that

Mr. Ponce-Gonzalez had relevant experience in technology, general administration, budget and finance, but “lack[ed] notable experience in organizational performance management and measurement, service delivery, and managing/measuring resources and resource efficiencies”.

7. Again, according to the MEU, on 8 December 2018, UNIFSA requested the FPD for approval to issue another TJO on the basis of the failed RFR. The FPD was “evidently” unable to address UNIFSA’s request before the end of the year.

8. Effective 1 January 2019, UNIFSA was granted the delegated authority for recruitment. On 11 January 2019, UNIFSA circulated another TJO 109862 for the same CORM position.

9. Mr. Ponce-Gonzalez applied for the position in a timely manner and was shortlisted and invited for an interview. According to the MEU, UNIFSA attempted, on 11 January 2019, to cancel RFR 104637, “but was unsuccessful”. RFR 104637 was administratively cancelled only about two weeks later, on 27 January 2019, and the following day, Mr. Ponce-Gonzalez was notified that the RFR 104637 recruitment exercise had been cancelled and that the post might be advertised at a later stage.

10. It is clear that the CMS was involved in the exercises for both RFR 104637 and TJO 109862, but it is not clear as to what happened to TJO 109862 or whether RFR 104637 was subsequently re-advertised.

11. On 18 March 2019, Mr. Ponce-Gonzalez requested management evaluation of the decision to cancel RFR 104637 “while the process was proceeding” and the “[fa]ilure to afford full and fair consideration” to his candidacy for the CORM position. On 10 April 2019, he submitted an addendum to his 18 March management evaluation request.

12. In a letter dated 7 May 2019, the MEU informed Mr. Ponce-Gonzalez of the outcome of the management evaluation that his request was not receivable and premature, because the cancellation of RFR 104637 was merely a step in the selection process for the CORM position and was not a final decision amenable to appeal. The MEU noted that the advertisement of RFR 104637 had not resulted in the selection of any rostered candidate, and moreover, it had been superseded by the circulation of TJO 109862.

13. After he had submitted a request for management evaluation, on 26 March 2019, Mr. Ponce-Gonzalez filed with the Dispute Tribunal an application for suspension of action on TJO 109862.

14. In Order No. 46 (NBI/2019) dated 3 April 2019, the Dispute Tribunal rejected Mr. Ponce-Gonzalez's suspension of action application as unreceivable, as the posting of TJO 109862 provided him an opportunity to exercise his right to be considered for the job in satisfaction of his legitimate interests. The UNDT noted, in respect of the cancellation of RFR 104637, that Mr. Ponce-Gonzalez had not been recommended and consequently the "onerousness of the cancellation of the RFR" was indirect for him.¹ However, the UNDT did voice concern about whether, if the same CMS had a decisive influence on the selection, Mr. Ponce-Gonzalez would receive full and fair consideration during the selection exercise for TJO 109862, as he had been found unqualified for the same position under RFR 104637.

15. On 5 August 2019, Mr. Ponce-Gonzalez filed a revised application contesting the failure to afford full and fair consideration to his candidacy for the CORM position and alleging abuse of authority in cancelling RFR 104637 in violation of the applicable rules following his unlawful disqualification.

16. In Judgment on Receivability No. UNDT/2020/079 dated 28 May 2020, the Dispute Tribunal rejected Mr. Ponce-Gonzalez's application as not receivable, because it lacked jurisdiction to review preparatory steps of an administrative decision. In the view of the Dispute Tribunal, the cancellation of RFR 104637 was such a step in a selection process, and as such it may be challenged only in the context of an appeal against the outcome of the process.

17. Mr. Ponce-Gonzalez appealed the UNDT Judgment to the Appeals Tribunal on 24 July 2020, and the Secretary-General filed his answer on 28 September 2020.

18. On 10 February 2021, Mr. Ponce-Gonzalez filed a motion seeking to adduce a Reply dated 25 March 2020 that the Secretary-General submitted to the Dispute Tribunal in another case (No. UNDT/NBI/2020/017), in which he challenged his non-selection for TJO 109862. Mr. Ponce-Gonzalez claimed that the 25 March 2020 Reply was relevant to the present case, because it "corrects" the misrepresentations in the Respondent's answer in the

¹ Order No. 46 (NBI/2019), para. 45.

present case and “invalidates” other misleading arguments made by the Hiring Manager in the present case. Mr. Ponce-Gonzalez also claimed that this Reply was not available either to him on 5 August 2019, when he filed his application with the Dispute Tribunal in the present case, or to the UNDT, when it issued the impugned Judgment on Receivability in the present case.

19. On 26 February 2021, the Secretary-General filed his response to Mr. Ponce-Gonzalez’s motion. He requested that the Appeals Tribunal deny the motion or grant him an opportunity to file a written submission in response to the additional evidence that Mr. Ponce-Gonzalez sought to adduce. He noted that Mr. Ponce-Gonzalez was seeking to adduce the Respondent’s Reply in another on-going case. He also noted that the said Reply was submitted to the Dispute Tribunal on 25 March 2020, some two months before the UNDT issued the impugned Judgment in the present case, but that Mr. Ponce-Gonzalez has not pointed to any concrete circumstances that would have prevented him from requesting the said Reply to be part of the record of the UNDT before it issued the impugned Judgment. The Secretary-General maintains that Mr. Ponce-Gonzalez has failed to show any exceptional circumstances warranting the introduction of the additional evidence. Furthermore, Mr. Ponce-Gonzalez has failed to explain how the additional evidence is relevant to the issue of receivability of his UNDT application, or how adducing additional evidence would be in the interest of justice and efficient and expeditious resolution of the proceedings.

Submissions

Appellant’s Appeal

20. Mr. Ponce-Gonzalez requests that the Appeals Tribunal find in his favor and order rescission of the contested decision, or remand the case to a different Judge of the Dispute Tribunal for review on the merits. He also requests that the Appeals Tribunal order the Secretary-General pay him material damages in the amount of two years’ net base salary for loss of opportunity, unspecified moral damages for violation of his rights and harm to his “*dignitas*” and his health. He further requests that the Appeals Tribunal order his promotion to the P-5 level, or payment to him, until retirement, of the pay difference between P-4 and P-5 including the difference in pension contributions. Lastly, he requests that the Appeals Tribunal refer the responsible officials for accountability.

21. Mr. Ponce-Gonzalez maintains that the Dispute Tribunal erred in law and in fact resulting in a manifestly unreasonable decision in rejecting his application as not receivable on the basis of its misunderstanding that the cancellation of RFR 104637 was the sole contested decision; that RFR 104637 was not cancelled but merely adjourned and TJO 109862 gave him an opportunity to be considered again; and that the recruitment process for the CORM position was on-going. In addition to challenging the cancellation of RFR 104637, he had contested the Hiring Manager's failure to accord him full and fair consideration during the assessment and alleged his abuse of authority in cancelling RFR 104637 following the unlawful disqualification of his candidacy. The UNDT erred in fact by confusing the two distinct processes for the same post and treating RFR 104637 and TJO 109862 as one continuous process. The regular recruitment process for RFR 104637 was not resumed; instead it was replaced by a different process for a temporary position.

22. The UNDT erred and failed to exercise its jurisdiction when it failed to examine the initial reasons for cancelling RFR 104637. By declaring Mr. Ponce-Gonzalez's application not receivable, the Dispute Tribunal contradicted its own Order No. 46 (NBI/2019), in which the UNDT recognized the issue of full and fair consideration to be receivable.

23. According to paragraph 10.4 of Administrative Instruction ST/AI/2010/3, the Hiring Manger should have recommended the CORM position to be advertised in the compendium after no rostered candidate had been found to be suitable. There was no explanation as to why this procedure had not been followed in the present case. The issuance of TJO 109862 was in effect an abuse of the newly delegated authority on staff selection.

24. The Dispute Tribunal erred in concluding that the cancellation of RFR 104637 was a preparatory step and was patently incorrect in inferring that the issuance of TJO 109862 was the culmination of the same selection process as RFR 104637. That consideration defies logic, because TJO 109862 was circulated 10 days before RFR 104637 was officially cancelled on 27 January 2019. The argument that RFR 104637 was a preliminary step and TJO 109862 was a final step in filling the regular post, defies both ST/AI/2010/3 and ST/AI/2010/4. Moreover, that interpretation is not supported by ST/AI/2010/3 governing the manner in which regular positions such as the P-5 CORM post are filled, whereas TJO 109862 was governed by a different process detailed in ST/AI/2010/4. That was why UNIFSA had to cancel the initial TJO 104314 at the instruction of the FPD because the advertisement of a permanent regular post under a TJO was not compliant with the provisions of ST/AI/2010/3. Contrary to the

Hiring Manager's Manual, in the present case, RFR 104637 was not cancelled before the assessment exercise; it was cancelled after the candidates had been identified. The outcome rejecting Mr. Ponce-Gonzalez's candidacy was the final step of that recruitment process and as such it remains receivable.

25. Mr. Ponce-Gonzalez then identifies and explains in detail the irregularities in the recruitment process for RFR 104637 in support of his position that the Hiring Manager had improperly cancelled the RFR 104637 recruitment process on the basis of a false determination that he was not a suitable candidate.

The Secretary-General's Answer

26. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Ponce-Gonzalez's appeal and affirm the UNDT Judgment.

27. The Secretary-General submits that the Dispute Tribunal correctly found that Mr. Ponce-Gonzalez's application was not receivable, as it has no jurisdiction to review preparatory steps leading to an administrative decision. The UNDT Judgment is consistent with the jurisprudence of the Appeals Tribunal. The cancellation of RFR 104637 carried no direct legal consequences for Mr. Ponce-Gonzalez's terms of employment. All the consequences that Mr. Gonzalez alleges are speculative and not supported by any evidence.

28. The Secretary-General also submits that all the submissions that Mr. Ponce-Gonzalez makes in respect of TJO 109862 are outside of the scope of the present case. In his request for management evaluation, Mr. Ponce-Gonzalez did not challenge any decision related to TJO 109862; his claims were limited to the RFR 104637 selection exercise. The Dispute Tribunal rejected his application for suspension of action on TJO 109862 as not receivable.

29. The Secretary-General further submits that Mr. Ponce-Gonzalez's claims about the internal legal framework are incorrect, as the legal framework (Section 2.2(d) of ST/AI/2010/4) allows a hiring manager to issue a TJO and decide whether to cancel a selection exercise. His allegations of irregularities surrounding RFR 104637 are a repetition of the arguments that he made in his UNDT application, but they do not show how the alleged errors led the UNDT to reach a manifestly unreasonable decision.

30. The Secretary-General finally submits that the Dispute Tribunal made correct findings and there is no reason for the Appeals Tribunal to rescind the contested decision and award Mr. Ponce-Gonzalez compensation. Furthermore, there are no justifiable bases for accountability, since Mr. Ponce-Gonzalez has failed to meet his burden of proof in establishing any breach of conduct by the Hiring Manager.

31. The Secretary-General notes that all other arguments that Mr. Ponce-Gonzalez makes in the present appeal are identical to the arguments that he made before the Dispute Tribunal. He is essentially seeking to reargue his case in a hope that the Appeals Tribunal would consider his arguments *de novo* and come to a different conclusion.

Considerations

Preliminary issue of motion to adduce additional evidence

32. Mr. Ponce-Gonzalez requests that additional submissions be received and considered. However, a review of his submissions in support of the motion leads the Appeals Tribunal to conclude that it is unlikely that Mr. Ponce-Gonzalez would provide information or evidence that could be relevant and material to the issue at stake in the present case. Rather, the Appellant seeks to rebut the Secretary-General's response to his appeal, which is not admissible at this stage.

33. Mr. Ponce-Gonzalez claims that the UNDT erred when it found that the RFR cancellation was a preparatory step in the recruitment exercise.

34. The concise UNDT Judgment seems to have reasoned that, when the post was the same, the cancellation of the previous selection exercise which automatically led to another one followed a continuous thread that led to an ultimate decision, the only one which would be judicially reviewable. Based on its understanding of *Ishak*, *Ngokeng* and *Kawamleh*, the UNDT held that "a selection process may only be challenged in the context of an appeal against the outcome of that process and [...] where the selection exercise was cancelled, there was no contestable decision".² The UNDT further held that it lacked jurisdiction to review preparatory steps of an administrative decision.

² Impugned Judgment, paras. 9 and 10, quoting *Ishak v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-152, para. 29 and citing *Ngokeng v. Secretary-General of the*

35. The jurisprudence cited in the UNDT Judgment does not seem to apply to this case, however. In *Ishak*, the staff member concerned sought to review a decision relating to non-promotion. After having had a promotion denied, he filed for administrative review of this decision. A recourse session was then convened, and he was successful in his promotion. Still, Mr. Ishak filed an application, which the UNDT dismissed as unreceivable because he had been promoted. The Appeals Tribunal affirmed that decision and added that “[a] selection process involves a series of steps or findings which lead to the administrative decision. These steps may be challenged only in the context of an appeal against the outcome of the selection process, but cannot alone be the subject of an appeal to the UNDT.”³ However, this statement has to be read in the context of the factual situation of that case, where Mr. Ishak was ultimately promoted after the recourse in that very same promotion process. His final objective, to be promoted, was achieved. The present case deals with two different job openings relating to two different legal frameworks, one for RFR 104637 and the other for TJO 109862, and Mr. Ponce-Gonzalez had been disqualified from the first one and not selected for the second one. He contests the first administrative decision not to select him.

36. In *Ngokeng*, the recruitment for the job opening had been suspended – that is, halted temporarily – not cancelled.⁴ Mr. Ngokeng contested the decision to suspend the selection process. Then a second job opening replaced the first one for the same post, changing one of the *requirements* (ability to interpret) into a “*desirable asset*”, since none of the applicants had the requisite demonstrated ability to interpret. The Appeals Tribunal found that the UNDT erred in deciding that there had been two separate selection processes, since there had been notification that “the selection process for the Post was to be “*resumed*” and that the VA had been “*revised*”.”⁵ The Appeals Tribunal then found that the Administration’s decision to suspend the recruitment process was not a final administrative decision and therefore had no direct legal consequences for Mr. Ngokeng’s contract of employment.⁶ Unlike the present case, *Ngokeng* involved a selection exercise that had been suspended and then resumed, with the sole modification of a certain ability from “*required*” to “*desired*”, in light of the fact that none of the candidates satisfied the requirements for the post. This could be indeed construed as a

United Nations, Judgment No. 2014-UNAT-460, para. 37; and *Kawamleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-818, para. 14.

³ *Ishak*, *ibid*, para. 29.

⁴ *Ngokeng*, *supra*, para. 35.

⁵ *Ibid.*, para. 36 (italics in original).

⁶ *Ibid.*, para. 37.

single continuous selection exercise. Here, it is indisputable that there was cancellation of the former selection exercise and the launch of a new one under a different legal framework.

37. The UNDT also cited *Kawamleh* as a precedent for its decision. In *Kawamleh*, the staff member contested the cancellation of a *test* within a selection exercise. The selection exercise as a whole was subsequently cancelled and thus never completed. The Appeals Tribunal then found that, since the proposed selection exercise had been cancelled, the issues relating to the irregularities of the first test were of no relevance and had no legal consequence. With respect to the second selection process, Mr. Kawamleh had no standing to contest the decision thereon, after he had elected not to participate in the process. Unlike the present case, in *Kawamleh*, the staff member had taken issue with alleged irregularities in the first selection exercise, but they were rendered moot by the cancellation of the selection exercise. The cancellation of the entire selection exercise thus responded to the aims of the staff member. In the present case, however, the cancellation of the first selection exercise did not meet the aspirations of Mr. Ponce-Gonzalez. Quite the opposite, Mr. Ponce-Gonzalez challenges the cancellation itself and claims that he was not afforded full and fair consideration when he was disqualified, leaving room for the vacancy to be cancelled.

38. The UNDT therefore erred when it found that these precedents were applicable to the present case, because the facts here are not materially identical and need to be distinguished. In the present case, while the post to be filled might remain the same in both selection exercises, Mr. Ponce-Gonzalez wishes to challenge his non-selection, as he appeared as one of the rostered candidates that could have met the requirements of the advertised position.⁷

39. Invoking ST/AI/2010/3 and ST/AI/2010/4, Mr. Ponce-Gonzalez claims that the advertised post of Chief, Operations and Resource Management was not a temporary vacancy subject to a temporary assignment, which is by nature more precarious and involves a wholly different set of regulations, only applicable to positions of shorter duration. This reveals that the crux of the case does not seem to be the outcome of the latter recruitment exercise, but rather the disqualification of Mr. Ponce-Gonzalez from the first selection exercise. In short, he challenges his non-selection in the first recruitment exercise.

⁷ Answer to the appeal, para. 15.

40. Moreover, there is a considerable difference in the legal framework applicable to each of the posts. One was regular, and the other was temporary. One was supposed to be filled by a rostered candidate, while the other did not have this requirement. To consider that the recruitment exercise was the same and that the cancellation of RFR 104637 was just a preparatory step of the selection process ignores the difference in the requirements and in the legal framework applicable to those very distinctive ways of contracting and in which each of these contracts is deployed.

41. Under these circumstances and for the purposes of considering the receivability of the application, the Secretary-General's argument that it was within the Administration's discretion to decide to fill the post with a temporary or a regular appointment, depending on its assessment of the needs on the ground, does not stand. First, because this is an issue that deals with the merit of the application. Second, because, as established in our jurisprudence, the Administration's authority or discretion is not unfettered.⁸ The UNDT did not examine whether there was arbitrariness, bias, improper motive or extraneous factors for the cancellation of RFR 104637 and the subsequent issuance of a new TJO, nor did it assess the reasonableness of this decision. The Appeals Tribunal does not know yet whether the explanation for the cancellation of RFR 104637 has been materialized in order for the Administration to issue another TJO, since there is no difference in the content of both job descriptions.⁹

42. The need to examine the merits of the case grows in substance when we notice that Mr. Ponce-Gonzalez alleges that he was unlawfully disqualified from the selection exercise. Moreover, RFR 104637 was cancelled on 27 January 2019, after the issuance of the parallel TJO 109862, and Mr. Ponce-Gonzalez's notification at the time indicated that the RFR 104637 recruitment exercise had been cancelled and that the post "may be advertised at a later date",¹⁰ with the consequence that there were indeed two selection exercises for the same post, one of which was eventually cancelled.

⁸ *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, para. 30.

⁹ Order No. 046 (NBI/2019), para. 8.

¹⁰ *Ibid.*, para. 10.

43. Moreover, as correctly shown by the UNDT,¹¹ having been considered unsuitable in the first selection exercise (RFR 104637), Mr. Ponce-Gonzalez's right to a full and fair consideration in the second recruitment exercise (TJO) could be jeopardized, particularly should the same hiring manager who previously disqualified him have a decisive influence on the selection. This shows that contesting the decision to disqualify him might have been far more effective than challenging the ulterior decision emerging from the TJO.

44. Finally, a delicate balance must be struck between efficiency in the recruitment exercise and respect of the rights of the candidates. Even allowing the Administration a certain degree of discretion in cancelling the RFR and issuing a new TJO, to consider Mr. Ponce-Gonzalez's application not receivable would impose upon him too much of a burden before being able to contest his disqualification from the first selection exercise: he would have to wait until a candidate is selected in the new TJO, despite the fact that he claims that his disqualification from the first selection exercise had been unlawful. By the time he would be able to challenge his disqualification, a candidate might have been wrongly selected and the situation might have been consolidated, which would probably only lead to a possible payment of compensation in lieu of rescission instead of a more effective and suitable remedy.

45. Hence, by considering his disqualification from the RFR process a mere preparatory step of an eventual administrative decision only issued after the second TJO had been completed, the UNDT erred in fact, leading to a manifestly unreasonable decision. In the circumstances of the case, the second TJO issued while the RFR was still running, cannot be regarded as a mere continuation of the eventually cancelled RFR. Mr. Ponce-Gonzalez's application is receivable.

46. The parties' other arguments relate to the merits of the case. Because we are remanding the case to the UNDT for decision on its merits, we will not decide these alternate grounds of challenge.

¹¹ *Ibid.*, para. 47.

Judgment

47. The appeal is upheld and Judgment No. UNDT/2020/079 is hereby vacated. The case is remanded to the UNDT for additional fact-finding and judgment on the merits.

Original and Authoritative Version: English

Dated this 19th day of March 2021.

(Signed)

Judge Halfeld, Presiding
Juiz de Fora, Brazil

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 26th day of April 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar