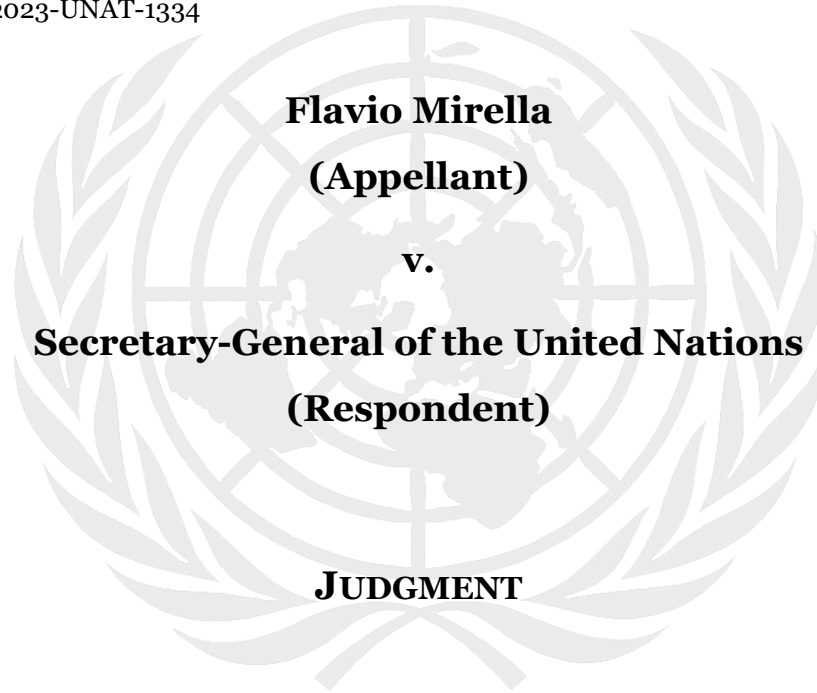




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1334



**Flavio Mirella
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Kanwaldeep Sandhu Judge John Raymond Murphy
Case No.:	2022-1657
Date of Decision:	24 March 2023
Date of Publication:	2 May 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	Robbie Leighton, OSLA
Counsel for Respondent:	Francisca Lagos Pola

JUDGE SABINE KNIERIM, PRESIDING.

1. Mr. Mirella, a staff member in the United Nations Office on Drugs and Crime (UNODC), appeals Judgment No. UNDT/2021/143 (the impugned Judgment) in which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) rejected his application contesting his non-selection for the position of Deputy Director (Operations: Drug Control and Crime Prevention) at UNODC.
2. Mr. Mirella appeals and requests that the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) reverse the impugned Judgment and rescind the contested non-selection decision or award him loss of opportunity damages.
3. For the reasons set forth herein, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure

4. The Division of Operations (DO) of UNODC advertised the position of Deputy Director (Operations: Drug Control and Crime Prevention) at the D-1 level in Job Opening (JO) 107776.
5. On 14 December 2018, Mr. Mirella who had been at the P-5 level for many years, applied for the position.
6. On 17 December 2018, the Hiring Manager recommended the selection of an individual from the pre-approved roster of candidates.
7. On 9 January 2019, the Hiring Manager advised the Chief, Human Resources Management Section (HRMS) that the selected rostered candidate was no longer available, and that rather than select the second recommended candidate, the Executive Director (ED, UNODC) wished to have the full selection process move forward with review of more applicants. The Hiring Manager requested that all eligible candidates be released so that she could start the long and shortlisting for the position.
8. From the 179 candidates who applied, 111 applications were released to the Hiring Manager by HRMS. She reviewed the released eligible candidates and placed Mr. Mirella on the longlist. She ultimately shortlisted eight candidates, but not Mr. Mirella.

9. On 15 February 2019, the Hiring Manager made a recommendation to HRMS of two candidates for the position, both of whom were pre-approved roster candidates. HRMS, in turn, submitted this recommendation to the ED, UNODC, on 18 February 2019.

10. With regard to the candidacy of Mr. Mirella, the Hiring Manager stated that:¹

While he has over 15 years experience with UNODC, it is not ‘progressively responsible experience with an excellent performance record’ as he has been at same level (P5) since 2003 and the amount and complexity of responsibility has not progressively increased.

11. On 4 March 2019, the Office of the Executive Director (OED) provided some feedback on the recommendation. OED stated that they were “somehow confused” about the assessment, observing, among other things, that it “appear[ed] that the same type and length of qualifying experience make some applicants suitable for the written test and some not suitable”.² In addition, OED noted that no external applicants made it to the written test. OED shared some specific comments and requested clarifications of possible inconsistent treatment of candidates. With regard to Mr. Mirella, OED noted that he “meets the requirements and the desirables indicated in the job opening”.

12. That same day, HRMS conveyed OED’s observations to the Hiring Manager, and asked for her review and feedback.

13. On 6 March 2019, the Hiring Manager provided an explanation as to her assessment process and application of the work experience criteria. In pertinent part, she noted:³

OED states that “*the criteria used to exclude some from the written test were not taken into consideration when evaluating those who had been admitted to it*” and that “*the same type and length of qualifying experience make some applicants suitable for the written test and some not suitable.*” This is wrongly observed, and the conclusion is not supported by a careful analysis of the facts, which I am sure you can see in the paragraphs to follow. On the contrary, the same criteria were consistently applied but with much more careful scrutiny applied to both the criteria and the applicants’ claims than summarily applied by OED reviewers. The reasons for these decisions are set forth below.

...

¹ Appellant’s Annex 5 (Hiring Manager’s candidate assessment matrix).

² Appellant’s Annex 6 (Office of the Executive Director request for clarification from Hiring Manager).

³ Appellant’s Annex 7 (Response to the Office of the Executive Director request for clarification from Hiring Manager), emphases in original.

Please note that the candidates below were evaluated against the above criteria that go beyond simply requiring a number of years of experience but further require “*excellent performance record*” while performing at a “*senior level*” while delivering certain leadership, management, and substantive duties relevant to the post. Also, “*proven demonstrated successful results*” were stated as desirable. To the extent the records of performance of candidates were assessable they were applied against these criteria.

These are objectively verifiable facts that should inform the short[-]listing process to avoid advancing every barely qualified candidate to the next stage of the selection process. Otherwise, a hiring manager’s failure to exercise discipline during short[-]listing would create unnecessary crowding of the short[-]list and written assessment and interview processes, leading to a waste of time and effort, and defeating the entire purpose of narrowing of the pool from a long[-]list to a short[-]list. In my view, too many selection processes in UNODC today are lacking the exercise of this management responsibility. Failing to narrow the pool to those most qualified leads to unnecessary use of time and resources required to finalize a selection process. I see this leading to excess workload as well as damage to morale among staff by raising false expectations where it is not warranted. Therefore, I have consciously exercised these responsibilities of the hiring manager in this case, as I have done in a previous case where I lead the selection panel, and have been encouraging managers under my supervision to do the same in the interest of reducing the time required for completing selection processes - which as you know is a corporate priority.

Further, the application of JO’s criteria was not done in a vacuum or in a hurry. As I evaluated the rich and numerous applicant pool, with many internal candidates (17 from UNODC), I took special care to look closely among similar sounding experiences, to differentiate carefully the actual content of the experience and the known achievements made during assignments, instead of simplistically counting the years of experience, etc. For instance, while many candidates would have experience “coordinating and leading the implementation of programmes and projects at the field level”, some experiences are more valuable and relevant in the context of discharging the duties of Deputy Director DO, as described in the JO. As a supervisor to many of the applicants, it is my prerogative, indeed my duty as the hiring manager, and my obligation to the Organization, to consciously apply their known professional record of duties, performance and results against the established criteria in the JO. This also facilitated reducing the very long list of candidates to advance those best matching the criteria to the next phase of assessment.

...

(...) Flavio Mirella

As stated above, it is my responsibility as the hiring manager to have a more careful and nuanced look into the similar sounding experiences and to verify the applicant’s claim against established facts. Following this criteria strictly within the JO’s parameters, I have assessed that Mr. Mirella does not meet the following two requirements: “progressively

responsible professional experience” “with an excellent performance record”. It is my prerogative and duty to apply my assessment for these requirements and I have no second thoughts about this leading to non-shortlisting of Mr. Mirella.

14. On 20 March 2019, the ED, UNODC, and the Director, Division of Management, UNODC, met with the Hiring Manager to discuss the rationale behind her recommendation. A Note to File was prepared of this meeting.

15. On 21 March 2019, the ED, UNODC approved the selection of the candidate recommended by the Hiring Manager.

16. On 26 March 2019, Mr. Mirella was advised that he was not selected for the position.

17. On 22 May 2019, Mr. Mirella requested management evaluation of the non-selection decision.

18. On 5 July 2019, the Secretary-General decided to uphold the non-selection decision.

19. On 27 September 2019, Mr. Mirella filed an application with the UNDT challenging the non-selection decision.

The impugned Judgment

20. In the impugned Judgment, the Dispute Tribunal first agreed with the Respondent that Mr. Mirella’s challenge to not being shortlisted was not receivable, because it was not a final decision. Thus, the Dispute Tribunal focused on the non-selection decision, which encompassed Mr. Mirella’s contentions regarding shortlisting.⁴

21. The Dispute Tribunal found that whether candidates for a particular vacancy possess all required criteria is subject to an assessment by the Hiring Manager. The Tribunal further found that the Hiring Manager provided a detailed account of the evaluation process that she followed, and in Mr. Mirella’s case, concluded that he met the 15 years of experience quantitatively but not qualitatively.⁵

⁴ Impugned Judgment, para. 16.

⁵ *Ibid.*, para. 23.

22. The Dispute Tribunal stated that it “examined with special attention” the Hiring Manager’s detailed e-mail in response to the questions raised by OED as well as the Note to File prepared of the meeting between the Hiring Manager and the ED, UNODC.⁶

23. Following its review, the Dispute Tribunal was satisfied that the Hiring Manager assessed the candidates, including Mr. Mirella, within the proper framework and against the criteria of the JO. The Dispute Tribunal concluded that the Hiring Manager “provided a detailed reasoned account” of her assessment process, and accordingly, Respondent had “more than minimally shown that [Mr. Mirella] was afforded full and fair consideration”.⁷

24. The Dispute Tribunal also rejected Mr. Mirella’s argument that because he was subsequently rostered for a similar position but a different job opening, that this meant he should have been shortlisted for the contested JO.⁸

25. Finally, the Dispute Tribunal found that there was no evidence to support any bias by the Hiring Manager in the selection recommendation process.⁹

26. On 30 November 2021, the Dispute Tribunal dismissed Mr. Mirella’s application.

27. Mr. Mirella filed an appeal of the impugned Judgment on 28 January 2022, to which Respondent filed his answer on 29 March 2022.

Submissions

Mr. Mirella’s Appeal

28. Mr. Mirella submits that the Dispute Tribunal erred as a matter of law when it found that Section 7.4 of Administrative Instruction ST/AI/2010/3 (Staff selection system) entrusted the Hiring Manager with the discretion to make the assessment of whether he possessed all the required criteria in the vacancy. Mr. Mirella argues that Section 7.4 provides for a review of candidates to ascertain those “who appear most qualified for the job” and that inclusion of the word “most” indicates a comparative review against other candidates.

⁶ *Ibid.*, para. 24.

⁷ *Ibid.*, para. 27.

⁸ *Ibid.*, para. 30.

⁹ *Ibid.*, para. 31.

29. Mr. Mirella contends that the Dispute Tribunal erred in fact and in law by finding that the Hiring Manager reasonably excluded him under Section 7.4, even though the Hiring Manager did not compare Mr. Mirella's experience against that of other candidates. Rather, the Hiring Manager excluded Mr. Mirella on the basis that he did not meet the minimum requirements.

30. Mr. Mirella submits that the Dispute Tribunal erred in law by finding that the Hiring Manager had discretion to interpret the meaning of "progressively responsible experience" in the vacancy announcement. Mr. Mirella points out that this phrase appears in all United Nations global vacancy announcements for the P-1 level upwards, and that whether a candidate meets this criterion must be based on objective fact, and not subject to the Hiring Manager's discretion.

31. Mr. Mirella draws attention to the fact that he was found to meet the experience requirement by OHRM when it screened his application and that OED also queried why he was excluded given that he had the requisite years of experience. Mr. Mirella further notes that less than a year after the events in question, he was rostered for a D-1 level position that had this same experience requirement. Mr. Mirella submits that the Dispute Tribunal erred in law in finding that the Hiring Manager had the discretion to define this global minimum standard differently than in other parts of the Organization.

32. Mr. Mirella submits that the Dispute Tribunal erred in law and failed to exercise jurisdiction by not considering his arguments regarding the legality of the Hiring Manager's definition and application of the term "progressively responsible experience". Mr. Mirella asserts that the Dispute Tribunal misrepresented his arguments, and thus failed to exercise jurisdiction over the arguments that he actually made. Mr. Mirella states that his actual arguments were that he was not subject to a comparative review (and should have been) and that the definition of "progressively responsible" as applied by the Hiring Manager was "arbitrary".

33. Mr. Mirella submits that adoption of the Hiring Manager's interpretation of "progressively responsible" would mean he would no longer be eligible to apply for any D-level position. Mr. Mirella argues that the Hiring Manager essentially finds that his failure to be promoted within a certain period renders a candidate ineligible for promotion.

34. Mr. Mirella submits that the Dispute Tribunal erred in law in finding that his rostering for a D-1 position after the events in this case was irrelevant. To the contrary, Mr. Mirella argues that his rostering shows that other hiring managers confirm that he meets the global minimum work experience requirement for a D-1 position.

35. Mr. Mirella also claims that the Dispute Tribunal failed to exercise jurisdiction when it did not consider the Personal History Profile (PHP) of another candidate that was submitted by Mr. Mirella, wherein that candidate had spent similar time at the P-5 level as Mr. Mirella, but with initially greater managerial responsibility and later less, yet this other candidate was found to have met the work experience requirement.

36. Mr. Mirella submits that the Dispute Tribunal erred in fact and in law in finding that the Hiring Manager had provided a reasoned justification for Mr. Mirella's exclusion. Mr. Mirella states that the Dispute Tribunal erred in finding that when the Hiring Manager evaluated the "claimed vs. known experience" of candidates, that the "known experience" was "directly and objectively from the records". Mr. Mirella claims that the Hiring Manager was "quite open" that she was applying her subjective experience with the candidates to draw her conclusions. Mr. Mirella further argues that the Dispute Tribunal erred in failing to address how such subjective evaluation inevitably leads to unequal treatment of candidates. Mr. Mirella also alleges that the Dispute Tribunal should have addressed the fact that the Hiring Manager had little to no knowledge of Mr. Mirella's functions or performance, having interacted with him only five times in his career.

37. Mr. Mirella submits that the Dispute Tribunal erred in law and failed to exercise jurisdiction in not addressing the inherent contradiction in the Hiring Manager acknowledging that he met the "basic evaluation criteria" while concurrently finding that he did not meet the minimum requirements for the post. The Dispute Tribunal's conclusion that the Hiring Manager's decision was reasonable is contradicted by these statements.

38. For the foregoing reasons, Mr. Mirella requests that the impugned Judgment be overturned. He further requests rescission of the contested non-selection decision or in the alternative, loss of opportunity damages. Mr. Mirella submits that such damages should be calculated from the position that the Mr. Mirella's subsequent rostering at the D-1 level demonstrated his suitability to perform the functions listed in the contested JO.

The Secretary-General's Answer

39. The Secretary-General submits that the Dispute Tribunal correctly found that the non-selection decision was lawful, and this conclusion is in accordance with relevant jurisprudence.

40. The Secretary-General submits that, pursuant to Article 101(1) of the Charter of the United Nations, he has broad discretion in matters of staff selection. The Secretary-General points out that the Appeals Tribunal has recognized this broad discretion, and held that “in reviewing such decisions, it is not the role of the UNDT or the UNAT, in the absence of evidence of bias, discriminatory practices or *mala fides* to substitute its judgment for that of the competent decision-maker”.¹⁰

41. The Secretary-General points to guiding principles set by the Appeals Tribunal with respect to the review of administrative decisions regarding appointments and promotions. First, in *Majbri*,¹¹ the Appeals Tribunal has ruled that the factors to be examined are: “(1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration”. Second, the Appeals Tribunal in *Charles*,¹² has held that a selection “should be upheld when candidates have received full and fair consideration, when discrimination and bias are absent, when proper procedures have been followed, and when all relevant material has been taken into consideration”.

42. The Secretary-General also relies on the “presumption of regularity,” set forth in *Rolland*, namely that “[t]here is always a presumption that official acts have been regularly performed”.¹³

43. The Secretary-General submits that under Section 7.1 of ST/AI/2010/3, the human resource office will pre-screen candidates “to determine whether they meet the minimum requirements of the job opening”. Section 7.2 of the same administrative instruction provides that the applications that successfully passed the pre-screening process are released to the hiring manager. Under Section 7.4, the hiring manager “shall further evaluate all

¹⁰ *Bofill v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-383, para. 21.

¹¹ *Majbri v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-200, para. 35.

¹² *Charles v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-286, para. 27 (internal citation omitted).

¹³ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 26.

applicants released to him/her and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation”. Section 7.5 provides that only the shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening.

44. The Secretary-General submits that the Hiring Manager in this case followed the proper procedures and shortlisted only those candidates that appeared to her to be the most qualified based on a review of the applications.

45. The Secretary-General argues that the Hiring Manager more than minimally demonstrated that she gave Mr. Mirella full and fair consideration. She reviewed Mr. Mirella’s PHP against the work experience requirement in the JO and noted that although he had been at the P-5 level for 15 years, the amount and complexity of responsibility during that time had not increased.

46. The Secretary-General submits that Mr. Mirella has made unsubstantiated allegations that the Hiring Manager did the shortlisting based on her personal knowledge of the candidates, but there is no evidence in the record to support this.

47. The Secretary-General maintains that Mr. Mirella has failed to demonstrate that the Dispute Tribunal made any errors warranting reversal of the impugned Judgment. The Secretary-General points out that Mr. Mirella’s appeal repeats all of the arguments from his submissions to the Dispute Tribunal, particularly his rejoinder. Accordingly, the Appeals Tribunal should dismiss the appeal because, according to settled jurisprudence, an “appeal is not an opportunity for the parties to reargue their case”.¹⁴

48. The Secretary-General submits that Mr. Mirella is incorrect to argue that the Hiring Manager was supposed to conduct a comparative assessment of the qualifications of the candidates under Section 7.4 of ST/AI/2010/3. He argues that a plain reading of this provision shows that the Hiring Manager is only required to evaluate each applicant and prepare a shortlist of those who appear most qualified for the job opening based on a review of each individual applicant’s documentation. The Secretary-General submits that there is no obligation at this stage for the Hiring Manager to do a comparative assessment of all released candidates, which in this case would have been of 111 candidates.

¹⁴ *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-096, para. 21.

49. The Secretary-General submits that Section 7.4 gives hiring managers extensive discretion and flexibility to conduct the assessment of the applicants released to them, and that the Appeals Tribunal has recognized the broad discretion of hiring managers to establish shortlists.¹⁵ In Respondent's view, Mr. Mirella has failed to demonstrate any error of law in the Dispute Tribunal's conclusion that Mr. Mirella's exclusion from the shortlist complied with Section 7.4.

50. The Secretary-General considers that Mr. Mirella's main argument is that the Hiring Manager's interpretation of the phrase "progressively responsible experience" was not allowed under the Staff Rules, and that the Dispute Tribunal erred in permitting the Hiring Manager to subjectively interpret a standard phrase.

51. The Secretary-General submits that Mr. Mirella's arguments are misplaced, and that there is not one way of interpreting "progressively responsible experience" and there is no set definition of this term in the Organization's legal framework. The Secretary-General argues that an assessment of what constitutes progressively responsible experience varies from position to position and it is the Hiring Manager's responsibility to determine what they consider required for a particular position and apply such criteria fairly and consistently to all applicants. The Secretary-General relies on *El-Madhoun*, in which the Appeals Tribunal upheld the decision of a hiring manager to exclude a staff member from the shortlist for not possessing a university degree when the vacancy announcement stated that "a university degree or equivalent experience" was required.¹⁶

52. The Secretary-General further argues that every vacancy has distinctive characteristics, and the hiring manager for each vacancy, because they are part of the department or office that is recruiting, is in a unique position to determine what qualifications are required to best fulfil the functions. The Secretary-General maintains that a selection process with the same candidates for the same position carried out by two different hiring managers may end up with different results, but both processes can be proper and lawful.

¹⁵ *El-Madhoun v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-947, para. 14.

¹⁶ *Ibid.*, paras. 11 and 19.

53. The Secretary-General submits that Mr. Mirella's interpretation of the Hiring Manager's e-mail of 6 March 2019, in which she explained how she evaluated the candidates, is misleading. Mr. Mirella argues that her assessment was subjective and arbitrary. The Secretary-General counters that the Hiring Manager's assessment was neither, rather it was based on objective factors such as the amount and complexity of the responsibilities that Mr. Mirella had in the course of his last 13 years at the P-5 level in UNODC. The Secretary-General submits that this conclusion is supported by Mr. Mirella's PHP.

54. The Secretary-General submits that the various arguments advanced by Mr. Mirella to the effect that the Dispute Tribunal failed to exercise jurisdiction by ignoring numerous of his arguments is without merit. The Secretary-General maintains that the impugned Judgment sets forth Mr. Mirella's submissions in detail and the Dispute Tribunal gave them due consideration. In any event, the Dispute Tribunal was not obliged to review each and every unsubstantiated claim in order to draw its conclusion.

55. The Secretary-General requests that the Appeals Tribunal affirm the impugned Judgment and dismiss the appeal in its entirety.

Considerations

56. The crucial issue on appeal is whether, contrary to the impugned Judgment, the decision not to select Mr. Mirella for the D-1 post was unlawful because he should (at least) have been shortlisted. We find that Mr. Mirella's appeal does not show any errors on the part of the UNDT.

57. Under the constant jurisprudence of the Appeals Tribunal, the scope of judicial review in matters of staff selection is limited. We have repeatedly acknowledged that "[t]he Secretary-General has broad discretion in making decisions regarding promotions and appointments", and that "it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process".¹⁷

58. In *Verma*,¹⁸ we grounded this principle in the Organization's legal framework, stating:

¹⁷ *Abassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 24.

¹⁸ *Verma v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-829, para. 13.

(...) In terms of the discretion vested in the Administration, under Article 101(1) of the United Nations Charter and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of the Appeals Tribunal has clarified that, in reviewing such decisions, it is the role of the Tribunals to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner.

59. Accordingly, the Appeals Tribunal has instructed that:¹⁹

(...) In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

60. Given these narrow parameters of review, while the “Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process” it “may do so only under extremely rare circumstances”.²⁰ As we stated in *Rolland*,²¹ “[g]enerally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion”.

61. In addition, in matters of staff selection, the Appeals Tribunal applies the principle of a presumption of regularity:²²

(...) There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant’s candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

62. In the present case, we agree with the UNDT that the Administration has shown that Mr. Mirella’s candidature was given full and fair consideration which satisfies the presumption of regularity, and Mr. Mirella has not proven through clear and convincing evidence that he was denied a fair chance.

¹⁹ *Abassi Judgment, op. cit.*, para. 23.

²⁰ *Rolland Judgment, op. cit.*, para. 20.

²¹ *Ibid. See also Kucherov v. Secretary-General of the United Nations, Judgment No. 2016-UNAT-669, para. 27* (“The judicial review of selection and promotion decisions is limited to the determination as to whether or not a candidate received full and fair consideration.”).

²² *Rolland Judgment, op. cit.*, para. 26.

63. Mr. Mirella alleges that the UNDT erred in law by finding that his exclusion from the recruitment process was in compliance with Section 7.4 of ST/AI/2010/3. In Mr. Mirella's view, Section 7.4 requires a comparative review; however, the Hiring Manager applied a threshold test when she stated that he did not meet the minimum experience requirement. Mr. Mirella argues that the review of whether candidates meet the minimum requirements for a post is entrusted to OHRM.²³ As will be explained, these arguments do not put the impugned Judgment into doubt.

64. Section 7 of ST/AI/2010/3 provides, in relevant parts, as follows:

Section 7 Pre-screening and assessment

7.1 Applicants applying to job openings will be pre-screened on the basis of the information provided in their application to determine whether they meet the minimum requirements of the job opening.

7.2 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support will release electronically to the hiring manager (for position-specific job openings) and occupational group manager (for generic job openings), within and/or shortly after the deadline of the job opening, the applications of candidates who have successfully passed the pre-screening process, together with the names of pre-approved eligible candidates, for consideration for selection.

7.3 OHRM, the local human resources office or the Field Personnel Division of the Department of Field Support has the authority to pre-screen individuals identified through an outreach strategy aiming for target groups in terms of gender, geography and/or specialized expertise within the deadline of the job opening. The applications of successful candidates will be released to the hiring or occupational group manager.

7.4 The hiring (...) manager shall further evaluate all applicants released to him/her and shall prepare a shortlist of those who appear most qualified for the job opening based on a review of their documentation.

7.5 Shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening. The assessment may include a competency-based interview and/or other appropriate evaluation mechanisms, such as, for example, written tests, work sample tests or assessment centres.

7.6 For each job opening, the hiring (...) manager shall prepare a reasoned and documented record of the evaluation of the proposed candidates against the applicable evaluation criteria to allow for review by the central review body and a selection decision by the head of the department/office.

²³ In this case, HRMS performed the functions of OHRM in Section 7, ST/AI/2010/3.

65. Mr. Mirella does not take into account that OHRM and the hiring manager are performing separate functions in the pre-screening and assessment process. Based on the applications submitted, OHRM undertakes a pre-screening review to evaluate which candidates are eligible for the post. It is then the task of the hiring manager to decide which candidates are the most promising because only those shall proceed to the next step in the selection process. For this purpose, the Hiring Manager first creates a longlist and then decides which of the eligible candidates appear “most qualified” for the job opening to be put on the shortlist.

66. In evaluating and deciding which candidates appear most qualified for the job opening, a hiring manager has broad discretion. In the past, the Appeals Tribunal has upheld a decision of a hiring manager to exclude a candidate from a shortlist for not possessing a university degree when the vacancy announcement stated that “a university degree or equivalent experience” was required.²⁴ In that case, the hiring manager applied the requirement of a university degree as a threshold test for the decision whether or not to further regard a candidate, even though, according to the vacancy announcement, “equivalent experience” could also suffice. Nonetheless, in the absence of any allegation of bias or discrimination, we found no error in this decision.

67. As to the interpretation of the requirement of “extensive experience” in a job opening, we have also allowed the Administration considerable leeway. For example, in *Mohamed*, we opined:²⁵

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

²⁴ *El-Madhoun Judgment, op. cit.*, paras. 18-19.

²⁵ *Mohamed v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-985, para. 32.

68. With regard to the requested “minimum of 15 years of progressively responsible professional experience“ in JO 107776 (and other job openings), it has to be noted that this criterion has both a quantitative component (the number of years) and a qualitative component (“progressively responsible” experience). While the more formal and quantitative evaluation might be sufficient for the pre-screening by OHRM and even for the longlisting, we find no fault in the Hiring Manager’s decision to closely review the quality of the candidates’ work experience, in terms of assessing whether it reflected “progressively responsible” experience, and to only put those candidates on the shortlist who fulfilled the criterion in this respect. Our conclusion is in accord with our decision in *Dhanjee*,²⁶ in which we affirmed the “broad discretionary power” of the Hiring Manager “to exercise a preliminary evaluation of the applicants in order to establish the shortlist” and recognized that identifying the “most qualified or promising” candidates necessarily requires the exercise of judgment, with which this Tribunal “will not easily interfere”.

69. As is apparent from her 6 March 2019 explanation, it was the Hiring Manager’s goal to keep the number of shortlisted candidates rather small in order to streamline the subsequent steps of the selection process.²⁷ Although it would also be possible to take a broader approach and allow more candidates on the shortlist, the Hiring Manager’s decision is within her broad discretion and in accordance with Section 7.4 of ST/AI/2010/3.

70. It is this difference between a formal/quantitative and a merit-based evaluation which explains both OHRM’s and Mr. Mirella’s difficulties in understanding the Hiring Manager’s decision. Having been in P-5 positions for more than 15 years, Mr. Mirella undoubtedly is eligible for a D-1 position and could expect to be put on the longlist for relevant vacancies. However, for the shortlisting, it was lawful and reasonable for the Hiring Manager “to look closely among similar sounding experiences, to differentiate carefully the actual content of the experience and the known achievements made during assignments, instead of simplistically counting the years of experience”.²⁸ It is clear from the Hiring Manager’s explanation that, although she found him eligible and suitable for the job (or she would not

²⁶ *Dhanjee v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-527, paras. 33-34 (internal citation omitted).

²⁷ Indeed, we note that in the original selection decision from the roster (*supra* at para. 6), the Hiring Manager emphasized her wish to complete the selection process by the end 2018, and that she believed her “accountability function” was “severely compromised without having the deputy in place”. See Appellant’s Annex 2 (Recommendation for recruitment from roster).

²⁸ Appellant’s Annex 7 (Response to Office of Executive Director request for clarification from the Hiring Manager).

have put him on the longlist) she did not think that Mr. Mirella fulfilled the criterion of “15 years of progressively responsible professional experience” in terms of the substance of his work during this period. Thus, while the Hiring Manager, like OHRM, was of the view that Mr. Mirella fulfilled the minimum eligibility requirements for the position, she found that he did not fulfill the (minimum) requirements for being placed on the shortlist upon closer inspection of his work history.

71. It is somewhat ironic that Mr. Mirella complains that the Hiring Manager did not undertake a comparative review of the candidates when she did effectively conduct such a review among the several candidates on the longlist in order to place the “most qualified” on the shortlist. If there was any error, it was that the Hiring Manager’s explanation of her decision was inartful. In order to enable unsuccessful candidates to better understand an unfavorable selection decision, it might be advisable for the Hiring Manager, in future selection processes, instead of stating that a candidate “does not meet the minimum of 15 years of progressively responsible professional experience”, to use a different expression which better explains that a candidate fulfills the minimum of 15 years of progressively responsible professional experience in a formal and quantitative respect but not in a qualitative dimension (e.g. “fully versus only partially meets criterion” or “shortlisted candidates better fulfill criterion than longlisted candidates”).

72. While we understand Mr. Mirella’s frustration that it might be easier for staff members who worked their way up from a P-3 or P-4 to a P-5 position during the last 15 years to fulfill the “progressively responsible” criterion, the JO undoubtedly requires the “minimum of 15 years of progressively responsible professional experience” from all candidates including those who have been at the P-5 level for the last 15 years.

73. Mr. Mirella’s allegation that he should have been put on the shortlist like his colleague Mr. M. who had also been at the P-5 level for 15 years,²⁹ is without merit. As stated above, it was lawful and reasonable for the Hiring Manager to closely review the quality of the candidates’ professional experience. Mr. Mirella has not shown that his own professional experience equaled or exceeded that of Mr. M. His submissions in this respect remain vague and unsubstantiated.

²⁹ Mr. Mirella’s proffer of the PHP of Mr. M., who was placed on the shortlist for the contested JO, also undermines his argument that the “progressively responsible” criterion unfairly favored staff members who progressed through several grades in 15 years, since Mr. M., like Mr. Mirella, had also not been promoted in 15 years.

Looking at the PHPs of both candidates, we find it reasonable that the Hiring Manager preferred Mr. M. to Mr. Mirella. Mr. M.'s cover letter and description of his current responsibilities were much more detailed than Mr. Mirella's. For example, Mr. M. described strategy development and broad managerial oversight of multiple field operations; whereas Mr. Mirella highlighted "providing briefings" and "identifying funding".³⁰ In addition, while Mr. M. accurately enumerates the time periods of all his previous appointments (e.g. 07-Jan-2013 / 26-Sep-2017), Mr. Mirella stated that all his previous appointments lasted until "present" (which cannot be correct, and could be viewed as a lack of attention to detail). We also note that Mr. Mirella's 2015-2016 e-PAS contains a mid-point-comment by his First Reporting Officer ("Very impressive and satisfactory accomplishments on some of the goals") and concludes with the overall end-of-cycle rating "successfully meets expectation". Although positive in nature, this comment and rating could also have been considered to have fallen short of the "excellent" standard of performance demanded in the contested JO.

74. Mr. Mirella's argument that he was rostered for another D-1 position shortly after the present selection process does not put the impugned Judgment into doubt. As stated above, as a longtime P-5 staff member, Mr. Mirella undoubtedly is eligible for D-1 positions. Whether or not a hiring manager will put him on the shortlist for a job opening will depend on the specific position, and the number and quality of other candidates applying for it.

75. Finally, Mr. Mirella states the UNDT should have addressed the fact that the Hiring Manager had little to no knowledge of his functions or performance, having interacted with him only five times in his career. This argument is also without merit. The Hiring Manager reviewed the candidates based on their PHPs and e-PASes all of which were part of the selection process.

76. For all of the foregoing reasons, we deny Mr. Mirella's appeal.

³⁰ Personal History Profile, Mr. Flavio Mirella.

Judgment

77. The appeal is dismissed, and Judgment No. UNDT/2021/143 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Knierim, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Murphy

Judgment published and entered into the Register on this 2nd day of May 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar