



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

Judgment No. 2022-UNAT-1250

**Giuseppe Belsito
(Appellant)**

v.

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

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu
Case No.:	2021-1577
Date of Decision:	1 July 2022
Date of Publication:	11 August 2022
Registrar:	Weicheng Lin

Counsel for Applicant: George Irving

Counsel for Secretary-General: Francisca Lagos Pola

JUDGE JOHN RAYMOND MURPHY PRESIDING.

1. The Appellant, Mr. Giuseppe Belsito, challenged the decision to cancel the selection process for a post and his non-selection for the subsequently readvertised post.
2. On 10 June 2021, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) issued Judgment No. UNDT/2021/067, rejecting the Appellant's challenge. The Appellant subsequently appealed Judgment No. UNDT/2021/067 to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal). This appeal is the subject of the present Judgment.
3. For the reasons as set out below, we dismiss the Appellant's appeal and uphold Judgment No. UNDT/2021/067.

Facts and Procedure

4. Mr. Belsito joined the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) in November 2012, and in September 2016, was assigned to the Programme Division at Headquarters, New York, as Senior Adviser to the Director.
5. On 22 October 2016, Mr Belsito applied for the D-1 position of UN Women Regional Director for Europe and Central Asia (the position). He was then required to write a written test for the position, which he did on 6 February 2017. On 24 March 2017 he attended a competency-based interview conducted by a selection panel, which included his supervisor (the Hiring Manager).
6. On 3 May 2017, in an exchange of text messages, Mr. Belsito and the Hiring Manager discussed the possibility of gender discrimination against him. The texts record the Hiring Manager as agreeing with criticism of the Executive Director "for not having enough men" and stating, "I will not allow this discrimination".
7. On 12 May 2017, the selection panel made a recommendation to the Senior Review Group (SRG) putting forward Mr. Belsito as the first recommended candidate. On 22 May 2017, the SRG endorsed the selection panel's recommendation and submitted its recommendation to the Executive Director of UN Women (the Executive Director).

8. On 18 May 2017, before the Executive Director had reached a decision regarding the selection and before the Executive Director had conveyed a decision to the candidates, Mr. Belsito informed the Hiring Manager that he knew he had been recommended for the position but that he had reason to believe that the recommendation would not be approved by the Executive Director. In response, the Hiring Manager stated that they did not know what the Executive Director's decision would be and reminded him that the Executive Director had the prerogative to decline the recommendation within her managerial discretion.

9. On 11 June 2017, prior to the Executive Director communicating her decision, Mr. Belsito shared with the Hiring Manager and the Deputy Executive Director of UN Women, a draft management evaluation request which he eventually submitted on 19 June 2017. The draft challenged the alleged decision not to select him for the position. On 19 June 2017, still before any decision had been conveyed to the candidates, Mr. Besito filed a management evaluation of the "decision rejecting his candidacy for the post". From these circumstances, it became evident that confidential information regarding the selection had been shared with Mr. Belsito, which other evidence showed included his test results.

10. On 6 July 2017, the candidates who had participated in the selection exercise were notified of the cancellation of the job opening for the position and were informed that the opening for the position would be re-advertised (the cancellation decision). On 13 July 2017, Mr. Belsito filed a second management evaluation request contesting the cancellation decision.

11. On 17 August 2017, after learning that both requests for management evaluation had been rejected, Mr. Belsito filed an application with the UNDT contesting the rejection of his candidacy and the cancellation decision. On 18 September 2017, the Secretary-General filed a reply to the application, submitting that it had no merit, as the cancellation decision was made on the legitimate grounds that there had been a breach of confidentiality in the selection process.

12. In September 2017, Mr. Belsito joined the UN Women Albania Country Office as Representative, at the P-5 level.

13. The position was re-advertised on 13 October 2017 and, on 29 October 2017, Mr. Belsito applied for the position again. On 12 April 2018, following the administration of a written test and interviews, the Central Review Board (CRB) recommended a female candidate without reservations and Mr. Belsito with reservations.

14. On 5 July 2018, the Executive Director approved the CRB's recommendation and offered the position to the candidate who had been recommended without reservations. On 20 July 2018, Mr. Belsito was informed that he had not been selected for the position (the non-selection decision).

15. On 13 August 2018, Mr. Belsito filed a request for management evaluation of the non-selection decision. On 28 November 2018, after he was notified that the non-selection decision had been upheld, Mr. Belsito filed a second application with the UNDT contesting the non-selection decision and requested that his earlier application contesting the cancellation decision be consolidated as both cases concerned the selection for the same position. In his reply filed on 31 December 2018, the Secretary-General submitted that the selection decision was lawful and that Mr Belsito was not the strongest candidate for the position. On 12 November 2019, by Order No. 160 (NY/2019), the UNDT consolidated the two applications.

16. The UNDT issued Judgment No. UNDT/2019/183 on 19 December 2019 in which it held that the Executive Director had acted within her authority when she decided to cancel the first selection exercise, which had been tainted due to the breach of confidentiality. It held also that the Executive Director had made no final selection in the first selection exercise and there was no evidence of any extraneous factors indicating that the Executive Director had discriminated against Mr Belsito based on his gender. The UNDT further held that Mr. Belsito's candidacy was given full and fair consideration in the second selection exercise. Consequently, the UNDT dismissed both applications. Mr. Belsito filed an appeal against Judgment No. UNDT/2019/183 on 10 January 2020.

17. On 26 June 2020, the UNAT issued Judgment No. 2020-UNAT-1013 in which it remanded the matter to the UNDT to hear additional evidence.

18. On 11 and 12 May 2021, the UNDT held a hearing at which four witnesses, including Mr. Belsito, testified. The UNDT issued its second judgment, Judgment No. UNDT/2021/067, on 10 June 2021. It held, in the light of the breach in confidentiality, that it was reasonable in the circumstances for the Executive Director to have taken the cancellation decision, which consequently was lawful.

19. With regard to his non-selection for the subsequently re-advertised position, the UNDT recorded Mr. Belsito's contention in that regard as follows:

54. The Applicant argues that he had "previously been denied fair consideration" in the first selection process and, therefore, the second selection process was "void *ab initio*". During his testimony, the Applicant himself confirmed this to be his only ground of appeal against the subsequent selection process.

20. The UNDT held that since the cancellation of the first selection process was lawful, Mr. Belsito's appeal against the second selection process, on this narrow ground, logically, also had to fail.

21. On 14 July 2021, Mr Belsito filed an appeal of Judgment No. UNDT/2021/067 with the Appeals Tribunal. On 13 September 2021, the Secretary-General filed his reply.

Submissions

Mr. Belsito's Appeal

22. Mr. Belsito makes several submissions, not all of which are relevant to the narrow question for determination on appeal.

23. He submits that any cancellation of a vacancy announcement must occur before the assessment exercise is completed and any recommendation is made. In this case, he contends, the evaluation process had been fully concluded.

24. Mr. Belsito repeats the submission he made before the UNDT that the selection decision was void *ab initio* because the cancellation decision was unlawful.

25. He argues that there was no documentary evidence existing of the reasons for the cancellation decision and that reporting the results of the selection exercise to him did not breach the integrity of the process.

26. Mr. Belsito requests that the Judgment of the UNDT be reversed and he be awarded compensation in the amount of two years net base salary.

The Secretary-General's Answer

27. The Secretary-General submits that the cancellation decision was lawful and the non-selection of Mr. Belsito was not in issue on appeal because no selection was made prior to the cancellation decision and Mr. Belsito limited his challenge concerning his non-selection to the legality of the cancellation decision.

28. The Secretary-General submits further that the cancellation decision was legal in terms of the applicable rules and jurisprudence governing staff selection which confer a wide discretion on the Executive Director to cancel a vacancy on rational grounds.

29. The Secretary-General contends that Mr. Belsito failed to show that the cancellation decision was motivated by improper motives or gender discrimination.

30. The Secretary-General requests that the appeal be dismissed and the Judgment of the UNDT be affirmed.

Considerations

31. The narrow issue to be determined on appeal is whether the cancellation decision of 6 July 2017 was lawful. As he did in the UNDT, Mr. Belsito has limited his challenge on appeal to the review of the cancellation decision on the basis that the non-selection decision was “void *ab initio*” due to the cancellation decision.

32. In the first selection exercise, the selection panel recommended Mr. Belsito together with a female candidate. That recommendation was endorsed by the SRG. The Executive Director, however, did not proceed in selecting either of the recommended candidates because she came to know that Mr. Belsito was in possession of confidential information about the selection exercise. He knew the numerical score of his written test and interview and that he was a recommended candidate for selection as early as 11 June 2017. He also engaged informally with the Hiring Manager, after his interview, about the possibility of gender discrimination in the selection decision. In view of that breach of confidentiality,

the Executive Director decided that it was in the best interest of UN Women to cancel the first selection exercise and re-advertise the position.

33. The cancellation decision was therefore motivated by and based on the discovery of a breach in the integrity of the process, in that there had been an evident breach of confidentiality. The text message communications clearly establish that. More than that, Mr. Belsito was apparently lobbying the Hiring Manager about his apprehension of gender discrimination and had indicated that he had grounds to believe he would be discriminated against prior to the selection being finalised and communicated.

34. The UNDT found on the totality of the evidence that the Executive Director took the cancellation decision before making a decision with respect to a preferred candidate. The evidence does not support the claim of Mr. Belsito that the Executive Director had made a final selection decision prior to the cancellation decision. It is common cause that no selection had been conveyed to the candidates at the time of the cancellation decision. Mr. Belsito's belief that there was in fact a decision made in the mind of the Executive Director has not been established in evidence, and even had the Executive Director made up her mind about a preferred candidate prior to the cancellation decision, such a decision would not have constituted an administrative decision with an adverse impact. Being at most merely within contemplation, it had no direct external legal effect. Judicial review is directed not at the ruminations of officials but at administrative decisions that become effective on communication.

35. The narrow question for determination therefore is whether in the light of the breach in confidentiality, it was reasonable for the Executive Director to take the cancellation decision.

36. The selection of staff at UN Women is conducted in accordance with the provisions of the Charter of the United Nations, the UN Staff Regulations and Rules and the provisions in the UN Women Recruitment Selection Guidance (the Guidance). The Guidance is a binding administrative issuance of UN Women on staff selection. Article 101(1) of the Charter of the United Nations provides that staff shall be appointed by the Secretary-General under regulations established by the General Assembly. Staff Regulation 4.1 further stipulates that the power of appointment of staff members rests with the Secretary-General. In terms of paragraph 72 of A/RES/64/289, the Executive Director shall appoint and administer the staff

of UN Women, including for its operational activities, in accordance with the Staff Regulations and Rules of the United Nations and the Secretary-General shall delegate to the Executive Director formal authority in personnel matters. In terms of the Guidance, the deliberations and assessment of the panel members are strictly confidential. The Guidance further provides that the Executive Director is not required to endorse or follow the recommendation of the interview panel or the review committee. Section 5.2.4.1 of the Guidance provides that SRG recommendations are submitted to the Executive Director for all international positions. Section 5.2.4.2 of the Guidance provides that the final selection decision will be made by the Executive Director consistent with the UN Staff Rules. It follows that the Executive Director, exercising the discretionary powers delegated by the Secretary-General, enjoys wide discretion on selection matters and that she is not required to endorse or follow the recommendation of the interview panel or the SRG.

37. The jurisprudence of the Appeals Tribunal holds that the Administration is not under an obligation to pursue a recruitment procedure once such process has begun. It is within the discretionary authority of the Administration to cancel a recruitment procedure on rational grounds on account of irregularities occurring in the recruitment process or for reasons connected with the interests of the service.¹ In general terms, a tribunal ought not to interfere with the discretion to cancel a recruitment exercise for rational reasons, even when a candidate had been recommended but not yet appointed.²

38. The undisputed breach of confidentiality provided rational grounds for the cancellation decision. The fact that Mr. Belsito had access to information about the possibility that gender issues might favour the other candidate, his test score and the like, and that he perhaps was seeking through the Hiring Manager to influence the decision, rendered the selection exercise problematic and unsatisfactory. An objective observer might reasonably have concluded that the process was open to illegitimate influence outside the mandated processes. It is irrelevant whether influence was in fact brought to bear. The perception was unavoidably created that Mr. Belsito was inappropriately favoured with access to information about a decision concerning his interests and in respect of which he enjoyed no authority. The integrity of the process was manifestly compromised. The mere fact that Mr. Belsito filed a request for management evaluation of “the decision to reject

¹ *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932, para 21.

² *Anis Basil AlMousa v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2021-UNAT-1134, para. 46.

his candidacy for the post” on 19 June 2017, before any selection decision had been formally made or communicated, contaminated the process sufficiently to justify the cancellation decision.

39. Mr. Belsito’s contention that any cancellation of a vacancy announcement must occur before the assessment exercise is completed and a recommendation is made is not correct. The Administration has discretion not to continue a selection exercise on rational grounds prior to a selection decision being made, especially once an irregularity or impropriety becomes evident. There is no obligation on the Administration to make a selection in the face of an evident irregularity simply because a certain stage in the selection process prior to decision has been reached.³ It is within its discretionary authority of the Administration to terminate a recruitment procedure even at the stage when a candidate has been recommended for selection. To hold otherwise would untenably require the Administration to make appointments on the basis of flawed procedures.

40. The UNDT accordingly did not err in holding that the cancellation decision was rational and lawful and there is no cogent evidence supporting the allegation that it was motivated by gender discrimination, improper motives or in bad faith. As Mr. Belsito has limited his challenge on appeal to the cancellation decision, there is no need to consider whether his ultimate non-selection in the second selection exercise amounted to unfair discrimination on the grounds of gender.

41. Accordingly, Mr. Belsito has not discharged his burden to show that the UNDT erred on the facts or in law. He has failed to identify any error by the UNDT and has not demonstrated any of the grounds for appeal in Article 2(1) of the UNAT Statute.

³ *Verschuur v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-149, para. 41.

Judgment

42. The appeal is dismissed, and Judgment No. UNDT/2021/067 is upheld.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Colgan

(Signed)

Judge Sandhu

Judgment published and entered into the Registry on this 11th day of August 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar