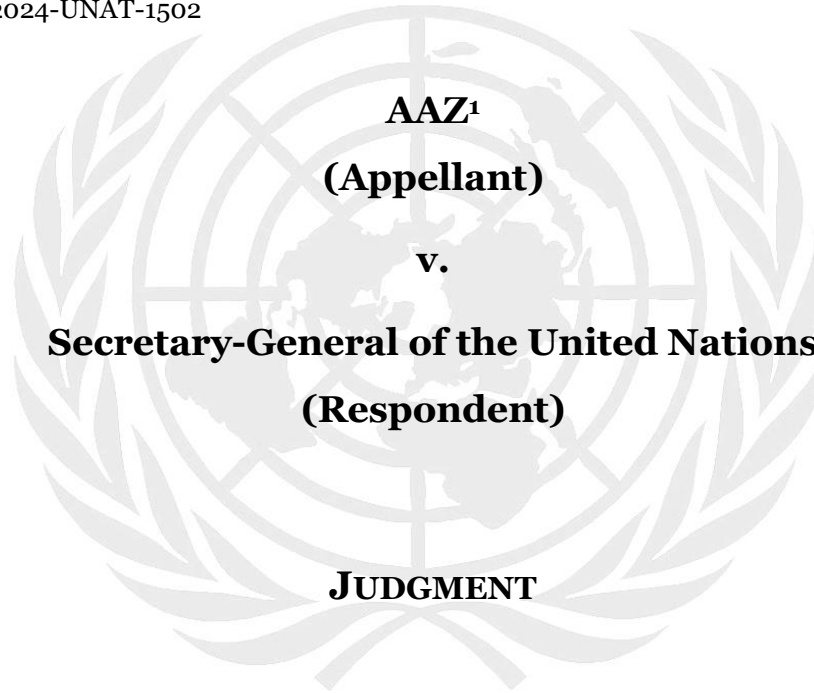




UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1502



AAZ¹

(Appellant)

v.

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

JUDGMENT

Before:	Judge Leslie F. Forbang, Presiding Judge Katharine Mary Savage Judge Graeme Colgan
Case No.:	2023-1878
Date of Decision:	25 October 2024
Date of Publication:	17 December 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant: Ludovica Moro

Counsel for Respondent: Angélique Trouche

¹ This unique three-letter substitute for the party's name is used to anonymize the Judgment and bears no resemblance to the party's real name or other identifying characteristics.

JUDGE LESLIE F. FORBANG, PRESIDING.

1. AAZ,² a former staff member of the Office of the High Commissioner for Human Rights (OHCHR), contested a decision not to select him for a fixed-term position, at the P-5 level, of Senior Human Rights Officer and Coordinator of the Secretariat of OHCHR's International Fact-Finding Mission (FFM) on Venezuela, based in Panama City (Post) (contested decision).
2. By Judgment No. UNDT/2023/112 (impugned Judgment),³ the United Nations Dispute Tribunal (UNDT) dismissed the application on the merits.
3. AAZ 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 Procedure⁴

5. On 2 December 2019, AAZ, a citizen of the United Kingdom, commenced his temporary appointment as Senior Human Rights Officer and Coordinator of the FFM Secretariat (FFM Coordinator), at the P-5 level, based in Panama City.⁵
6. In his performance appraisal for the reporting period from the start of his temporary appointment as FFM Coordinator through 30 September 2020, AAZ was rated as "exceeds performance expectations".⁶
7. In light of a renewal of the FFM's mandate, OHCHR decided to appoint FFM staff on fixed-term contracts rather than temporary appointments.⁷ Special arrangements were made to create new job openings and existing staff on temporary appointments, including AAZ, were authorized to compete for the positions they had been encumbering.

² Anonymity was granted by the United Nations Dispute Tribunal (Judgment No. UNDT/2023/112, para. 30).

³ *Applicant v. Secretary-General of the United Nations*, Judgment dated 9 October 2023.

⁴ Summarized from the impugned Judgment as relevant to the appeal.

⁵ Impugned Judgment, para. 4.

⁶ *Ibid.*, para. 5.

⁷ *Ibid.*, para. 6.

8. The Post was advertised under Job Opening No. 20-HRI-OHCHR-146267-R-Panama City (Job Opening) from 10 to 24 December 2020.⁸ Meanwhile, AAZ’s temporary appointment, which was set to expire on 30 September 2020, was extended until 31 December 2020 and, on 1 January 2021 extended again until 31 July 2021, pending finalization of the recruitment process for a fixed-term appointment.⁹

9. AAZ applied for the Post and was among the shortlisted candidates invited to a competency-based interview conducted on 13 January 2021.¹⁰ The assessment panel found him to be suitable for the Post and recommended him for appointment to the Post. However, due to “an administrative issue” with the composition of the panel, the interview was conducted a second time on 5 March 2021 with a slightly altered panel.

10. The recommendation memorandum dated 15 March 2021 (Memorandum), addressed to the High Commissioner, identified AAZ and two other male candidates—a Spanish national and a national of Switzerland—as meeting the requirements for the Post and recommended them.¹¹ The Memorandum also ranked the candidates by “order of preference”, with AAZ listed as the first choice and the Spanish national as the second choice. During its review of the recruitment process, the Central Review Body (CRB) raised a few questions, and after receiving clarification from OHCHR’s Human Resources Office (HRO), endorsed the list of recommended candidates on 17 June 2021.

11. On 17 July 2021, AAZ was informed of the contested decision.¹² In a standard e-mail notification from the Inspira recruitment platform, he was informed that he had been placed on a roster of pre-approved candidates for potential consideration for future similar job openings.

12. On 21 July 2021, AAZ was notified of his selection to a different temporary position with OHCHR—Senior Human Rights Officer and Country Representative, at the P-5 level, in La Paz, Bolivia—a position he had also applied to in the meantime.¹³ He attempted to accept that temporary position in Bolivia but apparently encountered technical difficulties and it remains unclear whether his acceptance was submitted in a timely manner.

⁸ *Ibid.*, para. 7.

⁹ *Ibid.*, paras. 7 and 42.

¹⁰ *Ibid.*

¹¹ *Ibid.*, para. 8; Memorandum.

¹² Impugned Judgment, para. 9.

¹³ *Ibid.*, paras. 10-11.

13. Subsequently, AAZ learned that on 16 July 2021, the Spanish national who was also the second-ranked candidate (Selected Candidate) had been offered and had accepted the Post.¹⁴ AAZ made enquiries with the HRO and was advised that the Selected Candidate had been selected for the Post in the interest of geographical diversity at the P-5 level, among other reasons.

14. Upon further enquiry into his non-selection for the Post, AAZ received information that senior OHCHR officials had warned the High Commissioner that it would be a mistake to adopt the recommendation and select him because “serious allegations” had been levied against him.¹⁵ On 3 August, believing these allegations to constitute a malicious complaint and a form of harassment as defined in Sections 1.3 and 1.4 of the Secretary-General’s Bulletin ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), AAZ approached the Office of Internal Oversight Services (OIOS) and reported potential misconduct by the sources of these allegations. However, OIOS informed him on 2 November 2021 that it had determined that his report did not warrant investigation and the case was closed.

15. On 11 August 2021, the Chief of Human Resources (C/HR) at OHCHR notified AAZ that OIOS had opened an investigation against him based on allegations of harassment and abuse of authority reported by a former FFM staff member (Complainant).¹⁶

16. On 15 September 2021, AAZ sought management evaluation of the contested decision.¹⁷

17. From 23 to 29 November 2021, OHCHR advertised a temporary job opening for the position of Senior Human Rights Officer and Coordinator of the FFM, at the P-5 level, based in Panama City.¹⁸ AAZ did not apply to this job opening.

18. Having reached 729 consecutive days of service on a temporary appointment—the maximum duration allowable—AAZ was subject to a mandatory break-in-service on 29 November 2021.¹⁹ He then continued as FFM Coordinator on a one-month contract from 1 December 2021 until 31 December 2021 when he separated from the Organization upon expiration

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para. 13.

¹⁶ *Ibid.*, para. 14.

¹⁷ *Ibid.*, para. 9.

¹⁸ *Ibid.*, para. 15.

¹⁹ *Ibid.*, para. 16.

of the contract. He received a rating of “exceeds performance expectations” in his performance evaluation for the period from 1 October 2020 to 31 December 2021.

19. On 14 February 2022, AAZ filed his application challenging the contested decision.

The impugned Judgment

20. By Judgment No. UNDT/2023/112 dated 9 October 2023, the UNDT dismissed the application.

21. The UNDT held that the High Commissioner had followed the correct procedures laid out in the applicable legal framework for selection.²⁰ The record shows that following the finding of the CRB that the candidates had been evaluated on the basis of approved evaluation criteria and that the applicable procedures had been followed, the High Commissioner, in her capacity as head of OHCHR, proceeded to select the candidate she considered to be best suited for the functions of the Post.²¹ In taking the decision, she took into account, *inter alia*, factors such as “the status of the selected candidate as a career staff [member] who had been serving in an acting role for several years, his qualifications and experience as well as the commitment to geographical diversity”.²²

22. The UNDT found that there was no evidence to support AAZ’s claim that the High Commissioner’s selection decision had been influenced by extraneous considerations such as the allegations of misconduct against him.²³ In view of the facts,²⁴ it is unlikely that there had been serious concerns among OHCHR senior officials about his conduct. The C/HR did not mention the Complainant’s concerns to AAZ until AAZ spoke to the C/HR after learning that another candidate had been selected for the Post in July 2021. Moreover, it was only after the High Commissioner had taken the contested decision that OIOS notified OHCHR and AAZ that it had opened an investigation against him. His candidacy was given full and fair consideration.

²⁰ *Ibid.*, paras. 39-40.

²¹ The UNDT cited *Elzarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-893, para. 37.

²² Impugned Judgment, para. 39.

²³ *Ibid.*, paras. 42-44.

²⁴ The UNDT referred to the following facts: (i) on 1 January 2021, AAZ’s temporary appointment as FFM Coordinator was renewed; (ii) he was allowed to compete for the fixed-term appointment as FFM Coordinator and was ranked in first place among the recommended candidates following both competency-based interviews; (iii) the Memorandum identifying him as the first-ranked candidate was submitted to the CRB for clearance; and (iv) on 21 July 2021, he was notified of his selection as a Senior Human Rights Officer and Country Representative, at the P-5 level, in La Paz, Bolivia.

23. The UNDT held that the applicable regulations and rules were applied in a fair, transparent and non-discriminatory manner.²⁵ The evidence shows that there had been other occasions when the High Commissioner had not selected the first-ranked candidate on the list of recommended candidates following an assessment process. The High Commissioner deviated from the Hiring Manager's order of preference for a legitimate and fully articulated reason, namely the need to promote a long-serving, qualified and experienced internal candidate in OHCHR. The contested decision is not tainted by bias, prejudice or improper motive and takes relevant factors into consideration.

24. In response to AAZ's argument that both he and the Selected Candidate belong to countries that are members of the Western European and Other States Group (WEOG), the UNDT noted that the relevant provisions did not contain any reference to such a group and, instead, referred to "nationality" as the basis for geographical distribution.²⁶ The composition of OHCHR staff, as indicated in the Secretary-General's filing, also lists the number of staff by nationality and not by region.

25. The UNDT found that as the contested decision had been lawful, there was no basis for awarding AAZ the requested compensation and damages.²⁷

Procedure before the Appeals Tribunal

26. On 6 December 2023, AAZ filed an appeal of the impugned Judgment with the Appeals Tribunal, to which the Secretary-General filed an answer on 5 February 2024.

27. AAZ filed several motions which were all denied by the Appeals Tribunal.²⁸

²⁵ Impugned Judgment, paras. 48-49.

²⁶ *Ibid.*, para. 47.

²⁷ *Ibid.*, para. 50.

²⁸ In Order No. 581 (2024), the Appeals Tribunal denied the 18 March 2024 "Motion for leave to submit comments and clarifications", in Order No. 582 (2024) it denied the 19 September 2024 "Motion for requesting the hearing of a key witness *in camera*" and in Order No. 583 (2024) it denied the 25 September 2024 "Motion for requesting the submission of a confidential witness statement".

Submissions

AAZ's Appeal

28. AAZ requests the Appeals Tribunal to rescind the contested decision, make several findings, award him compensation in the amount of two years' salary plus benefits related to the fixed-term appointment, compensation for moral damage in the amount of USD 50,000 and costs for legal fees incurred in the submission of the appeal in the amount of USD 15,000.²⁹

29. AAZ argues that the UNDT erred in fact and in law, as manifested in omissions and misinterpretations of factual and procedural information in the impugned Judgment, rendering it substantially flawed.

30. AAZ contends that the UNDT failed to consider the misrepresentation of his performance in the Memorandum.³⁰ In addition to downplaying it from "exceeding performance expectations", the Memorandum also misrepresented the professional grade of the Selected Candidate. The UNDT appears to have overlooked that the C/HR was presented with the misleading information.

31. AAZ submits that the UNDT failed to consider that the shortlisting process had been flawed. The UNDT failed to recognize that the work experience of the Selected Candidate does not support the claim of meeting the desirability criteria. The UNDT appears to have acted in disregard of its competence to scrutinize the contested decision. It should have considered that both the assessment panel and the CRB endorsed him for selection. The UNDT failed to understand how the shortlisting is carried out—the Investigative Services Unit (ISU) does the shortlisting, not the assessment panel or the Hiring Manager. The UNDT failed to engage meaningfully with the issue that the Selected Candidate should not have been shortlisted.

32. AAZ infers that the UNDT confused allegations of workplace harassment made in 2020-2021 and the allegation of SEA, dismissed as *prima facie* unsubstantiated in 2011. The UNDT failed to appreciate the possibility that the "very serious allegations" were related to the complaint of SEA. The C/HR, who was also the Focal Point for OIOS investigations within OHCHR, could

²⁹ In addition, AAZ reiterates his request for anonymity. He also submits that it is essential that the Appeals Tribunal, instead of referring to the allegation against him of sexual exploitation and abuse (SEA) as "unproved", clarify that the allegation was "dismissed for lack of *prima facie* merit in 2011".

³⁰ AAZ refers to Annexes 10, 12, 14 and 15 to the appeal.

have accessed his personnel file. A witness (WO1) is able to testify that senior decision-makers at OHCHR denied him the Post due to “very serious allegations” against him.³¹

33. AAZ maintains that geographic diversity should be considered at each level, not merely across the entity, and therefore the argument that the promotion of the Selected Candidate from P-4 to P-5 would not have increased the number of staff belonging to the WEOG must fail. The UNDT incurred another error of fact in considering the examples of cases in which the second-ranked candidate had been selected as a reasonable explanation for the non-selection of AAZ. The UNDT failed to engage with his argument that each example at P-5 appeared to be for gender reasons.

34. AAZ contends that, considering that OHCHR did not provide transparent information to the High Commissioner for the contested decision, it did not adequately evaluate his qualifications and experience against the criteria for the Post, and this amounts to a denial of full and fair consideration. The UNDT failed to acknowledge this. The UNDT also erred on an issue of law in endorsing the “discretionary” approach to the assessment of the desirable criteria and the eligibility requirements. By selecting a candidate who did not meet the eligibility criteria, OHCHR breached the principle that the Organization must abide by the conditions it has itself set for the competition and the principle that the conditions of entry for a competition may not properly be altered once the process is under way.

35. Turning to the remedies sought before the UNDT, AAZ argues that the UNDT failed to take account of his attempts to mitigate the economic loss and disregarded the relevant facts and his pleadings. He stood a very high likelihood of being selected to the Post. In any event, the violation of procedural fairness was severe. The contested decision caused him reputational harm and a severe trauma.

The Secretary-General’s Answer

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

³¹ AAZ submits that he did not present WO1 to the UNDT because the existing evidence should have been sufficient to set aside the contested decision and, until reading the flawed impugned Judgment, WO1 was not prepared to reveal his or her identity to the Tribunals in fear of suffering reprisals. AAZ refers to OHCHR having “weaponiz[ed]” OIOS and the United Nations internal system of discipline in reprisal against its staff members who have challenged its behaviour as unethical in the past.

37. The Secretary-General argues that the UNDT correctly concluded that the contested decision was lawful. AAZ has failed to demonstrate any error of the UNDT warranting intervention of the Appeals Tribunal and, for the most part, has failed to set out how the alleged errors impacted the impugned Judgment.

38. The Secretary-General contends that the UNDT did not misinterpret or conduct an incomplete consideration of the facts. The Memorandum correctly described AAZ's performance as "fully satisfactory" and the UNDT was not required to address it.³² The UNDT considered the potential impact of the earlier 2011 allegation of SEA. He has not shown that Wo1 was not available during the UNDT proceedings. AAZ's argument with regard to the policy on geographical diversity misconstrues the UNDT's finding and is irrelevant to showing any error.

39. Citing numerous precedents, the Secretary-General submits that AAZ has failed to demonstrate that the UNDT erred in law.

40. The Secretary-General maintains that no compensation for material or moral damage should be awarded. Also, AAZ's claim is excessive in view of his chance of being selected and, in addition, the fact that by choosing not to apply to the 23 November 2021 temporary job opening of Senior Human Rights Officer/Coordinator, P-5 level, Panama City, which would have secured him a position until September 2022, he failed to mitigate his loss. None of the medical certificates establish a link to the contested decision.³³ With regard to his request for legal fees, he has not shown that the Secretary-General has manifestly abused the appeals process.

Considerations

41. This appeal contests the UNDT Judgment No. UNDT/2023/122 of 9 October 2023 upholding the administrative decision not to select AAZ for the fixed-term position of

³² Referring to Section 9.6 of Administrative Instruction ST/AI/2021/4 (Performance management and development system), the Secretary-General submits that the ratings of "exceeds performance expectations" and "successfully meets performance expectations" both establish "full satisfaction" with the work performed.

³³ Referring to one of the medical certificates (Annex 18 to the appeal), the Secretary-General observes that it was not before the UNDT and is not admissible in the absence of a motion to adduce it as evidence.

Senior Human Rights Officer and Coordinator (P-5) based in Panama City, Panama, advertised under Job Opening No. 20-HRI-OHCHR-146267-R-Panama City from 10 to 24 December 2020.

Preliminary Issue: anonymity

42. As a preliminary issue, we address AAZ's request for continued anonymity.

43. As concerns the continuation of anonymity on appeal, our Practice Direction No. 1 provides at paragraph 32:

A person who has been granted anonymity by the UNDT or the neutral first instance process of an entity accepting UNAT's jurisdiction need not request it at UNAT as such order will remain in effect, unless there is a challenge to such anonymity on appeal and UNAT has given its judgment on the issue. A person who wishes anonymity before UNAT for the first time may file a motion to request anonymity in exceptional circumstances and for good cause.

44. Perhaps in ignorance of this practice, AAZ included in his pleadings in support of his appeal a request for the continuation of the anonymization of his identity. The Secretary-General did not cross-appeal the UNDT's order for anonymization, but responded to AAZ's submission, albeit faintly, by opposing it.

45. The case concerns a non-selection decision. Reference to a prior complaint or complaints against AAZ was relevant to his grounds of challenge to the non-selection decision, but those past complaints were never established and their nature and details are irrelevant to the decision of this case. He is entitled to the presumption of innocence in relation to them. The necessary transparency of this Judgment and the issues it decides can be achieved by our reasons that we set out herein and, in these circumstances and balanced against the reasons for anonymity, AAZ's identity need not be published to achieve that transparency. The allegations are historic and unproven.

46. While the UNDT anonymized AAZ's identity, it described the nature of the unproven allegations against him and this Judgment is traceable to the UNDT Judgment which is before us on appeal. In these circumstances, it would be unconscionable to identify him, even if the nature of the allegations were to be redacted.

47. In the absence of an appeal against the UNDT's order, we follow our Practice Direction and continue the anonymization of AAZ's identity ordered by the UNDT.

Merits of the appeal

48. The crux of this appeal is whether the Administration was bound by the selection recommendation of the Hiring Manager and whether the High Commissioner's decision to select a second-ranked candidate rather than AAZ, who was the first recommended candidate in the Memorandum, is lawful. Before delving into the merits of AAZ's contention on this point, it is our duty to reprise the scope of judicial review in non-selection cases and address in turn the issues he has raised on appeal.

49. Under Article 101(1) of the Charter of the United Nations and Staff Regulation 1.2(c) and 4.1, the Secretary-General has broad discretion in staff selection matters. The jurisprudence of this Tribunal has clarified that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner.³⁴ The Tribunals' role is not to substitute its decision for that of the Administration.³⁵

50. Therefore, in reviewing an administrative decision regarding staff selection, the following factors are considered: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; (2) whether the staff member was given full and fair consideration, and whether the applicable Regulations and Rules were applied in a fair, transparent, and non-discriminatory manner.³⁶

51. Based on AAZ's submissions on appeal, the fundamental issues for determination before us are: (1) whether the UNDT committed an error in procedure, such as to affect the decision of the case, by not holding an oral hearing, (2) whether the UNDT misrepresented or failed to give complete consideration to the facts, (3) whether the UNDT erred on a question of fact, resulting in a manifestly unreasonable decision, or law in finding the non-selection decision lawful, (4) whether AAZ is entitled to an award of costs for his legal fees, and (5) whether he is entitled to compensation for material and moral damage. To these we now turn.

³⁴ *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932, para. 14 (internal citations omitted).

³⁵ *Ibid.* (internal citations omitted).

³⁶ *Flavio Mirella v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1334, para. 59 (internal citation omitted); *Savadogo v. Registrar of the International Tribunal for the Law of the Sea*, Judgment No. 2016-UNAT-642, para. 40 (internal citation omitted).

Whether the Dispute Tribunal committed an error in procedure, such as to affect the decision of the case, by not holding an oral hearing

52. AAZ submits that the UNDT erred on account of the factual and procedural history. He contends that the UNDT incorrectly asserted that he had initially requested an oral hearing in the case but later withdrew that request.

53. The Secretary-General admits that the UNDT appears to have erred in finding that AAZ withdrew his request for an oral hearing. However, the Secretary-General argues that AAZ has failed to show how this error impacted the impugned Judgment.

54. This Tribunal notes that by Order No. 045 (NY/2023) of 20 June 2023, the UNDT denied AAZ's request for an oral hearing, stating:

(...) The Tribunal notes that in light of the amount of time that has elapsed since the filing of the application; the fact that some relevant witnesses have left the Organization; and the factual elements recently disclosed by the Respondent, there is no longer any need for an oral hearing in this case.

55. As rightly pointed out, AAZ has the burden to show that the Dispute Tribunal's decision not to hold an oral hearing affected the decision in the case.³⁷ As we stated in *Nadeau*,³⁸

(...) Under Article 2(1)(d) of its Statute, the Appeals Tribunal is competent to hear and pass judgment on an appeal against a judgment rendered by the UNDT in which it is asserted that the UNDT has committed an error in procedure, such as to affect the decision of the case. It follows that a party, in order to be successful on appeal, not only has to assert and show that the UNDT committed an error in procedure but also that this error affected the decision on the case.

56. As AAZ has given no convincing reason on appeal as to why and how an oral hearing before the UNDT would have impacted the decision of the case, this ground of appeal must fail.

57. Furthermore, we do not find that by denying AAZ's requests for an oral hearing the UNDT committed an error in procedure. The UNDT Judge lawfully exercised the discretion vested in her

³⁷ *Nimer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-879, para. 33 (internal citation omitted).

³⁸ *Nadeau v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-733/Corr. 1, para. 31.

by Article 16(1) of the UNDT Rules of Procedure and gave a reasonable explanation for not holding an oral hearing.

58. Consequently, the Dispute Tribunal did not commit an error in procedure, such as to affect the decision of the case.

Whether the UNDT misrepresented or failed to give complete consideration to the facts

59. AAZ submits that the Dispute Tribunal failed to consider the misrepresentation of his performance evaluation as FFM Coordinator in the Memorandum dated 15 March 2021 addressed to the High Commissioner. He argues that his performance was misrepresented and assessed as “fully satisfactory” instead of “exceeds performance expectations”, thereby downplaying it. In addition, he contends that the UNDT’s conclusion that the interview was conducted twice due to “an administrative issue” fails to take into account the irregular panel OHCHR assembled or that this was the first in a series of irregularities by which OHCHR forfeited the presumption of regularity.

60. The Secretary-General argues that AAZ’s claim is without merit and should be dismissed because the Memorandum correctly described his performance as “fully satisfactory”. The Secretary-General reiterates the UNDT’s finding that the ratings of “exceeds performance expectations” and “successfully meets performance expectations” both establish “full satisfaction” with the work performed pursuant to Section 9.6 of ST/AI/2021/4.

61. Section 9.3 of ST/AI/2021/4 lists four overall performance ratings staff members may be given, namely: exceeds performance expectations; successfully meets performance expectations; partially meets performance expectations; and does not meet performance expectations.

62. With regard to the highest rating, Section 9.4 of ST/AI/2021/4 provides:

A rating of “exceeds performance expectations” should be considered in cases in which the staff member has surpassed the defined success criteria and/or performance expectations for the majority of the goals, key results and achievements, has continually gone beyond expectations or has significantly surpassed success criteria and/or performance expectations in quantity and quality during the cycle, including in demonstrating core values and competencies, as applicable.

63. As concerns the second-highest rating, Section 9.5 of ST/AI/2021/4 states:

A rating of “successfully meets performance expectations” should be considered in cases in which the staff member has fully achieved the defined success criteria and/or performance expectations for the majority of the goals, key results and achievements during the cycle, including in demonstrating core values and competencies, as applicable.

64. In respect of both aforementioned ratings, Section 9.6 of ST/AI/2021/4 stipulates:³⁹

The ratings of “exceeds performance expectations” and “successfully meets performance expectations” establish full satisfaction with the work performed and justify awarding a salary increment in accordance with section 16.3. *The ratings shall be so viewed when staff members are considered for selection for a position without prejudice to the discretionary authority of the Secretary-General to appoint staff members.*

65. It emerges from the foregoing that an overall rating of a staff member’s performance does not affect the discretionary authority of the Administration to appoint staff members. Therefore, whether AAZ had received the wrong rating, which is not the case here, such did not affect or influence the Secretary-General’s exercise of discretion to choose from the list of recommended candidates.

66. Similarly, AAZ has failed to show how the irregularity in the first interview due to “an administrative issue” had an effect on the second interview or impacted the lawfulness of the non-selection decision, especially as the issue of the irregular panelist in the first interview was cured and AAZ was recommended as the first-ranked candidate at the end of the second interview.

67. Therefore, we hold that the UNDT did not misrepresent or fail to give complete consideration to the facts.

Whether the UNDT erred on a question of fact, resulting in manifestly unreasonable decision, or law in finding the non-selection decision lawful

68. The Secretary-General maintains that the non-selection decision was a lawful exercise of the High Commissioner’s discretion to select one of the three recommended candidates, taking into account the status of the Selected Candidate as a career staff member, his long experience in

³⁹ Emphasis added.

acting in the role and the commitment to geographical diversity. The Secretary-General also asserts that the UNDT rightly concluded that the Administration had correctly followed the procedures laid out in the applicable legal framework for selection.

69. AAZ submits that the Dispute Tribunal did not engage with his argument that the second-ranked candidate should not have been selected for the Post. He further submits that the UNDT failed to consider that the shortlisting process was flawed, and argues that the Selected Candidate did not meet the desirable recruitment criteria set out in the Job Opening, particularly the requirement of “[e]xperience in Fact-Finding Missions/Commissions of Inquiry or an International criminal court”.

70. First, it is undisputed that the Memorandum dated 15 March 2021 addressed to the High Commissioner, ranked candidates by order of preference and that AAZ was listed as the Hiring Manager’s first choice in the list of recommended candidates. Nevertheless, Section 9.3 of Administrative Instruction ST/AI/2010/3 (Staff selection system), that was applicable at the time of the recruitment exercise, provides:

When recommending the selection of candidates for posts up to and including at the D-1 level, the hiring manager shall support such recommendation by a documented record. The head of department/office shall select the candidate he or she considers to be best suited for the functions. Prior to selection of an external candidate, that decision must be justified in writing to, and approved by, OHRM. (...)

71. Section 9.3 of ST/AI/2010/3 establishes that the Administration is not bound by the recommendation of the Hiring Manager in the staff selection exercise. We affirm that the Hiring Manager can make recommendations but it is the Head of Entity that is ultimately accountable for the selection decision and also responsible for setting targets in terms of gender parity and geographical representation, among other goals.

72. In this case, the responsibility fell on the High Commissioner to select the candidate best suited to the functions of the Post. She was under no obligation to select the first-ranked candidate, since all the candidates included in the list were deemed suitable to carry out the functions.

73. Second, the record in this case shows that the required criterion for the Job Opening was “[a] minimum of ten years of progressively responsible experience in human rights, political affairs, international relations, law or related area”. The other criteria, including “[e]xperience in

Fact-Finding Missions/Commissions of Inquiry or an International criminal court” and “[e]xperience working in or on Venezuela” were desirable. The Selected Candidate met the lone required criterion; it was therefore up to the Administration to interpret the desirable selection criteria. As we emphasized in *Bofill*, “it is up to the High Commissioner (...) to determine the relative importance of the criteria used to select staff members who will be promoted”.⁴⁰ Under the consistent jurisprudence of the Appeals Tribunal, the scope of judicial review in staff selection matters is limited. We have repeatedly acknowledged that the 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”.⁴¹

74. Therefore, we find that the UNDT did not err in determining that the procedure as laid down in the Staff Regulations and Rules had been followed.

75. Next, we examine the question of whether AAZ was given full and fair consideration, and whether the applicable Regulations and Rules were applied in a fair, transparent, and non-discriminatory manner.

76. The Dispute Tribunal concluded that AAZ’s candidacy was given full and fair consideration, stating that there was “no evidence to support the claim that the High Commissioner’s selection decision was in any way influenced by extraneous considerations such as the allegations of misconduct against the Applicant”.⁴²

77. AAZ submits that upon further enquiries into his non-selection for the Post, he informally learned that senior OHCHR officials had informed the High Commissioner that the order of preference established by the assessment panel should be overturned in favor of the second-ranked candidate because there were “very serious allegations” against him. He adds that his non-selection was based on reliance on unfounded allegations of harassment and abuse of authority made against him by a former FFM staff member that were unproven and not investigated and a sexual exploitation and abuse allegation dating back to 2010, that he contends was dismissed as *prima facie* unsubstantiated in 2011. AAZ concludes that, but for the

⁴⁰ *Bofill v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-383, para. 20.

⁴¹ *Mirella* Judgment, *op. cit.*, para. 57 (internal citation omitted).

⁴² Impugned Judgment, para. 44.

Administration's reliance on the above wrongful, improper, and extraneous considerations, his chances of selection for the Post were not "merely significant but virtually certain".

78. We agree with the Dispute Tribunal that the evidence on record contradicts AAZ's claim.⁴³ As the UNDT correctly pointed out, after purported allegations of harassment and abuse of authority made by a former FFM staff member against him in October 2020, there were several positive developments in AAZ's career that confirm that the non-selection decision was not influenced by extraneous considerations. Notably, in December 2020, his performance was evaluated as "exceeds performance expectations". After that, his temporary appointment as FFM Coordinator was renewed, he was allowed to compete for the fixed-term appointment as FFM Coordinator and was ranked first among the recommended candidates, following both competency-based interviews, and on 21 July 2021, he was notified of his selection as Senior Human Rights Officer and Country Representative, at the P-5 level, in La Paz Bolivia. Therefore, we agree with the UNDT's finding that "it is unlikely that some or all of this would have happened had there been serious concerns among OHCHR senior officials about [AAZ]'s conduct".⁴⁴

79. In addition, we note that the High Commissioner approved the selection of the Selected Candidate on 28 June 2021. OHCHR was only informed on 3 August 2021 by OIOS that a formal complaint had been lodged against AAZ. Thus, the contested decision was made before an investigation into the allegations against him began. Therefore, the investigation could not have had an impact on the outcome of the selection process.

80. We underscore the Administration's wide discretion in making staff selection and promotion decisions. In this case, the High Commissioner had a list of three potential candidates for final selection and AAZ was on that list. The High Commissioner could have selected any one of the three candidates, when she exercised her discretion and made the selection. Indeed, the Secretary-General on 9 May 2023, in compliance with UNDT Order No. 022 (NY/2020) of 28 March 2023 and Order No. 033 (NY/2020) of 24 April 2023, submitted a list of examples between 2021 and 2023 in which the first-ranked candidate was not selected. This evidence confirms that it was not unusual for the Administration to select a second-ranked candidate ahead of the first-ranked candidate.

⁴³ *Ibid.*, para. 42.

⁴⁴ *Ibid.*, para. 43.

81. The High Commissioner did not select AAZ; instead, she selected the Selected Candidate, taking into account, *inter alia*, the status of the Selected Candidate as career staff who had been serving in an acting role for several years, his qualification and experience as well as the commitment to geographical diversity. Each of those four categories of considerations is rational and each consideration is valid.

82. First, as concerns the status of the Selected Candidate, the Administration explained that the Selected Candidate was “a career staff, holding a permanent appointment with the United Nations since 1994 while [AAZ was] not a career staff as he was only holding a temporary appointment at the time”.⁴⁵ The Administration added that OHCHR had “committed itself to make greater efforts to avoid and end long-term acting roles and to promote those staff members provided they meet all the requirements and [were] high performers, in particular if a career staff [was] concerned as in the case at hand”.⁴⁶ The UNDT did not err in agreeing that this was a valid consideration.

83. Second, with regard to the qualifications of the Selected Candidate and his, AAZ has not submitted on appeal any fact that he would request the Appeals Tribunal to establish, nor explained what factual information on the candidates’ qualifications the UNDT failed to establish. AAZ has asserted on appeal that he was the “most qualified” candidate but has provided nothing in his pleadings to explain how his qualifications were “misrepresented”.

84. Third, the Administration confirmed that the Selected Candidate had extensive experience in managing teams of different sizes, experience with fact-finding missions and Commissions of Inquiry and experience in drafting reports, including on human rights topics.⁴⁷ AAZ has submitted that, in the employment history of the Selected Candidate, the latter did not mention having been employed by or having anything else to do with FFMs, Commissions of Inquiry or international criminal courts. The fact that the Selected Candidate had not included specific information about such experience is not sufficient to find that the claim by the Selected Candidate about his experience was incorrect. AAZ has not pointed to any other evidence to corroborate his allegation.

85. Fourth, the Administration explained that the selection of the Selected Candidate, an internal candidate from the WEOG region, would not have an impact on the overall geographical

⁴⁵ The Secretary-General’s reply before the UNDT, para. 43.

⁴⁶ *Ibid.*, para. 44.

⁴⁷ 16 November 2021 letter from the MEU.

representation in OHCHR, as he already factors into the existing statistics and, by contrast, the selection of AAZ, an external candidate serving on a temporary appointment, would bear an impact on that balance.⁴⁸ Therefore, the appointment of the Selected Candidate did not reduce the geographical diversity of OHCHR whereas the appointment of AAZ would have. This consideration does not appear unreasonable. There is nothing in AAZ's submissions to suggest any arbitrariness in the High Commissioner's approach.

86. Taking such considerations as the status of the Selected Candidate, a career staff member who had been serving in an acting role for several years, his qualification, experience, and the commitment to geographical diversity into account did not in and of itself amount to discrimination, and it was within the High Commissioner's discretion to do so. AAZ and the Selected Candidate were close contenders for the Post. There is no evidence that the exercise of discretion by the High Commissioner was arbitrary, discriminatory or irregular.⁴⁹ As we held in *Elzarov*:⁵⁰

(...) The general principle, as it relates to whether fair consideration is given to an application, is that when the Secretary-General makes a decision on staff selection, that decision is presumed to be regular, a presumption which is rebuttable in certain circumstances. Thus, if there is evidence that a candidate's case has received full and fair consideration wherein proper procedures have been followed and all relevant material has been taken into consideration, the UNDT is obliged to uphold the selection/promotion of the Secretary-General.

87. The presumption of regularity stands satisfied if the Administration is able to minimally show that full and fair consideration was given to the candidate. The burden of proof then shifts to the staff member to show, through clear and convincing evidence, that he was denied a fair chance of selection or promotion.⁵¹

88. In the circumstances, we find that AAZ has failed to show by clear and convincing evidence that he was denied a fair chance of selection.

⁴⁸ *Ibid.*

⁴⁹ See *Elzarov v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-893, para. 38.

⁵⁰ *Ibid.*, para. 39.

⁵¹ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 26.

89. Therefore, the UNDT did not err in concluding that his candidacy was given full and fair consideration and that the applicable Regulations and Rules were applied in a fair, transparent, and non-discriminatory manner.

90. Hence, we agree that the UNDT did not err in finding the contested decision lawful.

Whether AAZ is entitled to an award of costs for his legal fees

91. AAZ argues that the Administration should pay USD 15,000 for legal fees incurred in submitting the present appeal.

92. The Secretary-General submits that AAZ has not shown that the Secretary-General “has manifestly abused the appeals process” as required by Article 9(2) of the UNAT Statute.

93. Legal costs may only be awarded against a party when it has “manifestly abused the appeals process”. Such an order would rarely be made, and usually after the party has been fairly warned of that consequence if the abuse of process continues.⁵² Applying this standard to the present case, we find that the Secretary-General has not manifestly abused the appeals process.

94. Accordingly, AAZ is not entitled to an award of costs for his legal fees.

Whether AAZ is entitled to compensation for material and moral damage

95. AAZ argues that breaching procedural fairness is equivalent to violating his employment rights and should entail compensation. He submits that considering the severity of the violations in this case, compensation in the amount of two years’ salary (plus FTA-related benefits) at the P-5 level would be appropriate. In addition, he requests USD 50,000 as moral damages for harm he suffered to his professional reputation and harm in the form of stigmatization and emotional distress.

96. With regard to compensation for harm, our consistent jurisprudence requires the following:⁵³

⁵² *Ashraf Zaqqout v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2022-UNAT-1219, para. 59 (internal citation omitted).

⁵³ *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para. 68 (internal citations omitted).

(...) As per the Appeals Tribunal's jurisprudence, compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both. It is not enough to demonstrate an illegality to obtain compensation; the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien. If one of these three elements is not established, compensation cannot be awarded. Our case law requires that the harm be shown to be directly caused by the administrative decision in question. If these other two elements of the notion of responsibility are not justified, the illegality can be declared but compensation cannot be awarded.

97. Our foregoing conclusion that the UNDT did not err in finding the contested decision lawful precludes the Appeals Tribunal from awarding compensation.⁵⁴ Since no illegality was found, there is no justification for awarding of any compensation.

98. For that reason, AAZ's request for compensation for material and moral damage is denied.

⁵⁴ See *Gueben v. Secretary-General of the United Nations*, Judgment No. Judgment No. 2020-UNAT-988, para. 49.

Judgment

99. AAZ's appeal is dismissed, and Judgment No. UNDT/2023/122 is affirmed.

Original and Authoritative Version: English

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

(Signed)

Judge Forbang, Presiding

(Signed)

Judge Savage

(Signed)

Judge Colgan

Judgment published and entered into the Register on this 17th day of December 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar