



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

Judgment No. 2024-UNAT-1496

**Mahmoud Mohamad Zeidan
(Appellant)**

v.

**Commissioner-General
of the United Nations Relief and Works Agency
for Palestine Refugees in the Near East**

(Respondent)

JUDGMENT

Before:	Judge Abdelmohsen Sheha, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2024-1882
Date of Decision:	25 October 2024
Date of Publication:	6 December 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Stephen Margetts

JUDGE ABDELMOHSEN SHEHA, PRESIDING.

1. Mr. Mahmoud Mohamad Zeidan, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or the Agency), contested a decision not to select him for the position of Chief Field Education Programme, Grade 20, Lebanon Field Office (Post) (contested decision).
2. By Judgment No. UNRWA/DT/2023/045 (impugned Judgment),¹ the UNRWA Dispute Tribunal (UNRWA DT) dismissed the application on the merits.
3. Mr. Zeidan lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure²

5. At the material time, Mr. Zeidan was employed by the Agency as an Area Education Officer, Lebanon Field Office, Grade 17.³
6. On 11 May 2021, the Agency internally and externally advertised Vacancy Announcement (VA) 149445-R (First VA) for the Post.⁴ With respect to the required qualifications and work experience, the First VA stated:

Education

An advanced university degree preferably Ph.D from an accredited university in educational management/planning, or any advanced degree in any subject taught at UNRWA schools, plus a post-graduate diploma in education.

Work Experience

At least ten years of professional teaching experience of which at least five years should be at a senior managerial level in educational institutions, OR five years of large-scale educational programme management at the national or international level.

¹ *Zeidan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment dated 31 October 2023.

² Summarized from the impugned Judgment as relevant to the appeal.

³ Impugned Judgment, para. 5.

⁴ *Ibid.*, paras. 6-7.

...

Special Notice

...

Equivalency: Candidates with an equivalent combination of relevant academic qualifications, professional training and progressive work experience may also be considered.

...

7. Following the First VA, 55 candidates applied, including Mr. Zeidan and the candidate who, following subsequent recruitment developments described below, was ultimately selected for the Post (Selected Candidate).⁵

8. By e-mail dated 17 June 2021 to a Human Resources Career Management Officer, the Hiring Director stated *inter alia*:⁶

I would like to re-advertise the vacancy for this post. (...) Although we have an equivalency policy, this is not indicated in the VA and may have prevented qualified candidates from applying. Specifically, in the re-advertisement I would like the VA to read as follows (...).

...

Candidates with Bachelor's degrees in a relevant field may be considered on a equivalency basis.

9. In that e-mail, the Hiring Director indicated that the education requirements should include the following addition: "Candidates with Bachelor's degrees in a relevant field may be considered on a equivalency basis."⁷

10. By e-mail dated 30 June 2021, the Agency informed Mr. Zeidan that the recruitment for the Post had been cancelled and would be re-advertised soon.⁸

11. On 15 September 2021, the Agency internally and externally advertised Vacancy Announcement 159059-R (Second VA) for the Post.⁹ It stated the required qualifications and work experience as follows:

⁵ *Ibid.*, paras. 8-9.

⁶ *Ibid.*, para 10.

⁷ *Ibid.*

⁸ *Ibid.*, para. 11.

⁹ *Ibid.*, paras. 12-13.

Education

An advanced university degree preferably Ph.D from an accredited university in educational management/planning, or any advanced degree in any subject taught at UNRWA schools, plus a post – graduate diploma in education. (Bachelor degree with additional 3 years of qualifying experience may be considered)

Work Experience

At least ten years of professional teaching experience. (For Bachelor degree holders, additional 3 years of relevant experience may be accepted in lieu of Master’s degree - total 13 years).

At least five years should be at a senior managerial level in educational institutions. OR five years of large-scale educational programme management at the national or international level....

Special Notice

...

Equivalency: Candidates with an equivalent combination of relevant academic qualifications, professional training and progressive work experience may also be considered.

...

12. Following the Second VA, 46 candidates applied, including Mr. Zeidan and the Selected Candidate.¹⁰ Three candidates were shortlisted to take a written exam, including Mr. Zeidan and the Selected Candidate.

13. On 6 December 2021, the three shortlisted candidates took the written exam.¹¹ Only Mr. Zeidan and the Selected Candidate passed, with Mr. Zeidan scoring 56/100 and the Selected Candidate scoring 64/100.

14. On 25 January 2022, Mr. Zeidan and the Selected Candidate were interviewed by an interview panel (Panel) consisting of three staff members and a Human Resources representative.¹² The Panel tested the candidates on six competencies: vision, leadership, judgment, creativity, communication, and integrity. As reflected in the Recruitment Report dated 31 March 2022, the Panel scored both candidates equally on each of the competencies tested.

¹⁰ *Ibid.*, paras. 14-15.

¹¹ *Ibid.*, para. 16.

¹² *Ibid.*, para. 18.

15. Following the interviews, the Panel decided to conduct a second interview for both candidates.¹³ By e-mail dated 9 March 2022, Mr. Zeidan was invited to the second interview. The invitation stated *inter alia*:

Further to the Chief Field Education Programme interview, please note that a second interview will be conducted on Monday 14 March 2022 at [Lebanon Field Office] between 14:00-14:45hrs.

Additional technical instructions may be communicated in advance of the interview.

16. On 14 March 2022, the Panel conducted the second round of interviews during which both candidates were asked to (1) present a work plan for the following year, and (2) answer substantive questions on staffing issues, student assessment, compensation for lost learning and blended learning.¹⁴ Per the Recruitment Report, the Panel again scored both candidates equally on all components.

17. On 29 April 2022, Mr. Zeidan was informed of the contested decision.¹⁵ The recruitment notification informed him that he was the second recommended candidate.

18. According to the Recruitment Report, the Selected Candidate was ultimately recommended for the Post over Mr. Zeidan based on “an overall assessment of the two candidates’ performance, including the higher score achieved [by the Selected Candidate] on the technical test, as well as on the fact that both are internal and Palestinian refugees, and taking into account the action plan on gender parity and the Area Staff Selection Policy as related to close relatives”.¹⁶

19. On 11 May 2022, Mr. Zeidan submitted a Request for Decision Review (RDR) challenging the contested decision.¹⁷

20. By letter dated 23 May 2022, the Director of UNRWA Affairs, Lebanon, upheld the contested decision.¹⁸

21. On 18 August 2022, Mr. Zeidan filed an application with the UNRWA DT.

¹³ *Ibid.*, para. 19.

¹⁴ *Ibid.*, para. 20.

¹⁵ *Ibid.*, para. 21.

¹⁶ *Ibid.*, para. 22.

¹⁷ *Ibid.*, para. 23.

¹⁸ *Ibid.*, para. 24.

The impugned Judgment

22. By Judgment No. UNRWA/DT/2023/045 dated 31 October 2023, the UNRWA DT dismissed the application.

23. The UNRWA DT found that Mr. Zeidan and the Selected Candidate had been asked the same questions by the Panel in both interviews and, as such, the burden of proof shifted to Mr. Zeidan who was required to show through clear and convincing evidence that the recruitment had been discriminatory or biased.¹⁹

24. Observing that nothing in the Agency’s regulatory framework prohibited a hiring director from cancelling and re-advertising a VA in order to amend the VA requirements, the UNRWA DT nevertheless found that several facts supported Mr. Zeidan’s claim that the vacancy was re-advertised with modified requirements in order to ensure the inclusion of the Selected Candidate in the longlist.²⁰ At least six candidates appear to have fully met the minimum educational requirements in the First VA, casting doubt on whether re-advertisement was actually needed to obtain a sufficient number of qualified candidates, and, given that at least six fully qualified candidates had applied, the Hiring Director would not have been allowed to consider candidates—like the Selected Candidate—on an equivalency basis.

25. Turning to the Panel’s decision to conduct a second interview, the UNRWA DT agreed with Mr. Zeidan in that, contrary to the Commissioner-General’s assertion, the second interview had been plainly a technical interview and that the specificity of the questions provided some support to the claim that it had been tailored to the advantage of the Selected Candidate who was currently “acting” in the position under recruitment.²¹

26. Turning to the Agency’s application of its gender parity policy, the UNRWA DT held that while the application had been incorrect, it was not demonstrated that the Agency had attempted to favour the Selected Candidate.²² Mr. Zeidan and the Selected Candidate underwent two rounds of interviews and did equally well on each. If the Agency attempted to use the gender parity policy

¹⁹ *Ibid.*, paras. 36-37.

²⁰ *Ibid.*, paras. 40-43. The UNRWA DT noted that the language added to the Second VA was not the language requested by the Hiring Director: the Hiring Director had requested adding equivalency language to the academic requirements, but the VA simply lowered the academic requirements.

²¹ Impugned Judgment, paras. 44-46.

²² *Ibid.*, paras. 47-50.

to favour the Selected Candidate, it could have done so after the first round of interviews and there would have been no need to move to a second round of interviews.

27. The UNRWA DT was of the view that there were two primary pieces of evidence weighing against a finding of discrimination or bias on the part of the Agency.²³ First, the Panel—including the Hiring Director—scored Mr. Zeidan and the Selected Candidate identically across multiple competencies and skills in two separate interviews. Had the intent been to hire the Selected Candidate, these evaluations could have been manipulated to give her the advantage. Even more compelling is that the Panel decided to conduct a second interview at all. If the goal of the Hiring Director or the Panel was to appoint the Selected Candidate, there would have been no need or reason to move to a second round of interviews.

28. Noting that it found several aspects of the contested recruitment troubling and potentially indicative of discrimination or bias, the UNRWA DT nevertheless concluded that the fact that the Hiring Director and the Panel had decided to further test the candidates weighed strongly against a finding that there had been an intent to favour the Selected Candidate.²⁴ Mr. Zeidan has failed to meet his burden of showing by clear and convincing evidence that the recruitment was discriminatory or biased.

Procedure before the Appeals Tribunal

29. On 21 December 2023, Mr. Zeidan filed an appeal of the impugned Judgment with the Appeals Tribunal, to which the Commissioner-General filed an answer on 8 March 2024.

Submissions

Mr. Zeidan's Appeal

30. Mr. Zeidan requests the Appeals Tribunal to reverse the impugned Judgment, rescind the contested decision or, in the alternative, order the Agency to pay compensation in lieu of rescission, and order compensation for material damage.

31. Mr. Zeidan argues that the UNRWA DT erred on matters of law and fact when it determined that he failed to establish that the recruitment process had been discriminatory or

²³ *Ibid.*, paras. 51-52.

²⁴ *Ibid.*, para. 53.

biased and when it failed to conclude that the decision to modify the First VA had been an irregularity that had tainted the selection process. The UNRWA DT erred on matters of fact when it failed to consider and determine that he had met the requirements in respect of the First VA; and erred on matters of law and fact when it failed to conclude that the second interview had been unfair and biased and when it determined that the application of the gender parity policy did not demonstrate an attempt to favor the Selected Candidate. The UNRWA DT also erred on matters of law and fact when it failed to consider and determine that he was entitled to compensation for loss of chance.

32. Mr. Zeidan submits that he met the requirements of the First VA as he holds a Master's degree in human rights and democratization whereas the Selected Candidate failed to meet the requirements even under the equivalency. The UNRWA DT failed to consider that he should not have been considered on an equivalent basis with the Selected Candidate. It failed to take into account the material facts and applied the UNRWA Area Staff Rules improperly.

33. Mr. Zeidan contends that the UNRWA DT failed to consider the holistic view of the policy framework with regard to conducting the second interview. Such interviews must be competency-based, not technical.²⁵ It failed to consider that the questions were related to matters that only a candidate already involved in the functions of the Post, such as the Selected Candidate, could have been aware of. The UNRWA DT considered irrelevant matters, in particular the Commissioner-General's intention not to favour the Selected Candidate in deciding to hold the second interview. The UNRWA DT ignored the possibility that a conflict among the Panel members could have caused the cancellation of the first round and the calling for the second interview. The Panel violated the Selection Guidelines by providing a vague assessment without scores or even readable notes.

34. Mr. Zeidan submits that the UNRWA DT should have concluded that the contested decision exhibited a serious irregularity in the recruitment process in light of the evidence that there were more females than males in senior positions in the Education Department. It failed to

²⁵ Mr. Zeidan cites Module 5, paragraph 1 of UNRWA Area Staff Selection Guidelines, effective 1 December 2009 (PD A/4/Part II/Rev.7/Section I/Amend.1) (Selection Guidelines), issued as part of UNRWA Area Staff Personnel Directive PD A/4/Part II/Rev.7/Section I (UNRWA Area Staff Selection Policy), effective 1 July 2009 (Selection Policy).

consider the relevant facts and conclude that the contested decision did not comply with the rules and that the Commissioner-General had not favoured the Selected Candidate.

35. Lastly, Mr. Zeidan argues that the UNRWA DT should have ordered compensation. Taking into account the consideration of gender parity, he had a 100 per cent chance of being selected.

The Commissioner-General's Answer

36. The Commissioner-General requests the Appeals Tribunal to dismiss the appeal and affirm the impugned Judgment.

37. The Commissioner-General argues that Mr. Zeidan has failed to establish any reversible error of fact, law, or procedure warranting intervention by the Appeals Tribunal.

38. The Commissioner-General submits that the UNRWA DT properly considered Mr. Zeidan's submissions and evidence. He has failed to address the UNRWA DT's central and dispositive findings or make any submissions to suggest that its reasoning was flawed. He challenges the assessment of the facts, is dissatisfied with the impugned Judgment and disagrees with the outcome but has failed to meet his burden on appeal. The UNRWA DT carefully assessed the parties' submissions and the evidence before it.

39. The Commissioner-General contends that the UNRWA DT correctly did not consider Mr. Zeidan's request for remedies. As the contested decision was properly effected, there is no basis upon which to grant any of the requested reliefs.

Considerations

40. Mr. Ziedan contends that the UNRWA DT erred in law and in fact, resulting in a manifestly unreasonable decision, when it concluded that he had been given full and fair consideration. Under each head of contentions, he raises several challenges to the UNRWA DT's determinations.

41. For the sake of clarity, we shall examine each head of contentions separately below.

The alleged errors of law

42. Mr. Zeidan submits the UNRWA DT erred in law: (i) when it held that the Agency had the authority to hold technical interviews; (ii) when it failed to draw the necessary inferences from the Agency's failure to correctly apply gender parity rules; and (iii) when it ignored the Agency's error in considering his application on an equivalency basis.

43. The Tribunal understands that Mr. Zeidan's submissions were ultimately made to prove that the selection exercise was tainted by bias and discrimination. Nonetheless, if any of the alleged material procedural irregularities is established, affecting Mr. Zeidan's chance of selection, there would be no need to examine whether these irregularities supported the alleged bias or discrimination against him. Such material procedural irregularities would, in and of themselves, suffice to rescind the contested decision.

(i) whether the UNRWA DT erred in allowing the Agency to hold technical interviews

44. In the impugned Judgment, the UNRWA DT considered that "while the Agency's regulatory framework is internally inconsistent as to whether technical assessments can be conducted by interview, it does not unambiguously prohibit such assessments".²⁶

45. Mr. Zeidan disagrees. He maintains that the legal framework is clear that interviews are competency-based only.

46. We note that the applicable set of rules, on which the matter of law in dispute is to be decided, is UNRWA Area Staff Personnel Directive PD A/4/Part II/Rev.7/Section I (UNRWA Area Staff Selection Policy) (Selection Policy). It stands apart from administrative issuances that do not constitute law, hence lacking normative value. As per our consistent jurisprudence, administrative manuals and guides lack legal authority as they are not meant to create substantive rights or obligations. Administrative manuals and guides provide practical advice to UNRWA management and staff members undertaking their professional duties.²⁷ They are subject and subservient to regulations, rules and to contractual rights and obligations.

²⁶ Impugned Judgment, para. 45 (footnote omitted).

²⁷ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-744, para. 38; *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-496, para. 22.

Therefore, such issuances are not binding and cannot modify or supplement the rights and obligations specifically provided for under the relevant regulations, rules and personnel directives.

47. The law prescribed in the Selection Policy sets out the procedures to be followed, starting from the evaluation of needs for recruitment, until the selection of the most suitable candidate. In accordance with the Selection Policy, the selection exercise notably comprises tests that may be administered or waived, and an interview to be conducted with the shortlisted candidates.

48. In respect of interview panels, and the intersection of their work with tests and assessments, the Selection Policy comprises several pertinent provisions that we set out below.

49. Paragraph 22 of the Selection Policy reads, in relevant part:

The interview panel for each vacancy is responsible for: (...) Conducting competency-based interviews[.]

50. In regard to testing, paragraph 38 establishes:

Tests may be administered or waived as determined by the Hiring Director, and may either support the short-listing process or be conducted in conjunction with the personal interview.

51. In the same vein, paragraph 39 of the Selection Policy reads, in relevant part:²⁸

Tests are developed jointly by the Hiring Director and Recruitment Administrator. ... Evaluation criteria and weightings are determined prior to the administration of tests, and must reflect the post requirements set out in the job description and vacancy announcement. Assessment of tests is conducted by the Hiring Department in conjunction with the Recruitment Administrator based on *pre-approved criteria*, and *without knowledge of the identity of the candidates*.

52. With respect to the interview, paragraph 43 of the Selection Policy further provides:

During the personal interview stage candidates will be evaluated by the panel against the requirements set out in the post description and vacancy notice.

²⁸ Emphasis added.

53. Finally, paragraph 49 regarding the selection recommendation reads, in relevant part:

In conjunction with the Recruitment Section, the Hiring Director will provide a selection report which will contain the following information, as applicable: (...) Performance of candidates during the interview process and testing/assessment (for the interview this should contain a detailed narrative assessment against pre-determined job-related competencies, if testing/assessment was carried out details regarding the type and what this was intended to evaluate)[.]

54. It follows from the foregoing that as concerns testing, the provisions of the Selection Policy give the Hiring Director discretion to set or to waive such tests, as he or she deems appropriate. However, if the Hiring Director opts for such tests, the Selection Policy provides several safeguards to ensure a fair and objective assessment of the test, including, in particular, pre-approved criteria and the anonymization of the candidates.

55. If tests are administered, the successful candidates are then invited before an interview panel. The Selection Policy provides that selection interviews are competency-based. This means that interview panels normally and essentially assess the competencies of the shortlisted candidates against the competencies required for the advertised post.

56. Indeed, paragraph 38 of the Selection Policy sets out that administered tests may “either support the short-listing process or be conducted *in conjunction with the personal interview*”.²⁹ However, this provision should not be construed as allowing the interview panel itself to administer the technical test. This would run counter to the guarantees of objectivity and anonymization provided for under paragraph 39 cited above. The only constructive interpretation of paragraph 38 of the Selection Policy is to allow the Agency to administer technical tests either to create the shortlist from the longlisted candidates, or before the interviews of the shortlisted ones.

57. Indeed, technical knowledge could be said to be part of the competencies *lato sensu* that could be subject to evaluation during the interview. However, such technical assessment must be limited in scope, such as not to change the nature of the interview, rendering it a mere repetition of the technical test.

58. The Tribunal finds, therefore, no inconsistency in the Selection Policy, which must be construed and interpreted upon its own provisions. Therefore, we find that the UNRWA DT

²⁹ Emphasis added.

erred in law when it found that the applicable legal framework, comprising guidelines, allows the interview panel to administer technical assessments.

59. However, we remind that in matters of procedural irregularities, such irregularities shall result in the rescission of the contested decision only when the staff member had a significant chance of selection or promotion.³⁰

60. In the present case, the error of law in respect of the recruitment procedures is insufficient to change the outcome of Mr. Zeidan's case. Even if the Panel had not decided to convene the shortlisted candidates to a second round of interviews that was purely technical in nature, the result would have been the same as Mr. Zeidan was considered equally suitable to the other candidate following the first interview. Therefore, this procedural irregularity would not suffice to allow Mr. Zeidan's appeal.

(ii) whether the UNRWA DT erred when it failed to draw the necessary inferences from the Agency's failure to correctly apply gender parity rules

61. Mr. Zeidan contends that, having found that the Agency erred in applying the rules governing gender parity incorrectly, the UNRWA DT should have drawn the reasonable inferences in finding that he was the candidate in whose favour the rules should have worked.

62. Mr. Zeidan's contention has no merit. The case record shows that gender parity was not the only reason that supported the recommendation to appoint the Selected Candidate. In addition to gender parity, the Panel also considered the overall assessment of the two candidates' performance, including their scores on the technical test. If applied alone in the circumstances, which is lawful pursuant to the applicable rules, that factor would have been sufficient to support the recommendation for her appointment. According to the no-difference principle, we find that the contested decision still had a lawful ground to be sustained. The UNRWA DT did not err.

³⁰ *Bofill v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-174, para. 28.

(iii) *whether the UNRWA DT erred when it overlooked the Agency's error in considering Mr. Zeidan's application on an equivalency basis*

63. Mr. Zeidan submits that the UNRWA DT failed to consider that he should not have been considered on an equivalency basis. He submits that, unlike the Selected Candidate who had a Bachelor's degree only, he had a relevant Master's Degree.

64. This contention has no merit. The UNRWA DT correctly found that neither of the applicants needed to be considered on an equivalency basis following the amended Second VA that lowered the educational requirements.³¹ If the Agency had inexplicably filed equivalency determination forms for both Mr. Zeidan and the Selected Candidate,³² this was a superfluous procedure that was applied equally to both and had no impact on their chances for selection. The UNRWA DT did not err.

The alleged errors of fact

65. Mr. Zeidan disagrees with the UNRWA DT's overall assessment of the facts in respect of the allegations of bias and discrimination, and the weight it attributed to the totality of the evidence on record. He also submits that the UNRWA DT ignored the possibility that a conflict occurred between the members of the Panel of the first interview and the conflict was resolved by undertaking a second interview in which the Selected Candidate was favoured.

66. Under Article 2(1)(e) of the UNAT Statute, this Tribunal examines the impugned Judgment for errors of fact, resulting in a manifestly unreasonable decision. As such, not every error of fact would render the impugned Judgment defective. Rather, an error of fact must be of such significance that it must have led the first instance Tribunal to reach a manifestly unreasonable decision. Manifest unreasonableness could be found to occur when a finding of fact is entirely unsupported by the evidence, is speculative, or when it is established on excessive inferences.³³ It is the appellant's burden to show that such error exists.

67. In this respect, our Tribunal has consistently held that:³⁴

³¹ Impugned Judgment, para. 42.

³² *Ibid.*, para. 17.

³³ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, paras. 33 and 36.

³⁴ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 26.

The Appeals Tribunal considers that some degree of deference should be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. The UNDT has the advantage of assessing the demeanour of witnesses while they are giving evidence and this is critical for assessing the credibility of the witnesses and the persuasiveness of their evidence.

68. In the present case, we find that the UNRWA DT carried out a careful assessment of the evidence on record. Weighing the totality of the evidence available, it arrived at a reasonable conclusion that the allegations of bias and discrimination, despite being supported by some evidence, were not proven by clear and convincing evidence as required by the consistent jurisprudence of this Tribunal. Therefore, we do not find that the high threshold of unreasonableness was attained in the present case, and we will not disturb the findings of the UNRWA DT.

69. As to Mr. Zeidan's claim of a possible conflict between the Panel members of the first interview, we note that this argument is made for the first time on appeal. In any event, the argument has no chance of success as it is not supported by any evidence.

70. In light of the foregoing, the appeal must fail.

Judgment

71. Mr. Zeidan's appeal is dismissed, and Judgment No. UNRWA/DT/2023/045 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25th day of October 2024 in New York, United States.

(Signed)

Judge Sheha, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Sandhu

Judgment published and entered into the Register on this 6th day of December 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar

Concurring Opinion by Judge Graeme Colgan

1. I acknowledge that previously decided cases establish that in order to challenge successfully a non-appointment or a non-promotion decision, a staff member must satisfy a dispute tribunal of error by the decision maker to the standard of proof of clear and convincing evidence. However, I have serious concerns about the correctness and thereby the justice of this test. While the “clear and convincing” evidential test exists for serious misconduct cases involving potentially dismissal of a staff member and I do not question its application in such cases, it is unclear to me how and why it has expanded to cases such as this.

2. A non-appointment or a non-promotion decision is made by the relevant administration often without reasons or full reasons being known to the staff member when he or she has to choose whether to challenge it. In the absence of a full document disclosure or discovery process as in comparable cases in many national jurisdictions, documentary records showing a decision maker’s process and reasoning are not always known to the staff member or even sometimes to the tribunal. In such circumstances, it is at least difficult, if not impossible, for the staff member to attain that high (clear and compelling) evidential standard required.

3. Several aspects of this position may benefit from an appropriate judicial reconsideration in another case: who bears the onus of proof; whether the standard or burden of proof should be the balance of probabilities (the preponderance of evidence); whether first instance tribunals should require a greater degree of documentary disclosure as a matter of course in such cases; and there may be other elements which would benefit from a careful reconsideration of the applicable evidential test.

4. While I accept that for reasons of consistency and predictability we must decide this appeal as we do, I consider that it is time that the onus of proof and burden or standard of proof in such cases should be revisited by the Appeals Tribunal with the benefit of detailed argument in an appropriate case.

Original and Authoritative Version: English

Decision Dated this 25th day of October 2024.

(Signed)

Judge Colgan

Published and entered into the Register on this 6th day of December 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar