



**Before:** Judge Joelle Adda

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

PASSARELLI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

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**Counsel for Respondent:**

Miriana Belhadj, UNOG

Jérôme Blanchard, UNOG

Note: The number of this Judgment has been corrected on the cover page due to a typographical error. The correct Judgment number is UNDT/2021/042. The date and the content of the judgment remain identical.

## **Introduction**

1. The Applicant contests that she was not selected for the post at the P-5 level as Senior Human Rights Officer (“the Post”) with the Office of the High Commissioner for Human Rights (“OHCHR”) in New York, which was advertised as Job Opening No. 110837 (“the Job Opening”).
2. The Respondent contends that the application is without merit.
3. For the reasons set out below, the application is granted on its merits and the Applicant is compensated for her loss of chance.

## **Facts**

4. On 28 February 2019, the Applicant applied for the Post as advertised in the Job Opening.
5. By interoffice memorandum dated 22 January 2020, an OHCHR Director in New York wrote to the High Commissioner for Human Rights (“the High Commissioner”) that the Applicant had been recommended for the Post along with some other job candidates. The OHCHR Director further stated that the hiring manager endorsed the Applicant as the preferred candidate, explaining that the panel had given her the highest interview rating of all candidates and that she had scored the highest grade among the recommended candidates in the written assessment.
6. On 10 March 2020, a recommended—male—job candidate was informed that the Head of Department had selected him for the position. The selected candidate immediately confirmed his acceptance of the Post.
7. By email of 11 March 2020, the Applicant was notified, with reference to the Job Opening, that she had been rostered for positions with similar functions at the same level as the Post. Nothing was stated in email about her selection for the Post.

8. Upon the inquiry of the Applicant, by email of 20 March 2020, the Senior Gender Adviser in the Executive Office of the Secretary-General confirmed that her office had not received a request for an exception based on ST/AI/1999/9 (Special measures for the achievement of gender equality). The Tribunal notes that this administrative instruction establishes a system by which women are to be given preferential consideration in selection decisions in certain circumstances.

9. On 30 March 2020, the Tribunal issued Order No. 57 (NY/2020) rejecting the Applicant's application for suspension of action dated 23 March 2020, reasoning that the contested decision had already been implemented.

10. On 20 May 2020, it was announced to all OHCHR staff that the selected job candidate had been promoted to the Post in March 2020.

11. By interoffice memorandum dated 10 June 2020, the High Commissioner sought the "input" of the Under-Secretary-General and Senior Adviser on Policy (a person different from the aforementioned Senior Gender Adviser) concerning the recruitment of the selected male candidate for the Post. The High Commissioner explained that after the competency-based interview, three job candidates had been recommended for the Post, namely the selected male candidate, the Applicant and another male candidate, and that the Central Review Board had subsequently endorsed the recruitment of the selected candidate. Even though the Applicant was the hiring manager's preferred candidate, the High Commissioner found that "[a]fter a careful review and discussion of the candidates, and having fully given due consideration to female applicants, it [was] evident that the candidature of [the selected candidate stood] out compared to all other recommended candidates. The High Commissioner further explained that "[n]o other recommended candidate [had] an equal amount of skills and experience necessary for this position, which is an essential role within the OHCHR New York" and that she "fully [stood] by this recommendation". At the same time the High Commissioner regretted the "oversight for not having shared this assessment ... prior to pressing the selection button for [the selected candidate], which was "indeed

simply an omission since we are fully aware of the instructions provided in the gender policy guidelines”.

## **Consideration**

### *The issues of the present case*

12. The Appeals Tribunal has 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”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

13. Accordingly, the basic issues of the present case can be defined as follows:

- a. Was the selection decision lawful?
- b. If not, what remedies is the Applicant entitled to? This also includes an assessment of whether any of the alleged irregularities are of “such a nature that, had [they] not occurred, [the Applicant] would have had a foreseeable and significant chance for promotion” (see para. 48 of *Ross* 2019-UNAT-926)?

### *The lawfulness of the selection decision*

14. The Applicant, in essence, submits that the contested decision was unlawful because the Administration did not submit “the written analysis required by ST/AI/1999/91 as clarified by the [interoffice] memorandum of the Secretary-General dated 11 February 2019” to the Executive Office of the Secretary-General, which “impinged significantly on her chances of promotion”.

15. The Respondent’s submissions may be summarized as follows:

a. The Secretary-General has “broad discretion in matters of staff selection” (referring to *Abbassi* 2011-UNAT-110 and *Ljungdell* 2012-UNAT-265) and the judicial review of the Tribunal is limited (referring to *Kule Kongba* 2018-UNAT-849 and *Kellie* 2018-UNAT-875);

b. It is “uncontested that the Applicant’s candidacy received full and fair consideration”, and she was “recommended after a full-fledged selection exercise and was listed as the preferred candidate by the [h]iring manager”. Pursuant to sec. 9 of ST/AI/2010/3 (Staff selection system), the High Commissioner properly “exercised her discretion and selected the candidate she considered to be best suited for the functions”. The decision was “legal, rational, procedurally correct and not arbitrary”. The Applicant “does not contend that “the procedure” as set out in ST/AI/2010/3 “had not been properly followed, or that the discretion was not properly exercised” and “[t]here was no bias against the Applicant”;

c. The decision to select the other candidate was made by the High Commissioner “after a careful review and discussion of the candidates and having fully given due consideration to female applicants”. In the note sent to the Executive Office of the Secretary-General, “while sent belatedly, the High Commissioner provided the reasons for the contested decision”, in particular referring to the selected candidate’s skills and experiences;

d. The decision is consistent with sec. 1.8 of ST/AI/1999/9, as well as ST/AI/2020/5 (Temporary special measures for the achievement of gender parity), which although issued after the contested decision, may provide “interpretative guidance”. Under neither instruction is the head of entity “required to unconditionally select female candidates over male candidates” and shall only do so only if “the women candidates meet the requirements for the job opening and that their qualifications are substantially equal or superior to those of the competing male candidates”. The instructions do not purport “to

vest female candidates with an automatic entitlement or right to be selected over the competing male candidates”;

e. The High Commissioner considered that “the selected candidate had qualifications superior to those of the Applicant and that these qualifications were the determinant factor in the selection”. The “absence of a written analysis to [the Executive Office of the Secretary-General] did not render the decision unlawful”; and

f. It is “acknowledge[d] that no written analysis was submitted to the Executive Office of the Secretary-General ... as instructed by the Secretary-General in his 11 February 2019 [interoffice] memorandum”, and [r]easons were provided for this oversight”. The fact that “no note was submitted to the Executive Office of the Secretary-General prior to the selection does not of itself render the decision unlawful, as ultimately the instructions were not meant to supersede Section 9.3 of ST/AI/2010/3 that the head of department selects the candidate ‘best suited to the functions’”. The absence of “a note to the Executive Office of the Secretary-General ... prior to the selection is regrettable but it does not of itself render the selection exercise unlawful”.

16. The Tribunal notes that the Appeals Tribunal has consistently held that the Dispute Tribunal’s judicial review is limited and often refers to *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as 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”.

17. Specifically concerning promotion cases, the Appeals Tribunal has adopted the principle of regularity by which 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" after which the applicant "must 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).

18. At the outset, the Tribunal notes that the Applicant does not submit that the contested selection process was in violation of ST/AI/2010/3 and the staff selection system set out therein, but rather that it did not comply with the procedures set forth in ST/AI/1999/9 regarding special measures for the achievement of gender equality and the Secretary-General's interoffice memorandum dated 11 February 2019, which aims to implement ST/AI/1999/9.

19. Of relevance to the present case, under ST/AI/1999/9, sec. 1.8(d), the relevant "department or office *shall* submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation, indicating how the qualifications and experience of the recommended [male] candidate, when compared to the core requirements of the post, are *clearly superior* to those of the female candidates who were not recommended" (emphasis added).

20. By the interoffice memorandum of 11 February 2019, the Secretary-General intends "to clarify the procedures" of ST/AI/1999/9 "required for their implementation". After restating the requirements of sec. 1.8(d) of ST/AI/1999/9, the Secretary-General specifies that the relevant "written analysis and supporting documentation *shall* be submitted as a note to the Executive Office of the Secretary-General for his review and discussion *prior* to the head of entity making the selection in Inspira" (emphasis added).

21. In the present case, the Respondent agrees that the system of preferential consideration of women provided for in ST/AI/1999/9 and the 11 February 2019 interoffice memorandum applied to the situation of the present case. The Respondent further admits that the required note, which is to present the relevant written analysis

with documentation, was, nevertheless, not submitted before but after the selection decision was taken.

22. It is clear from ST/AI/1999/9 and the 11 February 2019 interoffice memorandum: (a) that sending a note to the Executive Office of the Secretary-General when selecting a male candidate instead of a suitable female colleague is a mandatory requirement as the verb “shall” is used; (b) that for “review and discussion”, the relevant note to the Executive Office of the Secretary-General is to be submitted before—and not after—any selection decision is taken; and (c) that in this note, the hiring entity is to explain and document why the “recommended” male candidate is “clearly superior” to any otherwise suitable female candidates.

23. The Tribunal observes that—before any final selection decisions are made—as the Chief Administrative Officer of the Organization vested with the ultimate authority to make selection decisions pursuant to arts. 97 and 101.1 of the United Nations Charter, the Secretary-General has a legitimate interest in ensuring that the special measures for the achievement of gender equality as per ST/AI/1999/9 and the 11 February 2019 interoffice memorandum are correctly implemented throughout the entire Organization. It is therefore only logical that the relevant note, which aims to explain and demonstrate this, is to be submitted to the Secretary-General’s Executive Office *prior* to any selection decision.

24. While the Tribunal agrees with the Respondent that under sec. 9.3 of ST/AI/2010/3, the official making the selection decision in a given recruitment exercise, in principle, is to select the best candidate, this obligation is somehow modified in ST/AI/2009/9 with the introduction of the “clearly superior” requirement. As the Secretary-General stands as the issuer of both administrative instructions and the ultimate decisionmaker in questions related to staff selection, it is evident that he has the power to make any such variation. Also, the Tribunal notes that, in the present case, the Respondent has not questioned the constitutional legality of the “clearly superior” requirement, which the Tribunal will therefore not review.



25. It is also instructive that in both ST/AI/1999/9 and the 11 February 2019 interoffice memorandum, the preferred male candidate is only described as a “recommended” candidate and as not a selected candidate. This underscores that no final selection decision is to be made before the note has first been presented to, reviewed by and discussed with the Secretary-General, or at least with his Executive Office, as per ST/AI/1999/9 and the 11 February 2019 interoffice memorandum. If the note could lawfully be submitted after the selection was made, ST/AI/1999/9 would be meaningless as the receiver of the note would be presented with a *fait accompli*.

26. The Respondent, nevertheless, submits that in the present case, it would have made no difference if the note had been submitted to the Executive Office of the Secretary-General before or after the contested selection decision.

27. The Tribunal disagrees therewith. It is not only evident that the provisions giving preferential consideration to female candidates in ST/AI/1999/9 and the 11 February 2019 interoffice memorandum are mandatory, but the Respondent has provided no evidence for his assertion on no difference. This contention therefore stands as nothing but speculation. At minimum, the Respondent could, for instance, have provided a statement from the Executive Office in support of his position, but he has not done so.

28. Also, the Tribunal notes that the evidentiary value of the note that was eventually submitted by the High Commissioner to the Executive Office of the Secretary-General is limited as it is only dated after the selection decision was actually made. It was therefore produced *ex post facto*.

29. In this note, it is, finally, nowhere explicitly stipulated that the selected male candidate’s qualifications and experience were actually *clearly superior* to those of the Applicant—it only follows that the High Commissioner opined that, for various reasons, he was a better fitted candidate than any other two recommended candidates.

30. Based on the above, with reference to *Lemonnier*, the Tribunal therefore finds that the Respondent has not minimally demonstrated that the selection decision was lawful.

### *Relief*

#### Rescission

31. The Applicant requests that the selection decision be rescinded. The Respondent makes no submissions thereon.

32. Under art. 10.5(a) of the Dispute Tribunal's Statute, the Tribunal may rescind a contested decision if found unlawful. In another non-selection case, namely *Chhikara* 2020-UNAT-1014, the Appeals Tribunal modified this Tribunal's judgment in *Chhikara* UNDT/2019/150 and decided to rescind the contested decision. Whereas this Tribunal had initially found rescission was "no longer a feasible option" because the selection decision had been taken long before the issuance of the judgment, the Appeals Tribunal held that "given the particular circumstances of the case and the 'grossly negligent' illegalities in which the selection process was conducted ... rescission of the contested decision is mandatory and cannot be avoided on the basis of the excessive length of time between the filing of the application and the issuance of the first instance decision".

33. In the present case, the Tribunal finds that the circumstances surrounding the irregularity are vastly different from those in *Chhikara*. While OHCHR's delay in submitting the note was evidently also negligent and led to an unlawful decision, it has not even as much as been suggested that the contested decision was tainted by any ulterior motives. More importantly, the Tribunal also notes that the candidate, who was selected for the Job Opening, accepted the offer long time ago and cannot now reasonably be forced to relinquish his appointment to the Post, which would be a direct consequence of rescinding the contested selection decision.

34. Accordingly, the Tribunal rejects the Applicant's claim for rescission of the contested decision.

### Compensation

35. Under art. 10.5(b) of the Dispute Tribunal's Statute, the Tribunal may order compensation for harm. This includes pecuniary damages, such as monetary recompense for any income loss suffered as a consequence of an unlawful selection decision (in line herewith, see, for instance, *Andersson* 2013-UNAT-379 and *Dia* 2015-UNAT-553).

36. In the Applicant's closing statement, she does not reiterate the claim for compensation for loss of opportunity (often also referred to as loss of chance) that she had stated in her application as an alternative to her claim for rescission. In the closing statement and her subsequent final observations, she, however, makes explicit references to the negative effect the unlawful decision had on her chances of promotion. In the Respondent's closing statement, his submissions on relief also relate to the Applicant's lack of a chance of selection rather than the rescission of the contested decision.

37. Also referring to *Fasanella*, the Tribunal will therefore consider the Applicant's claim for compensation for her loss of chance as a result of the contested selection decision.

38. Regarding the quantification of the Applicant's loss, the Appeals Tribunal has held that it "will generally defer to [the Dispute Tribunal's] discretion in the award of damages as there is no set way for the trial court to set damages for loss of chance of promotion". Rather, "what [the Appeals Tribunal] would ensure is that [the Dispute Tribunal] was guided by two elements. The first element is the nature of the irregularity; the second is the chance that the staff member would have had to be promoted or selected had the correct procedure been followed" (see *Muratore* 2012-UNAT-245, para. 5, referring to *Lutta* 2011-UNAT-117). The Appeals Tribunal has further held that "each case must turn on its facts" when quantifying a loss of chance

(*Leclercq* 2014-UNAT-429, para. 20). While the Dispute Tribunal is not obliged to “quantify” an applicant’s chance of being selected (*Gusarova* 2014-UNAT-439, para. 37), if it does so, this may be based on the number of suitable job candidates remaining in the selection process (*Asariotis* 2015-UNAT-496, para. 31, and *Chhikara* 2017-UNAT-723, para. 54) and also be expressed in percentages (*Hastings* 2011-UNAT-109).

39. In the present case, the Tribunal notes that three candidates were recommended for the Post and therefore eligible for selection by the decision-maker: the selected (male) candidate, the Applicant and another male candidate. Considering that (a) the Applicant was the candidate who did best in the written test and the competency-based interview among the three recommended candidates, (b) she was the hiring manager’s preferred candidate and (c) the system of preferential treatment of female job candidates in ST/AI/2009/9, the Tribunal finds that the other male candidate stood no chance of being selected. This leaves only the selected male candidate and the Applicant in the contest for the Post. Between these two candidates, it is not possible for the Tribunal to decide whether in the given circumstances, any of them were in a better position than the other, also taking into account the High Commissioner’s preference for the selected male candidate based on her perception of his unparalleled skills and experiences. The Tribunal therefore decides that the Applicant had 50 percent chance of selection.

40. Accordingly, as compensation for the Applicant’s loss of chance in the contested selection exercised under art. 10.5(b) of the Statute of the Dispute Tribunal, the Tribunal awards to the Applicant 50 percent of the income difference between her salary at the time of the selection decision and the salary that she would have obtained had she been selected for the Post. The compensation is to be calculated for two years, which what the Tribunal finds to be a reasonable measurement for the expected duration of the appointment.

## **Conclusion**

41. Based of the above, the Tribunal DECIDES that:
- a. The application is granted on its merits; and
  - b. As compensation, the Respondent is to pay the Applicant 50 percent of the income difference between her salary at the time of the selection decision and the salary that she would have obtained had she been selected for the Post for a period of two years.
  - c. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

*(Signed)*

Judge Joelle Adda

Dated this 27<sup>th</sup> day of April 2021

Entered in the Register on this 27<sup>th</sup> day of April 2021

*(Signed)*

Nerea Suero Fontecha, Registrar, New York