



**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

IZURIETA CANOVA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Anca Apetria

**Counsel for Respondent:**

Jérôme Blanchard, LPAS, UNOG

Patricia Illie, LPAS, UNOG

## **Introduction**

1. The Applicant contests the cancellation of Job Opening No. 75470 (“JO 75470”) for the post of Head (D-1), Unit for Economic Cooperation and Integration among Developing Countries (“the post”), United Nations Conference on Trade and Development (“UNCTAD”) to which he had applied.

## **Facts**

2. On 28 March 2017, JO 75470 was advertised in Inspira. The Applicant applied to it on 15 April 2017. Following an evaluation of candidates through screening, a written assessment and a substantive assessment of technical and professional knowledge, skills, and abilities, four candidates, including one female candidate and the Applicant, were invited to a competency-based interview. Two candidates, namely the Applicant and another male candidate, successfully demonstrated the required competencies during their respective competency-based interview.

3. On 10 January 2019, the hiring manager, namely the Director, Division of Globalization and Development Strategies, UNCTAD, submitted his endorsement of the above-mentioned two candidates as “recommended” to the Secretary-General of UNCTAD, prior to submission to the Central Review Board (“CRB”), United Nations Office at Geneva (“UNOG”).

4. On 11 February 2019, UNCTAD’s Departmental Focal Point for Women reviewed the hiring manager’s recommendation in accordance with Section 3.1(b) of ST/SGB/2008/12 (Departmental focal points for women in the Secretariat), noting concerns on the number of female applicants to the post and observing that broader dissemination of the job opening could have led to a greater number of female applicants.

5. On the same date, the Secretary-General of the United Nations, sent a memorandum to the Secretary-General of UNCTAD and other members of the Senior Management Group on the implementation of ST/AI/1999/9 (Special Measures for the Achievement of Gender Equality) stressing *inter alia* the Organization's priority to achieve gender parity.

6. By memorandum of 24 March 2019 to the Secretary-General of UNCTAD, the Assistant Secretary-General for Human Resources ("ASG/HR"), Department of Management Strategy Policy and Compliance, recalled, on the one hand, the commitment of all Senior Managers to achieve a geographically diverse workforce and, on the other hand, shared data about UNCTAD's geographical diversity at the end of 2018.

7. By note dated 4 April 2019 to the Chef de Cabinet, Office of the Secretary-General of the United Nations, the Secretary-General of UNCTAD *inter alia* noted that the two candidates the hiring manager recommended for JO 75470 were nationals from Italy and The Netherlands, namely countries in the Western European and Others Group ("WEOG") regional group, which were the highest represented regional group in UNCTAD at the time. Consequently, the Secretary-General of UNCTAD requested approval to re-advertise the post with the intent to reach UNCTAD's gender parity goals and improve its geographical representation.

8. By email of 17 June 2019, the Special Assistant, Office of the Assistant Secretary-General, Office of Human Resources, Management Strategy, Policy and Compliance ("MSPC"), clarified to UNCTAD the process to follow pursuant to ST/AI/1999/9 (Special Measures for the Achievement of Gender Equality) if Heads of Entity intended to recommend for selection a male candidates instead of a female candidate.

9. On the same date, by way of separate email, MSPC confirmed to UNCTAD that its Secretary-General was "empowered to make decisions relating to the administration of the staff selection process" under the new delegation of authority

structure, and suggested that cancelling JO 75470 and re-advertising, which fell under the scope of such delegation, could be a better option.

10. On 19 June 2019, the Secretary-General of UNCTAD requested the Chief, Human Resources Management Section (“HRMS”), UNCTAD, to cancel JO 75470 and to re-advertise the post.

11. By email of 17 July 2019, the Chief, HRMS, UNCTAD requested the Chief, HRMS, UNOG, to cancel JO 75470. On 19 July 2019, JO 75470 was cancelled in Inspira.

12. On 2 August 2019, the Applicant submitted a request for management evaluation. On 23 September 2019, the Under-Secretary-General for Management Strategy, Policy and Compliance, informed the Applicant of the decision to uphold the decision to cancel JO 75470.

13. On 12 December 2019, the Applicant filed with this Tribunal the application referred to in para. 1 above.

### **Parties Submissions**

14. The Applicant’s contentions can be summarized as follows:

a. The Secretary-General of UNCTAD cancelled JO 75470 after the names of successful candidates were recommended to him, and nearly two years after the list of applicants was released;

b. The reasons for the rejection of the recommended candidates varied from March 2019 and those explanations were a mere afterthought to justify said decision;

c. Gender parity and geographic diversity were arbitrarily used by the Administration to justify an unlawful decision; there is evidence that before and after the contested decision, male candidates were appointed to D-1 posts; and

d. The cancellation of JO 75470 was an act of gender discrimination against the Applicant, it violated the principle of estoppel and the prohibition of non-retroactivity of UN rules.

15. The Respondent's contentions can be summarized as follows:

a. The decision to cancel JO 75470 constitutes a lawful exercise of administrative discretion as it was fully justified by the interest of the service to attract a more diverse field of candidates for the post;

b. The Applicant has not identified any bias or inappropriate influence on the decision which is presumed regular;

c. By December 2018, UNCTAD's female representation at the D-1 level was 26.7% with a target for 2019 set at 41%;

d. On 11 February 2019, the Secretary-General of the United Nations underlined to the Senior Management Group the Organization's policy priority to achieve gender parity; and

e. The cancellation of JO 75470 was not detrimental to the Applicant's career as he is eligible to apply for other D-1 posts.

### **Consideration**

16. Based on its examination of the case file, the Tribunal finds that the legal question at stake is whether the decision of the Secretary-General of UNCTAD to cancel JO 75470 was a lawful exercise of administrative discretion.

#### *Scope of review and legal framework*

17. The Tribunal recalls that in selection matters, its role is unequivocally defined by the Appeals Tribunal holding in *Sanwidi* 2010-UNAT-084 (para. 40):

When judging the validity of the Secretary-General's exercise of discretion in administrative matters **the Dispute Tribunal determines if the decision is legal, rational, procedurally correct and proportionate**. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered and also

examine whether the decision is absurd or perverse. But **it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst various courses of action open to him. Nor is the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.** (emphasis added)

18. In *Ljungdell* 2012-UNAT-265 (para. 30), the Appeals Tribunal noted that:

Under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of [the Appeals] Tribunal has clarified that in reviewing such decisions, **it is the role of the 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. The Tribunals' role is not to substitute their decision for that of the Administration.** (emphasis added)

19. Concerning the Administration's ability to cancel an ongoing recruitment process, the Appeals Tribunal has stated that the Administration is not under an obligation to pursue a recruitment procedure once begun and that it is within its discretionary authority to terminate a recruitment procedure and/or to initiate a new one for sound reasons (*Kinyanjui* 2019-UNAT-932).

20. The Tribunal also recalls that it is well-settled case law that official acts are presumed to have been regularly performed, and the presumption stands satisfied if the Administration is able to minimally show that full and fair consideration was given to the candidate. Thereafter, the burden of proof shifts to the Applicant who must minimally show through clear and convincing evidence that he or she was denied a fair chance of selection/promotion (*Rolland*, 2011-UNAT-122).

21. With respect to the Organization's policy to reach gender parity, administrative instruction ST/AI/1999/9 (Special Measures for the Achievement of Gender Equality) is the applicable legal instrument.

*Merits*

Grounds for the contested decision – Gender parity/Geographical diversity

22. The Applicant argues *inter alia* that there were neither sound reasons nor any legal basis to cancel a selection process that followed the applicable procedures. Moreover, the Applicant argues that the alleged argument of reaching gender parity in UNCTAD does not justify the impugned decision under ST/AI/1999/9, because the measures therein do not require a minimum number of female candidates and do not provide for an entire recruitment process to be cancelled on the sole basis that a female candidate did not reach the final stage of a selection process.

23. Sec. 1.1 of ST/AI/1999/9 unequivocally sets the Organization’s goal with respect to gender distribution, namely a 50/50 split “in all posts in the Professional category and above, overall and at each level, including posts at the D-1 level and above”. Sec. 1.2 of that administrative instruction, setting the scope for the application of the special measures introduced to reach the gender distribution goal, provides that said measures “shall apply at all times, including during periods of retrenchment, when a recruitment freeze is in effect or when a department is reorganising”.

24. It is therefore reasonable to expect that the Organization will deploy efforts until the above-mentioned goal is reached, and sec. 1.9 of ST/AI/1999/9 clearly states that sections 1.6 and 1.8 shall apply to the selection of staff for posts in all categories where women are under-represented.

25. Such efforts also find grounding in sec 4.2 of ST/AI/1999/9, which requires that

All recommendations presented to the appointment and promotion bodies for recruitment, promotion or interdepartmental lateral transfer ... be accompanied by an explanation of how the recommended action will affect the representation of women in the department or office concerned, both at the level of the post to be filled and overall for posts in the Professional category and above.

26. UNCTAD's Departmental Focal Point for Women noted that only 19% of candidates to JO 75470 were female and that on 31 December 2018, UNCTAD's female representation at the D-1 level was 26.7%, which fell short of the set target of 41%.

27. The Departmental Focal Point for Women also observed that Human Resources, UNCTAD, did not undertake any outreach efforts to widen the range of female candidates for the job opening in question. In this regard, the Tribunal notes that sec. 1.5 of ST/AI/1999/9 clearly defines the role that Human Resources is expected to play in supporting the Organization's efforts to reach gender parity. Finally, the Departmental Focal Point for Women concluded that broader dissemination of the job opening could have led to an increased number of female candidates.

28. In addition to the gender parity consideration, the Secretary-General of UNCTAD took geographical diversity into account pursuant to the 24 March 2019 memorandum from the ASG/HR (see para. 6 above). The Tribunal notes that at the relevant time, the Western European and Others Group regional group accounted for 47% of UNCTAD's workforce, the remaining regional groups accounting for somewhere between 8% to 17%.

29. Bearing in mind the above, and recalling that the hiring manager recommended two male candidates from the Western European and Others Group regional group, as reflected in the 4 April 2019 note that the Secretary-General of UNCTAD addressed to the Chef de Cabinet, Office of the Secretary-General of the United Nations, the Tribunal is satisfied that there were sound reasons supporting the Secretary-General of UNCTAD's decision to cancel JO 75470, although it would have been desirable to undertake and complete a gender/geographical balance assessment at an early stage of the recruitment process.

### Discrimination

30. The Applicant further argues that there is no evidence that any of the women candidates met the qualifications for the post or had the same or superior qualifications that the recommended candidates. Therefore, the Applicant claims



that the impugned decision was an act of discrimination against him under staff rule 1.2(f) and ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

31. The Tribunal disagrees with the Applicant. Measures like the ones included in ST/AI/1999/9 do not run against article 101 of the Charter of the United Nations. They constitute permissible and lawful affirmative action on the part of the Organization to reach gender and geographical goals set by the UN General Assembly. They do not amount to discrimination under ST/SGB/2008/5 and are an additional component in recruitment exercises, on an equal footing as skills and competencies, until set goals are reached.

32. The Tribunal is of the view that such affirmative action does not mean that “less competent” individuals will be recruited to the detriment of others more qualified. It simply allows the broadening of the outreach exercise in connection with recruitment exercises and provides for a wider spectrum of considerations when selecting a candidate in order to meet the Organization’s needs.

#### Retroactive application of the UN Secretary-General’s memorandum

33. The Applicant also argues that the 11 February 2019 memorandum of the Secretary-General of the United Nations (see para. 5 above), which was issued after the selection recommendation had been submitted to the decision-maker, cannot be applied retroactively.

34. ST/AI/1999/9 implements the General Assembly resolutions related to reaching gender parity in the United Nations at its professional levels, and establishes the main principles and guidelines incumbent on the Organization to achieve that goal.

35. It is not disputed that said legal framework is applicable to recruitment processes in UNCTAD and, as a consequence, to the recruitment process at stake in this case.

36. Since ST/AI/1999/9 was in place at the time the recruitment process was launched, it is clear that there was no retroactive application of said normative. The 11 February 2019 memorandum from the Secretary-General simply recalled to Senior Managers, the Organization's priority to achieve gender equality arising from ST/AI/1999/9. The memorandum did not constitute a new issuance and referring to it to support the cancellation of JO 75470 cannot be said to constitute a retroactive application of that document. The Applicant's argument in this respect therefore fails.

#### Estoppel and waiver

37. According to the Applicant, if a minimum percentage of female candidates were required for the recruitment to be completed, the official involved in the recruitment process should have raised the issue in May 2017. Having chosen not to do so, the Applicant submits that the principles of estoppel and waiver precluded the Secretary-General of UNCTAD from advancing an insufficient number of female candidates as a rationale for the contested decision.

38. The Tribunal finds that the principle of estoppel is not applicable in the case at hand. Firstly, there is no right being asserted that contradicts a previous agreement by law. As noted above, the Secretary-General of UNCTAD exercised discretionary authority for sound reasons. The Tribunal understands that the cancellation of the job opening at stake at the final stage of a process where the Applicant was already a recommended candidate may be frustrating for him, but it does not render said cancellation illegal.

39. Secondly, the "gender-parity" policy was already in place at the time the post was opened for recruitment and, consequently, all the candidates were aware, or should have been aware, of it. Thirdly, the recruitment process was not finalized as none of the two recommended candidates were appointed.

40. In light of the above considerations, the Tribunal finds that the cancellation of JO 75470 was not an abusive exercise of administrative discretion by the Secretary-General of UNCTAD and, consequently, the contested decision was lawful.

*Remedies*

41. As a result of the Tribunal's finding about the lawfulness of the contested decision, there is no legal ground to grant the remedies requested by the Applicant.

**Conclusion**

42. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

*(Signed)*

Judge Teresa Bravo

Dated this 28<sup>th</sup> day of June 2021

Entered in the Register on this 28<sup>th</sup> day of June 2021

*(Signed)*

René M. Vargas M., Registrar, Geneva