



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

Judgment No. 2022-UNAT-1252

**Alejandro Frederico Izurieta Canova
(Appellant)**

v.

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

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2021-1584
Date of Decision:	1 July 2022
Date of Publication:	12 August 2022
Registrar:	Weicheng Lin

Counsel for Appellant: Anca Apetria

Counsel for Respondent: Francisca Lagos Pola

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Mr. Alejandro Federico Izurieta Canova in an application before the United Nations Dispute Tribunal (UNDT) contested the cancellation of Job Opening 75470 (JO 75470) for the post of D-1, Head of Unit for Economic Cooperation and Integration Among Developing Countries (the post), in the United Nations Conference on Trade and Development (UNCTAD) for which he had applied. The UNDT rendered Judgment No. UNDT/2021/074 (the Impugned Judgment), dismissing his application. Mr. Izurieta Canova appeals.
2. For the reasons set out in this judgment, we dismiss the appeal.

Facts and Procedure

3. Mr. Izurieta Canova applied for the post on 15 April 2017. Following an evaluation of candidates through screening, a written assessment and a substantive assessment of technical and professional knowledge, skills, and abilities, four candidates, including one female candidate and Mr. Izurieta Canova, were invited to a competency-based interview. Two candidates, namely Mr. Izurieta Canova and another male candidate, successfully demonstrated the required competencies during their respective competency-based interview.
4. The hiring manager, the Director, Division of Globalization and Development Strategies, UNCTAD, submitted his endorsement of the two candidates as “recommended” to the Secretary-General of UNCTAD, prior to submission to the Central Review Board (CRB), United Nations Office at Geneva (UNOG).
5. Thereafter, UNCTAD’s Departmental Focal Point for Women reviewed the hiring manager’s recommendation in accordance with Section 3.1(b) of ST/SGB/2008/12 (Departmental focal points for women in the Secretariat). It noted its concerns on the number of female applicants for the post and observed that broader dissemination of the job opening could possibly have led to a greater number of female applicants.
6. On the same day, the Secretary-General of the United Nations sent a memorandum to the Secretary-General of UNCTAD and other members of the Senior Management Group on the implementation of ST/AI/1999/9 (Special Measures for the Achievement of Gender Equality) stressing, *inter alia*, the Organization’s priority to achieve gender parity. In a memorandum dated 24 March 2019, addressed to the Secretary-General of UNCTAD, the

Assistant Secretary-General for Human Resources (ASG/HR), Department of Management Strategy Policy and Compliance (DMSPC), recalled the commitment of all Senior Managers to achieve a geographically diverse workforce and shared data about UNCTAD's geographical diversity at the end of 2018.

7. In a note dated 4 April 2019 to the Chef de Cabinet, Office of the Secretary-General of the United Nations, the Secretary-General of UNCTAD indicated that the two candidates recommended for JO 75470 were nationals from Italy and the Netherlands, both countries in the Western European and Others Group (WEOG) regional group, being the regional group in UNCTAD with the highest representation at the time. Consequently, the Secretary-General of UNCTAD requested approval to re-advertise the post with the intent to reach UNCTAD's gender parity goals and improve its geographical representation.

8. By e-mail of 17 June 2019, the Special Assistant, Office of the Assistant Secretary-General, Office of Human Resources, DMSPC, clarified to UNCTAD the process to follow pursuant to ST/AI/1999/9 (Special Measures for the Achievement of Gender Equality) when a Head of Entity intended to recommend for selection a male candidate instead of a female candidate. On the same date, by way of separate e-mail, DMSPC confirmed to UNCTAD that its Secretary-General was "empowered to make decisions relating to the administration of the staff selection process" under the new delegation of authority structure, and suggested that cancelling JO 75470 and re-advertising, which fell under the scope of such delegation, could be a better option.

9. On 19 June 2019, the Secretary-General of UNCTAD requested the Chief, Human Resources Management Section (HRMS), UNCTAD, to cancel JO 75470 and to re-advertise the post. By e-mail of 17 July 2019, the Chief, HRMS, UNCTAD requested the Chief, HRMS, UNOG, to cancel JO 75470. On 19 July 2019, JO 75470 was cancelled in Inspira.

10. Mr. Izurieta Canova then submitted a request for management evaluation on 2 August 2019. On 23 September 2019, the Under-Secretary-General for Management Strategy, Policy and Compliance, informed Mr. Izurieta Canova of the decision to uphold the decision to cancel JO 75470. On 12 December 2019, Mr. Izurieta Canova filed with the UNDT his application challenging the contested administrative decision to cancel the Job Opening.

11. On 28 June 2021, the UNDT issued the Impugned Judgment dismissing the application, finding the cancellation was a lawful exercise of discretion by the Secretary-General of UNCTAD. It held that the measures in ST/AI/1999/9 are consistent with the Charter of the United Nations as they constitute permissible and lawful affirmative action aimed legitimately at reaching gender and geographical goals set by the General Assembly.

12. With reference to the Organization's goal with respect to gender distribution to achieve equal representation in all posts in the professional category and above, overall and at each level, including posts at the D-1 level and above, as set out in Section 1.1 of ST/AI/1999/9, the UNDT held that it is reasonable for the Organization to deploy efforts until the gender parity goal is reached and accordingly that there were sound reasons supporting the Secretary-General's cancellation decision. In this regard, it noted: (i) only 19 per cent of candidates for the post were female when on 31 December 2018 UNCTAD's female representation at the D-1 level was 26.7 per cent, which fell short of the set target; (ii) OHR UNCTAD did not undertake any outreach efforts to widen the range of female candidates for JO 75470; and (iii) at the relevant time, the WEOG accounted for 47 per cent of the regional representation of UNCTAD's workforce.

13. The UNDT dismissed Mr. Izurieta Canova's contention that the memorandum of the Secretary-General dated 11 February 2019 could not be applied retroactively. It held that the memorandum did not constitute a new administrative issuance but merely reminded senior managers of the Organization's priority in achieving gender equality which was set out in ST/AI/1999/9. It held also that there was no merit in the argument that the Organization was estopped from raising the issue of gender and regional representation at a late stage of the recruitment process. The principle of estoppel was not applicable in the present case, because there was no right being asserted that contradicted a previous agreement by law. The gender parity policy was already in place at the time the post was opened for recruitment.

14. Mr. Izurieta Canova filed an appeal against the UNDT Judgment on 21 July 2021.

Submissions

Mr. Izurieta Canova's Appeal

15. Mr. Izurieta Canova requests the UNDT judgment be overturned or alternatively for the case be remanded to UNDT to a different Judge.

16. He maintains that the cancellation was of a regular and lawful recruitment process that had spanned more than one and half years and for which he was a recommended candidate after a competitive process.

17. The UNDT erred in fact and law in finding that the cancellation was based on “sound reasons” related to gender parity and geographical distribution. The UNDT erred in interpreting the policy ST/AI/1999/9 as it is an incorrect premise that the Secretary-Generals’ discretion is unfettered as long as it related to gender parity. The measures to achieve gender parity are dependent upon the qualification of women candidates and not upon desired numbers of female candidates. Accepting those as valid criteria for the cancellation decision amounts to creating ad hoc legal requirements to achieve gender parity, which is beyond the UNDT’s competence.

18. Mr. Izurieta Canova argues that there was no evidence to support that HR did not make efforts to attract women candidates. The review of female candidates was undertaken by both HR UNOG and HR of UNCTAD with no concerns raised in that regard. The Secretary-General did not request such evidence before taking the cancellation decision.

19. The evidence demonstrates that serious efforts had been made on the part of the Organization personally by the hiring manager to widen the range of qualified women for the post. Numerous efforts were made to disseminate the JO which was never disputed by the Secretary-General. The written testimony of the hiring manager revealed that not only did he undertake special efforts to reach qualified women candidates, but he informed the UNCTAD Secretary-General of same and the written testimony of Ms. B, who occupied the post at the time of the JO advertisement, revealed the hiring manager undertook numerous efforts to ensure the JO reached as many qualified women as possible. The UNDT failed to consider the efforts made by the Organization to attract more female candidates.

20. ST/AI/1999/9 and the 11 February 2019 memorandum on gender parity do not confer authority to heads of office to deny qualified, recommended male candidates from being selected based on the percentage of female candidates or the current female representation in the department. Rather, they provide for selection of female candidates when both male and female candidates are recommended, and all other factors are equal. They do not provide for the cancellation of an entire selection process when there are a few female candidates or when no qualified women are found and or recommended. Thus, the number of female candidates

and the percentage of female representation in UNCTAD are not valid reasons to cancel a selection process that has been properly conducted.

21. The UNDT also erred in finding that geographical representation was a sound reason to cancel the process. The reminder memorandum about achieving regional diversity in upcoming jobs does not give authority to retroactively cancel a lawful selection process. Further, the UNDT ignored facts such as that he was wrongly considered a national of the Netherlands (presumably because this was his last domicile prior to his appointment) but he is a national of Ecuador and Uruguay by birth.

22. The UNDT also erred in law and fact concluding the decision was not an act of discrimination and unequal treatment against him per Staff Rule 1.2(f) and ST/SGB/2008/5. The UNDT erred in making no finding on the violation of the principle of equal treatment. The UNDT ignored reference to the two other male candidates from UK and Kenya appointed without competition in 2015.

23. The UNDT erred in law in finding that estoppel and waiver did not apply to the decision and that the decision did not violate his rights. He participated in a selection process over one and half years having advanced after written test and oral interview and having been recommended for the post at the end of the process, he had a legitimate expectation he would be given full and fair consideration. Yet the Administration relied on invalid reasons proffered *ex post facto* to cancel a lawful recruitment. This unlawful cancellation deprived him of legitimate opportunity of being selected and his career progression.

24. Based on the above, Mr. Izurieta Canova requests the UNAT to reverse the Judgment and order UNCTAD to select him and/or continue the recruitment for the post at the point it had been cancelled.

25. In the alternative, he requests that the UNAT order UNCTAD to pay him retroactively as of 19 July 2019 the salaries corresponding to D-1 level post, including all legal entitlements and emoluments such as pension contribution as if he had been appointed to the post and he would have retired from the post. He also seeks UNCTAD pay him compensation of 2 years gross salary for the prejudice.

26. Lastly, he seeks the UNAT to order legal fees (costs) for both the UNDT and the UNAT proceedings in the amount of CHF 20,000.

The Secretary-General's Answer

27. The Secretary-General requests the UNAT to uphold the Judgment and dismiss the appeal in its entirety.

28. The UNDT correctly found the cancellation decision was lawful as supported by the legal framework. The Administration has wide discretion, and the framework does not regulate when a head of department may cancel a selection process as cancellation is a discretionary decision.

29. Specifically, the DMSPC Staff Selection Manual provides that a request for cancellation may be approved if there are no qualified candidates of the gender which is underrepresented for the job opening level. The gender parity policy is supported in Article 8 of the UN Charter and General Assembly resolutions urging for 50/50 parity in all Secretariat posts especially for D level and above. In the instant matter, prior to the review by the CRB, the Secretary-General exercised his broad discretion to cancel the post for the purpose of increasing gender parity and geographical representation among the pool of applicants.

30. The UNDT's finding also conforms to the UNAT jurisprudence on cancellation of the selection process. The Administration is not obliged to complete a process once it has begun as held in *Kinyanjui*¹ and *Anis Basil Al Mousa*,² if the cancellation is for sound reasons and if for reasons in the interest of the Organization.

31. In addition, the UNDT was correct in finding that Mr. Izurieta Canova failed to meet his burden of proof that the decision was motivated by bias, prejudice, or improper motives. The record shows that the cancellation decision was made following a reasoned process by the Secretary-General of UNCTAD, and based on the applicable rules and jurisprudence, and in line with the Organization's policy on the achievement of gender parity and geographical diversity of workforce. The UNDT did not err in finding that gender and geographical representation were sound reasons for taking the cancellation decision.

¹ *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932.

² *Anis Basil Al Mousa v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2021-UNAT-1134.

32. As for the Mr. Izurieta Canova's claim that the UNDT did not consider his argument that OHR, UNCTAD had already made efforts to disseminate the Job Opening amongst female staff, this is not a reason to reverse the Judgment. The UNAT has held in *Abu Jarbou*³ that it is not necessary for any court, whether a trial or appellate court, to address every claim made by a litigant, especially when a claim has no merit.

Considerations

33. Mr. Izurieta Canova has applied in terms of Article 18(1) of the Rules of Procedure of the UNAT for an oral hearing to be held in this case. As this is a straightforward matter, not attended by any factual or legal complexity, we do not consider that a hearing would assist in the expeditious and fair disposal of the case. For that reason, the application for an oral hearing is refused.

34. The question for decision is a simple one: Was the impugned cancellation decision by the Secretary-General of UNCTAD a lawful and reasonable exercise of discretion?

35. This Tribunal has consistently held that the Administration is not obliged to pursue or complete a recruitment process once begun. The Administration has a wide discretion to cancel a procedure for sound reasons and in the interest of the Organization.⁴ Provided there is a reasonable and rational basis for the decision, the UNDT should defer to the Administration and not interfere with the exercise of discretion. The standard of review is the lower standard of rationality because the Administration is best placed to assess and implement polycentric human resource decisions that are allocative and distributive in nature.

36. In assessing the reasonableness and rationality of the cancellation decision generally, regard must be had to the motive, purpose, basis and effect of the decision. If there is a rational connection between the purpose of the empowering provision, the information on which the decision is based and the purpose and reasons for it, the decision will be rational and thus reasonable and lawful.

³ *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-292.

⁴ *Kinyanjui* Judgment, *op. cit.*

37. The motive for the cancellation decision was to advance the affirmative action policy and the requirements of geographical representation. The Organization is the custodian of human rights internationally and is obligated to advance the cause of gender equity; and, given its structural character, it is also required to ensure that its staff complement reflects and represents the different regions of the world.

38. The evidence indisputably reveals that the first recruitment exercise did not yield a satisfactory result in achieving those imperatives. The legitimate purposes of the gender and regional policies were not realized. Thus, in his discretion, the Secretary-General of UNCTAD opted to start the process again in the hope that a second round would cast the net wider and produce a more representative pool of candidates to be considered for selection. Hence, the cancellation decision aimed at achieving a legitimate policy and was rationally connected to that purpose.

39. Mr. Izurieta Canova's claim of discrimination is formalistic and is premised on a misunderstanding of the precepts of substantive equality. The differentiation in this instance was aimed at redressing past patterns of disadvantage (where males from certain geographical regions were previously favored). To achieve the objectives of gender fairness and regional representation, and to harmonize the interests of the people of the Member States for the common good, it is essential to regulate and it is impossible to do so without differentiation and without classifications that treat people differently. As said, differential treatment which pursues a legitimate policy is not unfair discrimination if there is a rational connection between the differentiation and the purpose it is designed to achieve. If it is justified in that way, it does not amount to discrimination. Fair and reasonable differentiation is acceptable in most modern societies.

40. Likewise, the UNDT did not err in rejecting Mr. Izurieta Canova's arguments regarding estoppel. The Administration did not misrepresent the legal position by not expressly stipulating the requirements of affirmative action and regional representation in JO 75470. These internal policies are well known, and Mr. Izurieta Canova cannot contend that he was prejudiced by reliance on any misrepresentation of them. These requirements also do not equate to ordinary eligibility criteria aimed more specifically at functional competence or occupational suitability. Hence, the failure to disclose these requirements in a job opening or vacancy announcement does not preclude the Administration from relying on them (as it is

obliged to do) in making any selection. All appointments are subject to the internal policies of the Organization.

41. The UNDT moreover did not err in concluding that the memorandum of 11 February 2019 did not constitute a new issuance that was applied retroactively. The applicable legal instrument was ST/AI/1999/9. The cancellation decision was squarely in accordance with its provisions.

42. In the premises, the UNDT did not err in its determination that the cancellation decision was lawful and reasonable. The appeal must accordingly be dismissed.

Judgment

44. The appeal is dismissed and Judgment No. UNDT/2021/074 is affirmed.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022.

(Signed)

Judge Murphy, Presiding
New York, USA

(Signed)

Judge Knierim
Hamburg, Germany

(Signed)

Judge Halfeld
New York, USA

Judgment published and entered into the Registry on this 12th day of August 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar