



**Before:** Judge Francis Belle

**Registry:** Geneva

**Registrar:** René M. Vargas M.

ELIAS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Evelyn W. Kamau, OSLA

**Counsel for Respondent:**

Nicole Wynn, AAS/ALD/OHRM, UN Secretariat  
Nusrat Chagtai, AAS/ALD/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a Security Assistant at the G-3 level in the Office of the United Nations Special Coordinator for Lebanon (“UNSCOL”), contests the decision not to select him for the position of Field Security Assistant at the G-4 level in UNSCOL (“the Post”). The position was advertised under Job Opening No. 73064 (“the first JO”), which was cancelled to attract more female candidates and then re-advertised under Job Opening No. 87333 (“the second JO”).
2. The Respondent submits that the application is without merit.
3. For the reasons set out below, the Tribunal rejects the application on its merits.

## **Factual and procedural history**

4. On 26 January 2017, UNSCOL issued the first JO with a closure date of 9 February 2017. The Applicant applied for the Post.
5. On 10 October 2017, subsequent to the Applicant passing a written assessment and a competency-based interview for the Post, the Country Security Advisor and the Chief Security Officer informed all security staff, including the Applicant, that the first JO would be cancelled and re-advertised to attract more female candidates in line with the Secretary-General’s System-Wide Strategy on Gender Parity of 12 September 2017 (“the Gender Strategy”).
6. On 20 October 2017, the Applicant received an email in which it was stated that the first JO had been cancelled and that it would be re-advertised.
7. On 3 November 2017, the Applicant filed a request for management evaluation of the decision to cancel the first JO.
8. On 25 October 2017, the Post was re-advertised under the second JO, and the Applicant reapplied for the Post.

9. On 18 January 2018, in relation to the second JO, the Applicant completed another written test for the Post.
10. On 24 January 2018, in response to the Applicant's request for management evaluation of the first JO, the Under-Secretary-General for Management informed the Applicant that the decision to cancel the first JO was upheld.
11. On 12 February 2018, the Applicant filed an application before the Dispute Tribunal challenging the decision to cancel the first JO. The case was registered under Case No. UNDT/NBI/2018/022 (Elias).
12. On 15 February 2018, in relation to the second JO, the Applicant underwent another competency-based interview for the Post.
13. On 1 June 2018, with reference to the second JO, the Applicant was notified that he had not been successful in the recruitment for the Post but been placed on the roster as a recommended candidate. Shortly thereafter, the Applicant learned that a male colleague had been selected for the Post.
14. On 25 July 2018, the Applicant requested management evaluation of his non-selection for the Post, namely the decision contested in the present case.
15. On 10 September 2018, in response to the Applicant's request for management evaluation, the Under-Secretary-General for Management informed the Applicant that the impugned decision was upheld.
16. On 5 December 2018, the Applicant filed the application in the present case in which he challenges his non-selection for the Post. The case was registered by the Nairobi Registry under Case No. UNDT/NBI/2018/119 (Elias). On 9 January 2019, the Respondent duly filed his reply.
17. On 19 March 2019, the present case was transferred from the Nairobi Registry to the Geneva Registry and re-registered under Case No. UNDT/GVA/2019/024.

18. On 21 November 2019, Judge Rachel Sophie Sikwese issued Judgment *Elias* UNDT/2019/166, in Case No. UNDT/NBI/2018/022, determining that the application was not receivable.

19. On 16 October 2020, the undersigned Judge, by Order No. 105 (GVA/2020) in the present case, rejected a request filed by the Applicant for consolidating this case with Case No. UNDT/NBI/2018/022, reasoning that the Dispute Tribunal had already disposed of the latter case. The Tribunal also noted that as neither party had requested any further evidence to be produced and the case record was fully informed, the case was to be determined on the papers before it. Before doing so, the Tribunal, however, allowed the parties to file closing statements, which they duly did on 29 October 2020 (the Applicant) and 12 November 2020 (the Respondent).

## **Consideration**

### *Scope of the case*

20. The Appeals Tribunal has consistently held that the Dispute Tribunal has “the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”, and “may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed” (see *Fasanella* 2017-UNAT-765, para. 20).

21. Based on the parties’ submissions, in line with Order No. 105 (GVA/2020), the Tribunal defines the issues to be adjudicated upon as follows:

- a. Was it lawful for the Administration to cancel the first JO and re-advertise the Post under the second JO in the given circumstances?
- b. Was the subsequent interview of the Applicant in relation to the second JO conducted in a lawful manner?

- c. If any irregularities occurred during the process, were any of these alleged irregularities of “such a nature that, had [they] not occurred, [the Applicant] would have had a foreseeable and significant chance for [selection]” (see the Appeals Tribunal in *Ross* 2019-UNAT-926, para. 48)?
- d. If so, to what remedies, if any, is the Applicant entitled?

*Issue (a) - the cancellation of the first JO and the re-advertisement of the Post*

Is the issue *res judicata*?

22. The Respondent submits that the Dispute Tribunal “disposed of this issue in its Judgment No. UNDT/2019/166”, where it was found that “the Applicant’s challenge to the cancellation of the first JO was not receivable”. The Applicant’s “challenge in this case, as stated in his Application, is limited to his non-selection for the second JO”.

23. The Tribunal observes that by Judgment *Elias* UNDT/2019/166, the Dispute Tribunal found the application in Case No. UNDT/NBI/2018/022 not receivable, reasoning that “since the process [following the first JO] did not yield a selection list, there was no administrative decision for the Applicant to contest” (see para. 44). Now, in the present case, such list has been established and a candidate other than the Applicant has also been selected for the Post.

24. The Dispute Tribunal is therefore yet to consider and adjudicate upon the substantive issue of the Applicant’s non-selection for the Post, including the matter of the cancellation of the first JO and re-advertisement of the second JO. This is consequently not *res judicata*, as otherwise apparently argued by the Respondent.

Was it an appropriate exercise of discretion when UNSCOL cancelled the first JO and re-advertised the Post under the second JO?

25. On the substance of the issue, the Tribunal notes that the situation of the present case, namely where the Administration cancels a job opening and re-advertises the same post under a new job opening with the purported objective of attracting more

female candidates, is not foreseen anywhere in the statutory framework governing recruitment at the G-4 level in the Secretariat.

26. The Applicant submits that ST/AI/2010/3 (Staff selection system) governs the impugned selection exercise, but by this administrative instruction's own terms, the Tribunal notes that it is only applicable to selection processes "at the G-5 and above levels in the General Service category" (see sec. 3.1). It is therefore not applicable to the present case. The Tribunal further notes that while art. 101.3 of the United Nations Charter highlights "the necessity of securing the highest standards of efficiency, competence, and integrity" and states that "[d]ue regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible", no mention is made of gender parity as a criterion to be considered in a selection process.

27. Whereas the Applicant is therefore correct that there was no statutory basis regulating the issue of cancelling the first JO to attract more female candidates, the Tribunal also notes that it is, on the other hand, nowhere prohibited either. The question is, therefore, whether UNSCOL could do so as a matter of its regular exercise of discretionary authority in such situation.

28. It is trite law that the Dispute Tribunal's judicial review is limited. In this regard, reference is often made by the Appeals Tribunal to *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review finding that "the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate". The Appeals Tribunal further held that "the Dispute Tribunal is not conducting a "merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision".

29. Specifically regarding selection and promotion decisions, in light of the Administration's broad discretion in such matters, the Appeals Tribunal has held that these types of decisions are governed by the so-called "principle of regularity". This

means that if the Respondent is able “to even minimally show that [an applicant’s] candidature was given a full and fair consideration, then the presumption of law stands satisfied”. To rebut this minimal showing, the applicant “must [then] show through clear and convincing evidence that [s/he] was denied a fair chance of promotion” in order to win the case (*Lemonnier* 2017-UNAT-762, para. 32).

30. As instructional basis for the decision, the Applicant instead refers to the Hiring Manager’s Manual, release 2.2 dated 18 April 2012, which, he essentially submits, only allows cancelling a job opening in certain specific instances and that attracting more female candidates is not one of them. The Tribunal notes that a later version of the Manual was released in October 2012 (release 3.0), which was titled, “Manual for the Hiring Manager on the Staff Selection System (inspira)” (“the Hiring Manager’s Manual”). This is therefore the relevant Manual.

31. The Tribunal further observes that even though the Appeals Tribunal has stated that the Hiring Manager’s Manual is not purported “to vest a staff member with an entitlement” (see, *Asariotis* 2015-UNAT-496, para. 23), the stipulations therein might cause a job candidate to legitimately expect that a selection exercise will be conducted in accordance therewith (in line herewith, see, for instance, *Sannoh* 2014-UNAT-451, para. 13, regarding an “information circular”, as well as the definition of such a legitimate expectation in *Sina* 2010-UNAT-094, which affirmed the liability findings of *Sina* UNDT/2010/060). In the present case, such expectation is further justified by the fact that UNSCOL indicated in the first JO that “[t]he screening and evaluation of applicants will be conducted on the basis of ... the applicable internal legislations of the United Nations including ... guidelines”.

32. The Respondent, however, contends that the Hiring Manager’s Manual does not apply to the present selection exercise because references are made therein to ST/AI/2010/3. The Tribunal notes that the fact that such references to ST/AI/2010/3 are made in this Manual does not mean by itself that it is inapplicable in this case as it is nowhere stated that its scope of applicability is limited to selection processes governed by ST/AI/2010/3. Rather, from the Manual’s stipulations it follows that it is

intended to provide guidance to hiring managers regarding all job openings posted on Inspira and not just those regulated by ST/AI/2010/3.

33. In the Hiring Manager's Manual, in sec. 6.10.6, it is stated that if "the assessment panel concludes that none of the applicants were found suitable for the position ... [t]he Hiring Manager will then submit to the Senior Recruiter a request to cancel the job opening". Nothing, however, is stipulated to the effect that this is the sole occasion at which a hiring manager can cancel a job opening. The Tribunal also observes that the cancellation was done prior to any selection recommendations being made, as according to sec. 6.10.7, "a job opening cannot be cancelled as long as there is one (1) suitable candidate on the recommended list who has passed the assessment exercise".

34. According to the Respondent, the selection process was instead executed in accordance with the Guidelines for the Selection of Locally-Recruited Staff Members in United Nations Peacekeeping Operations and Special Political Missions dated 5 July 2016. These Guidelines contain no provisions regarding the cancellation of a job opening, and of relevance to the present case, it is only stated that, "[p]osts at the G-4 level and below are not required to be advertised" and that "[t]he decision of whether to post a position-specific job opening shall be made by the Chief Human Resources Officer following consultation with the Hiring Manager" (see sec. 20). At the most, this would mean that a broad discretion was therefore granted to UNSCOL with regard to whether to even advertise the relevant job openings.

35. Both parties further refer to the Gender Strategy of Secretary-General, which albeit not of statutory nature, must be regarded as binding instructions for relevant United Nations entities to follow. In this Strategy is stated that "[j]ob openings that fail to yield a minimum 20% female applications will require written justification from the hiring manager on the positive outreach measures taken to attract women applicants" and that "[i]n the absence of a strong justification, job openings [are] to be extended / reopened". The parties agree that the first JO yielded less than 20 percent female candidates (the Respondent contends that only 7.7 percent of the candidates were female).



36. The Applicant submits that under the Gender Strategy, “UNSCOL could have exceptionally chosen one of the male candidates and provided written justification for doing so or reopened or extended the selection process to invite more female candidates”. Instead, “in a waste of the Organization’s resources, and the efforts of the seven successful male candidates, UNSCOL waited over five months after the competency-based interviews were completed to cancel the JO then re-advertise it”.

37. In this regard, the Tribunal finds that the Respondent has appropriately established that UNSCOL’s cancelled the first JO and re-advertised the Post under the Second JO in response to the issuance of the Gender Strategy on 12 September 2017, even if it was done seven months after the closure of the first JO on 9 February 2017 and subsequent to UNSCOL having already administered a written test and competency-based interviews.

38. Consequently, the Tribunal finds that the Respondent has appropriately established that UNSCOL’s decision to cancel the first JO and re-advertise the Post under a second JO in an effort to attract more female candidates to apply for the Post lawfully fell within its discretion, and that the Applicant has not been able to rebut this finding.

*Issue (b) - the interview of the Applicant in relation to the second JO*

39. The Applicant submits that the Human Resources official who participated in the competency-based interview was “not supposed to take part as an active member of the interview panel”. Rather, as an “*ex officio* member he was not meant to intervene in the interview”, and it was “for the Panel members to determine if a candidate’s responses were sufficient” for which reason he “overstepped his role”. In response, the Respondent merely contends that an *ex officio* panel member is not prohibited from asking questions during an interview without further substantiating the reason(s).

40. The Tribunal observes that the relevant statutory framework governing selection processes contain no provisions regarding how to conduct a competency-based interview. The role of an interview panel member, who is on the panel by virtue of her/his position (*ex officio*), is therefore, as such, unregulated.

41. In line with the above considerations, an interviewee might legitimately expect that the guiding principles of the Hiring Manager’s Manual will be followed in a competency-based interview. In addition, also in the second JO, UNSCOL explicitly states that the evaluation of applicants will be conducted in accordance with relevant guidelines, which the Tribunal also here finds would reasonably include the Hiring Manager’s Manual.

42. According to the Hiring Manager’s Manual, “the assessors” are to ask probing questions “in a systematic way ... to build up a picture of the relative strengths and weaknesses of the applicant on the specific competencies” (see sec. 9.5.1.5). Questions that go beyond these guiding principles would therefore be improper in accordance with the Hiring Manager’s Manual.

43. In the present case, it is not clear what the role was of the relevant Human Resources official at the competency-based interview—did he participate as an “assessor” or was he only there to ensure that relevant procedures were correctly observed by the interview panel? The fact that both parties state that the Human Resources official was on the panel in an “*ex officio*” capacity does not further elucidate this question, as the determining criterion under the Hiring Manager’s Manual would be if the person was an “assessor”, which to the Tribunal would mean that s/he serves as an interview panel member with a determining role in rating the interviewees’ performances.

44. While the Applicant submits that the Human Resources official was not authorised to ask probing questions during the interview, the Respondent has not provided any submissions whatsoever on what the Human Resources official’s role was to be in the interview process. The Tribunal, however, notes that no official with

a title related to Human Resources is indicated among the three interview panel members on the template for the individual handwritten interview assessments of the Applicant competency-based interview, which the Respondent appended to his reply. Instead, as interview panel members are listed a “Close Protection Officer”, an “Administrative Assistant” and a “Coordination Officer”.

45. Accordingly, the Tribunal therefore finds that the Respondent has not appropriately established that the role of the Human Resources official was to be that of an assessor within the meaning of the Hiring Manager’s Manual and that he was therefore authorised to ask probing questions to the Applicant during the interview.

*Issues (c) and (d) - the nature and impact of any irregularities and possible remedies*

46. With reference to the above, the only irregularity in the selection exercise that the Tribunal has found is that the Human Resources official went beyond his role when he asked the Applicant some probing question during the competency-based interview in relation to the second JO.

47. In this regard, the Applicant contends that the Human Resources official repeatedly “interrupted the Applicant with probing questions adversely affecting his ability to competently respond to the Panels’ questions and resulting in the subsequent ratings he received from the Panel”. The Applicant further contends that had the Human Resources official not done so “[he] would have scored highly in the [interview]”, and since the competency-based interview rating was “the factor the Hiring Manager relied upon to select the successful candidate, were it not for [the Human Resources official’s] actions, the Applicant would therefore have had a foreseeable and significant chance for selection”.

48. The Respondent submits the Applicant did not suffer any harm from the questions asked by Human Resources official, which therefore had no impact on the Applicant’s chances for selection as he also passed the competency-based interview.

49. The Tribunal notes that the Respondent has submitted in evidence a “United Nations Comparative Analysis Report” dated 19 December 2019 (“the Report”) in which the interview performances of all the job candidates, who participated in the competency-based interview, including the Applicant, are described and rated against the competencies of professionalism, communication and client orientation.

50. In the Report, when assessing the Applicant’s interview, no reference is made to the Applicant being interrupted by any probing questions from the Human Resources official. Instead, the examples provided by the Applicant are set out in much detail and appropriately assessed against a set of indicators relevant to each of the competencies. The conclusion was that it was found that the Applicant had successfully met the requirements for the Post in all of the three listed competencies and therefore to be placed on the relevant corresponding roster. From the Report further follows that some other job candidates’ interview performances were actually rated higher than that of the Applicant, but like him they were also only rostered, because one candidate was found to have exceeded the requirements in all the three competencies. When perusing the summary of the job candidates’ answers, all the assessments seem appropriate in the context.

51. The Tribunal further notes that the Applicant has not submitted that any of the Human Resources official’s probing questions were based on bias, irrelevant considerations, or matters that were unhelpful in assessing the Applicant to establish the competencies of professionalism, communication and client orientation. If so, under the consistent jurisprudence, it is for the Applicant to substantiate such allegation (see, for instance, the Appeals Tribunal in *Sanwidi*, as quoted in the above, and also *Bofill* 2013-UNAT-383, para. 26, and in line herewith regarding ulterior motives, *Ross* 2019-UNAT-944, para. 25 and *Mahmoud* 2019-UNAT-964, para. 30).

52. Based on the Report, and in the lack of further information and/or documentation from the Applicant other than he felt that the questions from the Human Resources official were interrupting, the Tribunal therefore finds that the Respondent has appropriately demonstrated that even if the detected irregularity had not occurred, the

Applicant would still not have had a foreseeable and significant chance for selection. The Tribunal further finds that the Applicant has not been able to rebut this finding.

53. Consequently, as the application therefore fails, it is not necessary for the Tribunal to review issue (d) regarding remedies.

**Conclusion**

54. The application is rejected.

*(Signed)*

Judge Francis Belle

Dated this 10<sup>th</sup> day of December 2020

Entered in the Register on this 10<sup>th</sup> day of December 2020

*(Signed)*

René M. Vargas M., Registrar, Geneva