



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-795

**Rehman
(Appellant)**

v.

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

JUDGMENT

Before: Judge Martha Halfeld, Presiding
Judge Richard Lussick
Judge John Murphy

Case No.: 2017-1080

Date: 27 October 2017

Registrar: Weicheng Lin

Counsel for Ms. Rehman: Self-represented

Counsel for Secretary-General: Amy Wood/Isavella Maria Vasilogiorgi

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/019, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 15 March 2017, in the case of *Rehman v. Secretary-General of the United Nations*. Ms. Rafia Rehman filed the appeal on 13 May 2017, and the Secretary-General filed his answer on 17 July 2017.

Facts and Procedure

2. The facts as established by the UNDT are as follows:¹

... The Applicant joined [the United Nations Children's Fund (UNICEF)], Islamabad, Pakistan, on 1 November 2006, as Project Assistant, GS-5, on a temporary fixed-term contract with the Construction Unit. On 17 March 2010, she was selected as Program Assistant GS-6, Construction Unit, and her appointment expired on 31 December 2012. She was granted a fixed-term contract as Programme Assistant, GS-6, Education Section, on 1 January 2013 and was separated from service on 31 December 2015, upon the expiration of her fixed-term contract.

... The Applicant applied to the post of Programme Assistant (GS-6), Polio Section, UNICEF, Islamabad, Pakistan, and on 18 November 2015, she participated in a written test for it. The test consisted of four questions with a total of eighty points to be awarded, and had a forty points passing mark. The two assessors awarded the Applicant eleven and twelve points respectively, and she was thus not invited for an interview.

... By email of 17 December 2015, the Applicant asked the Chief, Human Resources, UNICEF, Pakistan, to be given the marks she received in the written test for the post of Programme Assistant (GS-6), Polio Section, and those of two other tests she had taken for two other positions.

... By email of 21 December 2015, the Chief, Human Resources, UNICEF, Pakistan, informed the Applicant that while she had scored sufficiently in one of the three tests, and she would therefore be invited for an interview for that post, she had not passed the threshold for the other two posts, including the post of Programme Assistant (GS-6), Polio Section. She was also informed that under UNICEF's selection policy, it was not required to share the results of the written tests.

¹ Impugned Judgment, paras. 3-15 (emphases in original).

... On 29 December 2015, the Applicant requested management evaluation “to review/examine the process of shortlisting and [the] written test result for the position of Programme Assistant (GS-6)”. She received a response upholding the decision not to select her for the post on 8 January 2016.

... Only two candidates successfully passed the test for the GS-6 post at the Polio Section, and were invited for an interview. However, during the interview, none of them was found suitable and the post was re-advertised on 5 January 2016. The Applicant applied for the re-advertised post and was interviewed, with other candidates, after passing the written test. She was, however, not recommended for the re-advertised post after the interview.

[... By application filed [before the Dispute Tribunal] on 1 February 2016, the Applicant contest[ed] the decision not to select her for the post of Programme Assistant, GS-6, Polio Section, UNICEF in Islamabad, Pakistan, “and [a] non-transparent process”.]^[2]

... On 7 March 2016, the Applicant filed a request for submission of additional documents by the Respondent, and by Order No. 40 (GVA/2016) of 7 [March] 2016, the Respondent was invited to file comments thereon, which he did on 14 March 2016. The Applicant’s motion was granted by Order No. 52 (GVA/2016) of 17 March 2016, and the Respondent was asked to file the requested documents on an *ex parte* basis.

... By Order No. 243 (GVA/2016) of 14 December 2016, the [Dispute] Tribunal granted the Applicant access to the documents that the Respondent had filed *ex parte*, partly redacted and on an under seal basis. It further invited the Applicant to respond to the disclosed documents by 30 December 2016, and the parties to comment on the need for an oral hearing by 6 January 2017.

... On 29 December 2016, the Applicant filed a motion requesting that the documents disclosed to her be produced in Excel format. The Respondent replied to the motion on 3 January 2017, pursuant to para. 6 of [the UNDT] Practice Direction No. 5 [(On Filing of Motions and Responses)]. The Respondent’s submission and its annexes were filed on an *ex parte* basis, and he requested the [Dispute] Tribunal to order that the Excel files he provided be kept under seal.

... On 6 January 2017, pursuant to Order No. 243 (GVA/2016) of 14 December 2016, the Applicant informed the [Dispute] Tribunal that she considered that an oral hearing was necessary in this case, and referred to four staff members involved in the selection process who should be called as witnesses. On the same day, the Respondent informed the [Dispute] Tribunal that he considered that no hearing was necessary, and suggested that if it were decided to hold a hearing, “[the Applicant] first give[s] testimonial evidence of how there *has been* (not “*could be*”) ‘editing or tempering to enhance or deprive the status of any favourite or malicious

^[2] *Ibid.*, para. 1.

candidate”. Furthermore, the Respondent argued that only thereafter should the [Dispute] Tribunal decide about the reasonableness to hear evidence from the four witnesses suggested by the Applicant.

... By Order No. 13 (GVA/2017) of 19 January 2017, the parties were convoked to a case management discussion, which was held on 25 January 2017. By Order No. 23 (GVA/2017) of 25 January 2017, the [Dispute] Tribunal requested the Respondent to file additional documents, invited the Applicant to comment thereon, and convoked the parties to a hearing on the merits.

... The hearing on the merits was held on 2 and 3 March 2017, with the Applicant appearing by phone and Counsel for the Respondent by videoconference. The Applicant, the Human Resources Assistant who administered the written test for the GS-6 post at the Polio Section, and the Chief, Human Resources Section, UNICEF, Islamabad, Pakistan, were heard as witnesses. The [Dispute] Tribunal decided that the two remaining witnesses suggested by the Applicant, namely the two assessors of the test, were not relevant.

... After the hearing, and with leave from the [Dispute] Tribunal, both parties made one additional filing on 3 and 5 March 2017, respectively. By Order No. 64 (GVA/2017) of 7 March 2017, the parties were invited to submit comments on their respective filings. Both parties made an additional filing, pursuant to Order No. 64 (GVA/2017).

3. On 15 March 2017, the UNDT issued its Judgment pursuant to which it rejected Ms. Rehman’s application. The UNDT found that: (i) the record did not support an inference that Ms. Rehman’s test had been altered; (ii) any irregularity did not impact her right to a full and fair consideration; (iii) she did not provide evidence in support of her allegation that the selection process had been marred by bias or any other improper motive; and, (iv) it was not mandatory for the Administration to consider her for a lateral reassignment. The UNDT further found that, even if the contested decision had been illegal, Ms. Rehman’s request for relief had been rendered moot as the repetition of the selection exercise (which it had concluded was not before it) had already occurred with Ms. Rehman participating. With respect to the second selection exercise, the UNDT found that Ms. Rehman’s chances of success were “very low”³ as she had failed at the interview stage and, consequently, her non-selection “appear[ed] to be unrelated to her status as an external or internal candidate”.⁴

4. As noted above, Ms. Rehman filed the appeal on 13 May 2017, and the Secretary-General filed his answer on 17 July 2017.

³ *Ibid.*, para. 50.

⁴ *Ibid.*, para. 47.

5. On 22 May 2017, Ms. Rehman filed with the Appeals Tribunal a “Motion for Correction of Omission” seeking to “replace and omit” a reference to one annex in the text of her appeal brief with a reference to another annex as well as to include an additional annex. On 1 July 2017, the Secretary-General filed his response to the motion stating that he had no objection given the limited scope of the request. On 6 June 2017, the Appeals Tribunal granted the motion by Order No. 281 (2017).

Submissions

Ms. Rehman’s Appeal

6. The UNDT failed to consider important issues and facts included in the submissions and raised during the oral hearing, which resulted in a manifestly unreasonable decision. The UNDT also erred when it held that there was no mandatory obligation on UNICEF to laterally transfer Ms. Rehman and when it ignored the impact of having a consultant administer the written test in contravention of UNICEF’s administrative instruction on consultants and individual contractors. This “provided [a] cushion to protect wrong[ly]doing” by the competent authorities and “ignored the accountability” of the responsible staff members.

7. The UNDT also erroneously relied upon a “disputed document” (i.e., a version of the written test) to decide the merits of the case in the Secretary-General’s favour. The UNDT neither questioned why this document had not been produced earlier nor defined the limits of the editing and tampering to Ms. Rehman’s test. The UNDT decided the merits based on the Administration’s misleading statements in contravention of the record. The UNDT further erred when it found that she had not “mention[ed] any specific deletion in [her] written test” and that an “organogram” would not have fitted in the white space between the two quotes. The UNDT also ignored the fact that the second selection process “was actually a clever move to deny [her] (...) the strong opportunity for getting selected for being on the status of [an] internal candidate”.

8. Ms. Rehman requests compensation for loss of opportunity and referral for accountability of UNICEF staff members “involved in irregularities (...) in the selection process”.

9. Ms. Rehman submits that the UNDT denied her access to the transcripts of the oral proceedings and that upon access to and perusal of the transcripts, she may require an oral hearing on appeal.

The Secretary-General's Answer

10. The UNDT correctly held that Ms. Rehman's candidacy was given full and fair consideration and that there was no evidence to support a finding of bias. The UNDT carefully examined Ms. Rehman's claims that the UNICEF Administration was biased against her and that her written test had been "totally tampered with". The UNDT found that Ms. Rehman had presented no evidence of either allegation and its conclusion was both supported by the record and was fully consistent with the jurisprudence. Moreover, Ms. Rehman did not challenge an appealable administrative decision in that she did not seek management evaluation of any matter related to the final selection decision after it had been re-advertised; rather, she only challenged alleged irregularities in respect of one step in the selection process.

11. Ms. Rehman has failed to establish any error by the UNDT warranting reversal of its Judgment. Her submissions—that the UNDT erred in its assessment of the evidence and failed to adequately consider the alleged procedural irregularity of the Human Resources Assistant's administration of the written test—are without merit. As correctly noted by the UNDT, she failed to present evidence supportive of her claims and any irregularity did not impact the selection process or cause her harm. On appeal, she merely restates arguments rejected by the UNDT.

12. The Secretary-General requests that the appeal be dismissed in its entirety.

Considerations*Oral hearing*

13. Ms. Rehman requests an oral hearing. Her request is quite confusing. She stated in her appeal form that she was not provided with a transcript of the oral hearing held before the UNDT and that an oral hearing before the Appeals Tribunal "may be required after [it] access[es] (...) the UNDT recording of [the] oral hearing". Our reading of her request is that she considers that an oral hearing before us *might* be necessary, once we have heard the UNDT's recording. It also seems that Ms. Rehman sought to review the transcript of the UNDT hearing prior to submitting her appeal brief in order to "elaborate and raise the out[come] of statements and cross examinations".

14. Ms. Rehman requested (but did not receive) a copy of the transcripts of the UNDT's recording of its oral hearing. Indeed, by e-mail sent on 2 May 2017, the UNDT stated that "the UNDT systematically provides to [the Appeals Tribunal] access to the electronic case file, including the recordings of the oral hearing", implicitly refusing to give her the transcripts of the oral hearing.⁵

15. As it was not clear whether she had access to the recordings of the oral hearing before the UNDT, which is why she may have requested a copy of the transcript, the Registry of the Appeals Tribunal inquired and confirmed that she indeed did not have access.

16. We are of the view that Ms. Rehman should have had access to the recordings of the oral hearings held in her case on an automatic basis, as every party should have access to the full record of their respective cases, provided that they are not filed and kept *ex parte*. Such unrestricted access to the full record, including recordings of hearings, responds to the need for transparency in the proceedings and the adversarial principle.

17. However, in this specific case, when Ms. Rehman was denied access to the transcripts of the oral hearing, she accepted and did not ask to have access to the recordings before this Tribunal. Later, she filed her appeal brief on 13 May 2017

18. Moreover, Ms. Rehman did not provide any arguments as to why an oral hearing before the Appeals Tribunal would contribute to a fair and expeditious disposal of the case, as set forth in Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules), which establishes:

... The judges hearing a case may hold oral hearings on the written application of a party or on their own initiative if such hearings would assist in the expeditious and fair disposal of the case.

19. In her appeal, Ms. Rehman even challenges the testimony of the witnesses during the oral hearing before the UNDT, indicating that the statements were quite fresh in her memory.

20. We do not see any reason to grant an oral hearing. The request is thus denied.

⁵ Ms. Rehman and two witnesses gave evidence during the hearing on the merits before the UNDT: Ms. Beverley Mitchell, Chief, Human Resources, UNICEF, Islamabad; and, Mr. Ikhtiar Mohammad Khan, Human Resources Assistant, who administered the test to Ms. Rehman.

Merits of the appeal

21. We agree with the Dispute Tribunal that Ms. Rehman's application was moot, as she had already received the relief she requested, namely, the repetition of the selection exercise and her participation in it. Therefore, the relief sought could not have been granted.⁶ In the second selection process,⁷ although Ms. Rehman was successful in the written phase and invited to an interview, she was not found to be suitable for the post.

22. Notwithstanding that her request was moot, the UNDT dealt with the merits of the case and found that:

- i) A lateral reassignment following the abolition of her post was discretionary to the Administration, not mandatory, in accordance with Section 10.4 of UNICEF CF/EXD/2013-004 (Staff selection);⁸
- ii) by entrusting staff functions to the Human Resources Assistant, who was recruited as a consultant, the Administration "may have contravened [S]ec[tions] 1.1(a) and (...) 3.5 of CF/AI/2013-001 Amend 2 [(UNICEF Administrative Instruction governing consultants and individual contractors)]",⁹ but this irregularity had not impacted her right to a full and fair consideration;¹⁰
- iii) Ms. Rehman's general allegation of test alteration, with no specification as to what was tampered with and who modified it, was insufficient to support her claim;¹¹
- iv) there was no convincing evidence whatsoever of any substantive modification of Ms. Rehman's test;¹² and,

⁶ Even if the relief could have been granted and another selection exercise ordered, Ms. Rehman would similarly not have had the status of an internal candidate.

⁷ As correctly noted by the UNDT, the second selection exercise was not before it.

⁸ Impugned Judgment, para. 44.

⁹ *Ibid.*, para. 33.

¹⁰ *Ibid.*, para. 34.

¹¹ *Ibid.*, para. 35.

¹² *Ibid.*, paras. 35-44.

- v) there was no merit to Ms. Rehman's claim of having been disadvantaged by the timing of the second selection process (occurring when she had lost her status as an internal candidate) given that she failed at the interview stage.¹³

23. We agree with the full, rational and comprehensive approach of the Dispute Tribunal and find no reason to differ from it. The minor edit done to the test when it was coded, before it was sent to the assessors, was necessary to preserve the impartiality of the assessment,¹⁴ which was not contested at all.

24. Notwithstanding the foregoing, and in order to avoid discussions and/or suspicions of this nature in future selection processes, we fully adhere to the UNDT's recommendation that tests be "protected" against the possibility of editing or alteration.¹⁵ We also recommend that the Organization strictly comply with its Regulations, Rules and administrative issuances, particularly with respect to not entrusting staff functions to consultants and or/individual contractors.¹⁶

25. Moreover, we suggest that the UNDT in particular, and the Registries in general, grant parties to a case automatic access to the full record, including recordings of hearings (except those filed and kept *ex parte*).¹⁷ This conforms to the need for transparency in the proceedings and is in keeping with the adversarial principle.

¹³ *Ibid.*, para. 47.

¹⁴ The minor edit consisted in the removal of her name and identification, in order to preserve anonymity and to give her the opportunity to have her test assessed (*ibid.*, para. 28).

¹⁵ *Ibid.*, para. 52.

¹⁶ *Ibid.*, para. 33.

¹⁷ While we understand that parties have automatic access to the full record through the Court Case Management System, access to the folder containing the recordings of hearings are only made available upon request.

Judgment

25. The appeal is dismissed and Judgment No. UNDT/2017/019 is hereby affirmed in its entirety.

Original and Authoritative Version: English

Dated this 27th day of October 2017 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Murphy

Entered in the Register on this 8th day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar