



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

Judgment No. 2022-UNAT-1197

**Antonio Ponce-Gonzalez
(Appellant)**

v.

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

JUDGMENT

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| Before: | Judge Martha Halfeld, Presiding Judge John Murphy Judge Dimitrios Raikos |
| Case No.: | 2021-1558 |
| Date: | 18 March 2022 |
| Registrar: | Weicheng Lin |

Counsel for Appellant: George Irving

Counsel for Respondent: Noam Wiener & André Luiz Pereira de Oliveira

JUDGE MARTHA HALFELD, PRESIDING.

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Mr. Antonio Ponce-Gonzalez (the Appellant) contested the failure by the Administration to afford him full and fair consideration for the temporary position of Chief, Operations and Resource Management Section (ORM). In Judgment No. UNDT/2021/024 (the Impugned Judgment), the UNDT dismissed his application.

2. In the Impugned Judgment, the UNDT considered *inter alia* that: i) the applicable legal framework which provided the possibility of conducting a competency-based interview (CBI) for a temporary job opening (TJO) took precedence over the job advertisement exempting rostered staff members from participating in such an interview; ii) all the candidates, including Mr. Ponce-Gonzalez, had been expressly notified of the requirement to sit for the interview; iii) Mr. Ponce-Gonzalez was not assessed and thus failed in the selection exercise due to his non-attendance of the interview; and iv) Mr. Ponce-Gonzalez had not presented any evidence to show that his non-selection decision was improperly motivated.

3. Mr. Ponce-Gonzalez appeals the Impugned Judgment.

4. For the reasons below, we dismiss the appeal.

Facts and Procedure

5. The Appellant is a Chief, Budget and Finance Officer (P-4 level) with the United Nations Security Force for Abyei (UNISFA).

6. The following factual background is taken from the Impugned Judgment (footnotes omitted):

4. On 11 January 2019, [Temporary Job Opening (TJO)] 109862 was issued with a closing date of 18 January 2019. The Applicant applied for the position on the same date.

5. The Hiring Manager then reviewed the 65 job applications received and shortlisted nine job applicants, including the Applicant, for assessment through a competency-based interview [(CBI)]. Eight of the short-listed candidates participated in a competency-based interview [(CBI)]. The Applicant did not attend the interview. The interview panel documented its evaluation in the Inspira system as follows:

The candidate was invited to take part in the interview on 28 March. In an effort to accommodate the candidate's schedule and preferences the interview was rescheduled for 30 March, 01 April, and 08 April. Although the candidate expressed his continued interest in the position he failed to confirm his participation for any of the proposed dates. Following the final notification for 08 April, the panel convened and waited until 45 minutes beyond the scheduled interview time but no response was received from the candidate. He was duly informed that no further accommodations could be made to his interview, and his non-response was documented as a withdrawal of interest in the position.

6. The interview panel recommended the selection of another candidate for TJO 109862 on 11 April 2019.

The UNDT Judgment (Receivability and Merits)

7. On receivability, UNDT considered that it would not be in the interests of justice to deprive a staff member access to the internal justice system on the basis that he refused to participate in an interview, not voluntarily, but out of protest. UNDT held that his non-selection had direct legal consequences on his terms of appointment or contract of appointment. UNDT held that his application was therefore receivable.¹

8. The UNDT found that the Respondent satisfied the minimum burden of proof that he acted regularly and that the burden shifted to Mr. Ponce-Gonzalez to rebut this presumption through clear and convincing evidence that his candidacy was not given full and fair consideration.

9. The UNDT found that the Respondent's argument that the purpose of the TJO was to fill the position temporarily pending finalisation of a regular selection process was an acceptable reason recognised by the relevant Administrative Instruction, and the Applicant's arguments to the contrary were not proved by evidence or backed by law.²

10. The UNDT found that the Applicant was neither entitled to be exempt nor showed any legal basis that exempted him from participating fully and completely in the selection process. Similarly, the UNDT considered that the Mr. Ponce-Gonzalez had not shown which particular

¹ Impugned Judgment, para. 42.

² *Ibid.*, para. 88.

rule stated that the assessment of candidates must strictly adhere to criteria established in the published job opening.

11. The UNDT found that the correction of an error appearing in the advertisement exempting rostered staff members from participating in the interview was not prejudicial to Mr. Ponce-Gonzalez's right to full and fair consideration for the position on the basis that it had no effect on the outcome of the selection process as all candidates were on notice that they were required to sit for a CBI.

12. The UNDT held that, in relation to improper motives, it was the duty of Mr. Ponce-Gonzalez to provide clear evidence of improper motive, which he had not done.³

13. The UNDT held that the Appellant did not meet all the minimum and desirable requirements of the TJO as he did not attend the CBI and therefore his technical competency could not be tested.

14. The UNDT held that the Appellant's argument that he would only have achieved full and fair consideration if the CBI had been conducted by an impartial and independent panel outside UNISFA was without any factual or legal basis.

15. The UNDT held that the Appellant did not provide any evidence to support his contention that there had been "decisive influence" of the Hiring Manager in the selection process of the TJO. In addition, UNDT held that the Appellant had not adduced any evidence to establish that the selection exercise was corrupted or manipulated, or that there was a conflict of interest, animus or bias on part of the Hiring Manager.

16. Overall, the UNDT found that the Applicant had not proved any improper procedure, bias, conflict, impartiality, unfairness or illegality to rebut the presumption of regularity.

17. The UNDT found the application to be receivable but dismissed it on the merits.

³ *Ibid.*, para. 97.

Procedure before the Appeals Tribunal

18. On 18 May 2021, the Appellant filed an appeal of the Impugned Judgment with UNAT and, on 21 July 2021, the Respondent filed a reply.

Submissions

Mr. Ponce-Gonzalez's Appeal

19. Mr. Ponce-Gonzalez seeks the following relief: damages in the amount of two years' net base pay for loss of opportunity and moral damages for violation of rights, harm to *dignitas* and to his health and well-being; promotion to the P-5 level, or alternatively the difference in pay between P-4 and P-5 levels until retirement, including the difference in pension contributions; and accountability for the responsible officials.

20. Relying on UNDT jurisprudence in *De Cruze*⁴, the Appellant submits that the impropriety surrounding the previous Recruit from Roster (RfR) (104637) process nullified the appropriateness and legitimacy of the second selection exercise under TJO 109862.

21. The Appellant further submits a "Compendium of list of errors on questions of fact resulting in a manifestly unreasonable decision not relevant to the dispute of the present case".

22. In summary, the Appellant submits that:

- (a) the UNDT erred in rendering an unreasonable judgment on a recruitment exercise which was not a legitimate process;
- (b) the UNDT failed to examine how the breach and violations of the Appellant's right to fair consideration in the previous exercise nullified the legitimacy of the TJO exercise and appropriateness of the selection process;
- (c) the UNDT failed to exercise its jurisdiction and erred in matters of fact by not considering the evidence which established that the Appellant's right to fair consideration was compromised;

⁴ *De Cruze v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/099.

- (d) the UNDT erred in matters of law by not taking into consideration the jurisprudence which established the impugned decision had concrete repercussions on the Appellant's right to be fairly considered;
- (e) the UNDT exceeded its jurisdiction by rendering a judgment on issues which did not constitute the Appellant's grievances and failed to exercise its jurisdiction by not examining the evidence which rebutted the presumption of regularity;
- (f) the TJO was not the proper recruitment modality to fill a regular post;
- (g) the totality of facts demonstrates a pattern of procedural irregularities that unlawfully manipulated the selection process and the second selection exercise under TJO 109862 was void *ab initio*; and
- (h) the Appellant was subjected to bias and discrimination and denied a fair chance at consideration for the post as he was eliminated before he could even compete.

The Secretary-General's Answer

- 23. The Respondent requests UNAT to dismiss the appeal, "reject the application" and uphold the contested decision.
- 24. The Respondent submits that the UNDT correctly held that the Appellant had failed to rebut the presumption of regularity.
- 25. The Respondent submits that the Appellant's contentions are not supported by law or fact.
- 26. The Respondent submits that the UNISFA Administration was authorised to issue the TJO.
- 27. The Respondent submits that the Appellant's argument regarding the legality of the cancellation of the previous recruitment exercise had no bearing on the instant case and is the subject of a separate proceeding.

28. The Respondent submits that recruitment exercises for temporary appointments are not limited to vacancies created only by temporary positions, relying on Section 2.2(d) of ST/AI/2010/4/Rev. 1 (Administration of temporary appointments). Further the Respondent notes that the Administration has not changed the status of the position, and it remained a regular post, therefore the Appellant was factually incorrect on this point.

29. The Respondent submits that the Appellant's claim that the grounds for the issuance of TJO 109862 were irregular and designated to exclude his candidacy were not borne out by the facts, as the Appellant was invited to a CBI.

30. The Respondent submits that the Appellant failed to demonstrate bias or improper motives. Specifically, the Respondent submits that: the Appellant attempts to reargue previous claims related to the earlier recruitment that are "not pertinent" to the current dispute; the claim that the hiring manager was prejudiced against the Appellant was purely speculative; and that due to the fact he refused to attend the interview, he was "*a priori* unsuitable" for the appointment and has no grounds on which to claim either that he was better suited for the appointment or was excluded because of bias.

31. The Respondent submits that the Appellant's attempt to rely on the Secretary-General's bulletin on Delegation of authority of the Staff Regulations and Rules and the Financial Regulations and Rules (ST/SGB/2019/2) to claim that it is a conflict of interest to both make and execute a decision is a *non sequitur*. Further, the Respondent submits that decision-makers in the Organisation regularly execute the administrative decisions they make, both as hiring managers and otherwise.

32. The Respondent submits that the Appellant failed to provide evidence that the Hiring Manager had acted with bias or was in any way conflicted and that absent such evidence, UNAT should deny the Appellant's claim and uphold the Impugned Judgment.

33. The Respondent submits that the Appellant failed to demonstrate the Administration was not allowed to require the candidates to attend a competency-based interview as part of the selection process for the TJO.

34. Relying on *Smith*⁵, the Respondent submits that the UNAT has consistently affirmed the Respondent's discretion in the execution of staff selections, holding that the Organisation has "discretion to introduce" criteria for recruitment in the interests of operational requirements or efficiency" as long as this discretion is "exercise lawfully, reasonably and fairly".

35. The Respondent submits that the inclusion of the sentence that previously rostered candidates would not be subject to further assessment or invited to interview was an error which did not exempt the Appellant from attending the interview. The Respondent submits that the Appellant would have suffered no prejudice by attending the interview. He was not singled out or treated differently from any of the other candidates. The Respondent submits that the editorial error did not render the recruitment exercise unlawful, prejudice the Appellant's candidacy, and was not indicative of bias.

36. The Respondent submits that the UNDT was correct to set aside the Appellant's claims relating to earlier recruitment exercises, noting that the Appellant has filed a separate request for management evaluation and application to UNDT regarding those recruitment exercises, and they are currently pending before UNDT. The Respondent therefore requests the UNAT to set aside all arguments made by the Appellant that suggest the decision under appeal is illegal because of the alleged illegalities of the earlier recruitment exercises.

Considerations

Preliminary remarks – the scope of the present appeal

37. It is not disputed that the post of Chief/ORM which had initially been advertised as a regular post under RfR No. 104637 was subsequently re-advertised as a temporary position as the TJO 109862. Although Mr. Ponce-Gonzalez challenged his non-selection in both exercises, it is also not debated that the present case concerns only the TJO, since Mr. Ponce-Gonzalez's

⁵ *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-785.

non-selection under the RfR was the subject of a different case pending adjudication before the Appeals Tribunal at the date when the case management discussion was held.⁶

38. Nonetheless, Mr. Ponce-Gonzalez's submissions in his appeal sometimes appear to challenge the cancellation of the initial RfR (which led to the issuance of the TJO), rather than his non-selection under the TJO. He claims that: i) the selection process of the TJO itself was improper *ab initio*; ii) the TJO was unlawfully issued; iii) the legitimacy of the TJO exercise was nullified by the breach and violations of his rights in the previous exercise (the RfR); iv) the TJO was not the proper recruitment modality to fill a regular post; and that v) the Administration abused his discretionary authority and process with the issuance of an improper selection exercise, are all grounded in possible unlawfulness of the cancellation of the initial RfR, rather than in the illegality of his non-selection for the TJO, which therefore goes therefore beyond the limited scope of the present application. Mr. Ponce-Gonzalez's arguments should have been solely restricted to issues related to his non-selection for the TJO.

39. Moreover, Mr. Ponce-Gonzalez's attempt to challenge the cancellation of the initial RfR in the present application poses a paradox in his arguments, namely, how he can contest his non-selection for the TJO (as is the purpose of the present application), when he challenges the issuance of the TJO itself. For the purposes of the present case, the condition precedent for Mr. Ponce-Gonzalez to seek selection for the position re-advertised in the TJO is the acknowledgment that the TJO was lawfully issued, so that he could challenge his non-selection for the post. This is because, as had been agreed by the parties at the case management hearing held before the UNDT, the subject of this case is only the TJO.⁷

40. The Appeals Tribunal has enquired about the result of the separate case challenging the selection process in the RfR which was pending before UNAT, as referred to in para. 14 of the UNDT judgment. This enquiry was necessary in light of the fact that, in both applications, Mr. Ponce-Gonzalez has challenged both selection processes (RfR and TJO), which concern the same post. Therefore, any possible granting of the first application (RfR) by a decision which is definitive and binding on the parties could render moot the present appeal.

⁶ Impugned Judgment, paras. 9 and 14.

⁷ *Ibid.*, para. 14.

41. The previous case was dealt with by Judgment No. 1099-UNAT-2021⁸ and was remanded to the UNDT. According to the Appeals Tribunal research, the UNDT issued its Judgment No. UNDT/2021/161⁹ on the RfR 104637 on 23 December 2021. In this new Judgment, the contested decision was rescinded (and compensation in lieu set as an alternative), and further compensation for harm was awarded (USD 40,500 for loss of opportunity). The UNDT also found that:

51. On the basis of the Tribunal's findings that the Applicant was wrongly evaluated against unpublished criteria, discretionary authority to cancel the JO was misused and abused and the Applicant was not afforded a fair chance at adequate and impartial consideration, the Tribunal finds that the applicable Regulations and Rules were not applied in a fair, transparent and non-discriminatory manner.

52. Based on all the above findings and on the finding that the Applicant met and exceeded the requirements for the JO but that the RFR was improperly cancelled, the Tribunal finds that the presumption of regularity of the hiring manager's actions has been rebutted and that the Applicant's candidacy did not receive full and fair consideration.

42. Although the UNDT found for Mr. Ponce-Gonzalez, Judgment UNDT/2021/161 shows as its status "Appealed". The Registry of the Appeals Tribunal indeed confirmed the existence of the appeal filed by the Secretary-General on 21 February 2022, not yet assigned to a UNAT session because it is very new. Therefore, the RFR case is still pending a final decision by the Appeals Tribunal.

43. In light of the above, the Appeals Tribunal will restrict its consideration to Mr. Ponce-Gonzalez' submissions referring to his non-selection for the TJO.

Merits of the case – the non-selection for the TJO

44. The main issue for consideration and determination in this appeal is whether the UNDT erred when it found that Mr. Ponce-Gonzales was required to attend the interview during the selection for the TJO, even though the vacancy announcement had supposedly (because of the advertisement wording) exempted him from "any further assessment" due to the fact that he was on the roster, and that his non-selection was lawful because he did not attend the interview.

⁸ *Antonio Ponce-Gonzalez v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1099.

⁹ *Ponce-Gonzalez v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/161.

Despite this situation being the core of the matter in this appeal, Mr. Ponce-Gonzalez put forward several other arguments that the Appeal Tribunal will assess in the present Judgment.

45. In this regard, Mr. Ponce-Gonzalez's main argument in his appeal is that the TJO was in contradiction with the interview itself and that the Administration's non-adherence to the evaluation criteria specified in the job opening contradicts the jurisprudence as established by the UNDT in *Stefanizzi*.¹⁰ In that case, the UNDT held that "the criteria to be used in evaluating candidates must be clearly stated in the vacancy announcement"¹¹ and that "the Administration is bound by the terms of the vacancy announcement that regulates the selection exercise"¹².

46. The announcement of a vacancy should be considered a general guide for candidates to apply for a post. It should be reliable enough not to create false expectations, nor give incorrect information. In the present case, while the TJO provided the information that "[p]reviously rostered candidates are not subject to any further assessment and as such, will not be invited for such an assessment", Mr. Ponce-Gonzalez and all other nine candidates shortlisted out of a total of 65 applicants for the TJO were invited to an interview.¹³ The Comparative Analysis Report issued for the respective job opening provides these General Comments about Mr. Ponce-Gonzalez:

The candidate was invited to take part in the interview on 28 March. In an effort to accommodate the candidate's schedule and preferences the interview was rescheduled for 30 March, 01 April, and 08 April. Although the candidate expressed his continued interest in the position, he failed to confirm his participation for any of the proposed dates. Following the final notification for 08 April, the panel convened and waited until 45 minutes beyond the scheduled interview time but no response was received from the candidate. He was duly informed that no further accommodations could be made to his interview, and his non-response was documented as a withdrawal of interest in the position.

47. The crux of the matter lies therefore in determining whether Mr. Ponce-Gonzalez was required to attend the interview, or whether the Administration abused its power by introducing a new evaluation criterion which had been explicitly excluded by the vacancy announcement.

¹⁰ *Stefanizzi v. Secretary-General of the United Nations*, Judgment No. UNDT/2019/042.

¹¹ *Ibid.*, para. 19.

¹² *Ibid.*, para. 20.

¹³ Inter-office memorandum dated 11 April 2019 signed by the Chief of Mission Support to the Chief Human Resources Officer.

48. The Secretary-General and the UNDT relied on *Smith*¹⁴ to support the contention that the Respondent has discretion in the execution of staff selections, including introducing criteria. However, in *Smith*, the question for consideration was whether the Administration acted lawfully and reasonably when restricting the eligibility for the temporary vacancy to internal candidates who were staff members at the United Nations Mission in South Sudan (UNMISS). There, the TJO specified that it was not open to external candidates and Mr. Smith was excluded based exclusively on the fact that he was not a staff member at UNMISS. The Appeals Tribunal then considered that the decision by the UNMISS Administration to limit the appointment to UNMISS staff members was reasonable and that the appointment made in terms of that decision was lawful and reasonable.

49. The present case is, however, distinguishable from *Smith*, in which the criterion (the restriction to external candidates) was introduced in the TJO, whereas here, the disputable criterion (the CBI) was not introduced in the TJO, which, in quite the opposite fashion, expressly excluded the possibility of “any further assessment” of previously rostered candidates. The issue here is that the *criterion* seems to have been introduced not in accordance with the TJO, but in substantial contradiction with it.

50. The UNDT considered the issue of the introduction of the CBI for the assessment for the temporary position in its Judgment and found that the Administration had satisfied the minimum burden of proof that it acted regularly. It further noted that Section 3.5 of ST/AI/2010/4 Rev. 1 considers the CBI as a means of assessment for a TJO and that Mr. Ponce-Gonzalez had not shown any particular rule which stated that the assessment of candidates must strictly adhere to criteria established in the job opening.¹⁵ The UNDT found that ST/AI/2010/4 Rev. 1 is more authoritative than the TJO announcement and hence takes precedence over it.¹⁶

51. For the UNDT, all candidates without any exception had to undergo the interview and this requirement was known to all candidates well in advance. In addition, Mr. Ponce-Gonzalez was on three separate occasions invited and reminded to attend the interview.¹⁷ According to the UNDT, the Administration corrected the error of exempting rostered staff members from

¹⁴ See *supra*, footnote 8, para. 30. See also para. 90 of the Impugned Judgment.

¹⁵ Impugned Judgment, paras. 87 and 90.

¹⁶ *Ibid.*, para. 93.

¹⁷ Impugned judgment, paras. 85 and 86.

participating in the interview in the original announcement, and this was not prejudicial to Mr. Ponce-Gonzalez's right to fair and full consideration for the position.¹⁸

52. The administrative instruction ST/AI/2010/4/Rev.1 governs the administration of temporary appointments within the Organization. The purpose of a temporary appointment is to enable the Organisation to manage effectively and expeditiously its short-term staffing needs. As stated in General Assembly Resolution 63/250, "temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates".¹⁹

53. Incidentally, the Secretary-General correctly relies on Section 2.2(d) of ST/AI/2010/4/Rev.1 to show that temporary appointments are not limited to vacancies created by temporary positions, but may rather be granted for specific short-term requirements that are expected to last for less than one year at the time of the staff member's appointment, such as: (a) to respond to an unexpected and/or temporary emergency or surge in demand involving, for example, natural disaster, conflict, violence or similar circumstances; (b) to meet a seasonal or peak work requirement of limited duration that cannot be carried out by existing staff members; (c) *to temporarily fill a position whose incumbent is on special leave, sick leave, maternity or paternity leave or on assignment*; (d) to temporarily fill a vacant position pending the finalisation of the regular selection process; or (e) to work on a special project with a finite mandate.

54. Sections 3.3 and 3.4 of ST/AI/2010/4/Rev.1 establish the statutory requirements for the TJO:

3.3 The temporary job opening shall include a description of the qualifications, skills and competencies required and reflect the functions of the post, using to the greatest possible extent the database of generic job profiles maintained by the Office of Human Resources Management. Each temporary job opening shall indicate the date of posting and specify a deadline by which all applications must be received.

¹⁸ Impugned judgment, para. 91.

¹⁹ Section 1.1 of ST/AI/2010/4/Rev.1.

3.4 Temporary job openings shall be posted for a minimum of one week on the Intranet or be circulated by other means, such as e-mail, in the event that an Intranet is not available at the duty station concerned. A temporary job opening may also be advertised externally if deemed necessary and appropriate.

55. Among the statutory requirements for the TJO, there is no indication about the manner in which the candidates should be assessed. In this sense, Mr. Ponce-Gonzalez's insistence on the fact that the UNDT erred by failing to accept the requirement of strict adherence to criteria in the job opening is without merit. It is true that, as discussed, the vacancy announcement should state all the necessary requirements and methods of assessment for the relevant position. However, if the plain terms of the TJO exempting the previously rostered candidates from "any further assessment" applied, the very purpose of the selection exercise for the TJO would be questionable. Another complication might have been if there were more than one previously rostered candidates for the same post, then the manner of selection might have been unfair, particularly in the case where one or more of the previously rostered candidates were not suitable for the post. This dilemma indicates that there is a clear inconsistency between the statement which exempted the previously rostered candidates from any further assessment and the issuance of the TJO itself. It is true that such an exemption could be used for the RfR, but it was not adequate for the TJO and thus, the fact of being on a roster did not mean that the candidate would be selected for the TJO.

56. The Appeals Tribunal cannot thus conceive that the TJO intended that all previously rostered candidates would be automatically selected. This would have indeed contradicted the long-established jurisprudence according to which "[t]he roster is a pool of assessed candidates reviewed and endorsed by a central review body and approved by the head of department/office, (and) *who are available for selection* against a vacant position"²⁰ and that being on the roster does not create any expectancy or entitlement to selection and the mere fact of being on the roster does not guarantee a selection or a promotion.²¹ The UNDT was thus right when it found that Mr. Ponce-Gonzalez should not have been treated differently from the other candidates without justification, and that proceeding in the manner suggested by him would have breached the other shortlisted candidates' rights to fair and full consideration.²²

²⁰ *Charles v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-416, para. 28.

²¹ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-707, para. 29.

²² Impugned Judgment, para. 94.

57. Therefore, the only logical conclusion which can be drawn from the situation is that the UNDT was correct in its finding that there was a regrettable error in the TJO when it exempted the previously rostered candidates from any further assessment, and that this error was later rectified when all shortlisted candidates were invited to the CBI, as a means of assessment for the position. This is common practice in job openings and, in addition, is expressly authorised by Section 3.5 of ST/AI/2010/4/Rev.1. Hence, in the present case, the UNDT did not err in law by validating such an assessment method (CBI), even though further assessment had been excluded in the job opening. This change in the selection procedure brought to light a number of misunderstandings and should be avoided in the future. It does not, however, support the relief claimed by Mr. Ponce-Gonzalez that he be promoted to the position.

58. Mr. Ponce Gonzales did not dispute the fact that he did not attend the interview, despite having demonstrated an interest in it, as noted in the Comparative Analysis Report and evidenced by the e-mail exchanges between Mr. Ponce-Gonzalez and the UNISFA Human Resources Office. Mr. Ponce-Gonzalez claims that the interviews were improvised during the recruitment exercise and that the process was manipulated and tainted by improprieties. Mr. Ponce-Gonzalez further claims that the UNDT erred when it found that there was no clear and convincing evidence of improper motive and conflict of interest on the part of the Hiring Manager, given his role in the TJO process, including, but not limited to, “decisive influence”.

59. First, Mr. Ponce-Gonzalez’s contention that the bias on the part of the Hiring Manager had been affirmed by the Appeals Tribunal in its judgment on remand is misplaced. When deciding the appeal on another application contesting his non-selection for the same post but following the issuance of an RfR, the Appeals Tribunal stated that, hypothetically, Mr. Ponce-Gonzalez’s right to full and fair consideration in the second recruitment exercise (TJO) could be jeopardised, particularly should the same Hiring Manager, who had previously disqualified him, have a decisive influence on the selection. This argument led to the decision to remand that case, since contesting the decision to disqualify him might have been far more effective than challenging the eventual decision emerging from the TJO.²³ At no moment did the Appeals Tribunal state that there had been bias or improper motive. Its Judgment was on receivability, not on the merits, as the case was remanded to the UNDT for additional fact-finding and judgment on the merits.

²³ See *supra*, footnote 11, para. 43.

60. Second, while the UNDT dismissed the application on grounds that Mr. Ponce-Gonzalez had not shown any substantive irregularity in the selection exercise, the Appeals Tribunal is not persuaded that Mr. Ponce-Gonzalez has satisfied his burden of proof in establishing there was improper motive. His allegation of being “deliberately assessed as unsuitable on the basis of false information” does not go beyond mere speculation. The Appeals Tribunal has already held that the participation of a hiring manager who had previously excluded a candidate from another selection exercise does not in itself give rise to any substantive allegation of bias or discrimination, even in the more serious circumstance of the first selection exercise having been cancelled.²⁴ This is because to exclude a panel member from a selection exercise, there must be reasonable grounds and/or evidence of extraneous or improper motives.²⁵ Moreover, no accusation of impartiality of the Hiring Manager in the evaluation of Mr. Ponce-Gonzalez’s candidacy could be assumed by Mr. Ponce-Gonzalez’s allegations of procedural irregularities in the TJO.

61. Third and more importantly, what occurred in the present case is that Mr. Ponce-Gonzalez did not attend the required interview and thus was excluded from the selection exercise for the TJO. His claims about lack of impartiality of the interview panel, apart from having remained unsubstantiated, did not excuse his non-participation. The jurisprudence of *Loeber*²⁶ applies perfectly to the present case:

29. [...] Mr. Loeber chose voluntarily not to participate in the interview. Mr. Loeber claims that he was not required to do so, as the composition of the Panel was irregular, compromising its impartiality. He did not agree with the justification provided by the Administration, as in his view his concerns were not properly considered. As he stated during the UNDT hearing, for him, either there should have been a change in the composition of the Panel or an alternative Panel should have been created to interview him.

30. Mr. Loeber chose not to participate in the interview due to his belief that the Panel was biased against him. However, he has failed to present sufficient evidence of such bias. Furthermore, in failing to participate in the necessary recruitment procedures, he is estopped from contesting this aspect and without standing to contest the selection outcome.

62. As in *Loeber*, Mr. Ponce-Gonzalez was afforded full and fair consideration and his candidacy could not be evaluated because he failed to attend his interview. The Appeals Tribunal finds that the UNDT correctly found that Mr. Ponce-Gonzalez failed to establish any bias by the

²⁴ *Wilson v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-961, para. 21.

²⁵ *Ibid.*, para. 22.

²⁶ *Loeber v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-836.

members of the interview panel, the onus for which was on him.²⁷ Although rebuttable, the presumption of regularity of the selection exercise in the present case remained intact and the UNDT did not err in fact by finding that Mr. Ponce-Gonzalez was not entitled to, and showed no legal basis for, his exemption from the interview. Moreover, the UNDT did not err in fact in stating that a correction of an error in order to introduce interviews as a method of assessment was not prejudicial to Mr. Ponce-Gonzalez's right to full and fair consideration.

63. In light of the foregoing, Mr. Ponce-Gonzalez has not established that the UNDT, in rendering its judgment, exceeded its jurisdiction or competence, failed to exercise jurisdiction vested in it, erred on a question of law, committed an error in procedure such as to affect the decision of the case, or erred on a question of fact resulting in a manifestly unreasonable decision.

64. The appeal accordingly fails.

²⁷ *Ibid.*, para. 15.

Judgment

65. Mr. Ponce-Gonzalez's appeal is dismissed and Judgment No. UNDT/2021/024 is hereby affirmed.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Halfeld, Presiding
Juiz de Fora, Brazil

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on this 19th day of April 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar