



**Before:** Judge Alexander W. Hunter, Jr.

**Registry:** New York

**Registrar:** Nerea Suero Fontecha

RUSSO-GOT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER**

**ON CASE MANAGEMENT**

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**Counsel for Applicant:**  
Self-represented

**Counsel for Respondent:**  
Jameel Baasit, UNOPS

## **Introduction**

1. On 6 May 2019, the Applicant, a former Project Manager, at the United Nations Office of Project Services (“UNOPS”) filed this application in which he challenges “the decision of the Administration not to select him for the position of ERP/SAP Project Manager - VA/2018/B5011/16266”.
2. On the same date (6 May 2019), the Registry acknowledged receipt of the application and instructed the Respondent to file his reply within the mandatory 30-day time limit set out in art. 10 of the Dispute Tribunal’s Rules of Procedure. The case was not assigned to a specified Judge.
3. On 6 June 2019, the Respondent duly filed his reply in which he claims that the application is without merit.
4. On 1 April 2020, the case was assigned to the undersigned Judge.

## **Consideration**

*The Applicant filed the application before receiving the management evaluation response*

5. In the reply, the Respondent indicates that the Applicant filed the application before he received the management evaluation response, but essentially states that he is, nevertheless, ready to proceed with the case on the merits since the Applicant would otherwise just file another application with the Tribunal:

The Respondent wishes to note that the Application was filed at a time when the outcome of the management evaluation was still not due. In particular, the Application was filed when mediation was still ongoing. Indeed, the Applicant had been informed on 3 April 2019 “...since discussions are ongoing with the Ombudsman’s Office, we at UNOPS would prefer to let these discussions be completed before finalizing our review of your requests.” However, since the Applicant would

most likely file another UNDT application if this case is dismissed on the foregoing ground. the Respondent is prepared to proceed with this case.

6. The Tribunal notes that art. 8.1 of the Dispute Tribunal’s Statute sets out the deadlines for when the Applicant—at the latest—must file his application:

... An application shall be receivable if:

(d) The application is filed within the following deadlines:

...

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant’s receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices.

7. Nothing is provided as to when—at the earliest—the Applicant can file for management evaluation. The risk of filing the application before the receipt of the management evaluation response is that if the remedy requested by the Applicant is granted in this response, the application becomes moot. The Respondent’s submission in the reply must, however, be interpreted as him somehow knowing that the contested decision is going to be upheld in the present case.

8. The Tribunal notes that the application to this Tribunal was filed on 6 May 2019 and that the Applicant’s management evaluation request was dated 3 April 2019.

9. The 30-day period for the Respondent to complete the management evaluation under art. 8.1(d)(1)(b) of the Dispute Tribunal’s Statute and staff rule 11.2(d) had therefore expired at the time of the submission of the application. Also, there is no

evidence: (a) that this deadline had been “extended by the Secretary-General pending efforts for informal resolution by the Office of the Ombudsman, under conditions specified by the Secretary-General”, or (b) that the Applicant had been advised that a management evaluation response would be forthcoming although delayed.

10. Accordingly, the Tribunal finds that the application is not moot or filed prematurely.

*The Tribunal’s limited judicial review regarding a non-selection decision*

11. It is trite law that the Dispute Tribunal’s judicial review is limited. In general, the Appeals Tribunal often refers to its judgment in *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as “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”.

12. 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).

13. In line herewith, the Appeals Tribunal stated in *Verma* 2018-UNAT-829 (affirmed in *Kinyanjui* 2019-UNAT-932) that, “In terms of the discretion vested in the Administration, under Article 101(1) of the United Nations Charter 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 Tribunals 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" (see para. 13).

14. In *Verma*, the Appeals Tribunal further held that, "Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion" (see para. 14).

15. To minimally show that an applicant's candidature was given a full and fair consideration, the Respondent must therefore typically, at minimum, be able to produce a contemporaneous written record to demonstrate that the candidature of the applicant in question, as a matter of fact, received such consideration.

*The scope of the case*

16. 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.

17. The Applicant submits in the application that, "[t]he Administration is not compliant with *Timothy* 2018-UNAT-847 and UN jurisprudence to let [him] participate on a preferred or non-competitive basis in the mandatory order established by Staff Rule 9.6(e), without having to go through a competitive selection process".

18. The Tribunal notes that staff rule 9.6(e) solely concern the situation where a staff member is separated from services as her/his appointment is terminated and not where, as in the present case, it is not renewed. In line herewith, the Tribunal refers to the Appeals Tribunal in *Nouinou* 2019-UNAT-902, paras. 31 and 32.

19. The issues of the present case may therefore be defined as:

- a. Was the decision not to select the Applicant for the position as Project Manager proper in light of the Tribunal's limited judicial review?
- b. If not, what remedies are the Applicant entitled to?

*The applied legal framework*

20. The Tribunal notes that the parties have not produced the selection rules according to which any of the relevant selection exercises at UNOPS were conducted noting that the Tribunal is not in the possession thereof.

21. As the Respondent conducted the selection exercise, he is to produce these UNOPS rules.

*The factual circumstances as presented by the parties*

22. The Respondent states in his reply that he “does not accept the factual assertions in the Application, unless explicitly expressed in this Reply”. When presenting his version of the facts, the Respondent, however, nowhere explicitly accepts any of “the factual assertions” made by the Applicant although some appear to be reiterated or are evidently proved by the written record.

23. With due regard to judicial economy, statements such as that of the Respondent are not helpful for the Tribunal to determine the matters before it. To ensure a fair and expeditious disposal of the case and to do justice to the parties, the

parties are therefore jointly to produce two separate lists of the facts that they agree on and of the facts that they disagree on.

*Further evidence*

24. The Tribunal observes that neither party has requested the production of any further evidence. Under art. 18.2 of the Dispute Tribunal's Rules of Procedure, the Tribunal may, however, "order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings".

25. The Respondent submits in evidence an email dated 6 June 2019 in which an explanation is provided as to why the Applicant was not shortlisted for the relevant post. The Tribunal notes that this evidence is evidently made *ex post facto* for the purpose of the present proceedings and that no evidence is on file for the contested decision as to when it was actually taken. The Respondent is therefore to submit all relevant information and documentation thereon, and in order to ensure confidentiality, can do so by redacting the names of any other candidates.

*Closing statements*

26. Subsequent to the parties' submissions listed above, the Tribunal finds that the case is ready for adjudication on the papers on present record. Consequently, the parties are thereafter to be ordered to file their written closing statements.

IT IS ORDERED THAT:

27. By **4:00 p.m. on Tuesday, 28 April 2020**, the Respondent is to file:

- a. The UNOPS rules according to which the relevant selection exercises were conducted;

- b. The management evaluation response;
- c. All relevant information and documentation as to how the decision for not shortlisting the Applicant was made (names of other candidates can be redacted from the documents);

28. By **4:00 p.m. on Tuesday, 28 April 2020**, the parties are to file a jointly-signed statement providing, under separate headings, the following information:

a. A consolidated list of the agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support an agreed fact, clear reference is to be made to the appropriate annex;

b. A consolidated list of the disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex. At the end of the disputed paragraph in square brackets, the party contesting the disputed fact shall set out the reason(s).

29. By **4:00 p.m. on Tuesday, 12 May 2020**, the Respondent is to file his closing statement, which is to be five pages maximum, using Times New Roman, font 12 and 1.5 line spacing. The closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage;

30. By **4:00 p.m. on Tuesday, 19 May 2020**, the Applicant is to file his closing statement responding to the Applicant's closing statement at a maximum length of five pages, using Times New Roman, font 12 and 1.5 line spacing. The closing statement is solely to be based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage;



31. By **4:00 p.m. on Friday, 22 May 2020**, the Applicant is to file a statement of any final observations responding to the Respondent's closing statement. This statement of final observations by the Applicant must be a maximum of two pages, using Times New Roman, font 12 and 1.5 line spacing. It must be solely based on previously filed pleadings and evidence, and no new pleadings or evidence are allowed at this stage.

32. Unless otherwise ordered, on receipt of the last mentioned statement or at the expiration of the time limit provided, the Tribunal will adjudicate on the matter and deliver Judgment based on the papers filed on record.

*(Signed)*

Judge Alexander W. Hunter, Jr.

Dated this 6<sup>th</sup> day of April 2020