



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

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Case No. 2010-148



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**Before:** Judge Jean Courtial, Presiding  
Judge Kamaljit Singh Garewal  
Judge Mary Faherty

**Judgment No.:** 2011-UNAT-149

**Date:** 8 July 2011

**Registrar:** Weicheng Lin

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**Counsel for the Respondent/Applicant:** Katya Melliush/Miles Hastie

**Counsel for the Appellant/Respondent:** Wambui Mwangi

**JUDGE JEAN COURTIAL**, Presiding Judge

**Synopsis**

1. Mr. Eric Verschuur, a staff member at the P-4 level and candidate for a vacant P-5 post, contests the decision, as a result of the intervention from the head of a recruiting department, to exclude him from the list of candidates transmitted to the Central Review Body despite the fact that he had been recommended by the panel and, consequently, not to include him in the roster of candidates approved to fill any subsequent vacancies with similar functions.

2. The provisions of administrative instruction ST/AI/2006/3 concerning the staff selection system, in particular sections 7 and 9, show that it is not for the head of department to intervene in the evaluation process conducted by the programme manager, the central review body and, where applicable, the panel. At that stage, up to and including the approval of a list of qualified candidates, the duties of the head of department are only to ensure that the Organization's human resources planning objectives and targets are taken into account, especially with regard to geography and gender; to ensure that the established procedures are respected; and, at the final stage of the procedure, to appoint the candidate that he or she believes to be best suited. The head of department is not entitled to exclude a candidate from the list of qualified candidates and hence from the roster of qualified candidates. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) did not commit an error of law or fact in ruling that the contested administrative decision was marred by irregularity and ordering that Mr. Verschuur should be paid compensation equivalent to six months' base salary as an alternative to the rescission of the improper decision.

3. The UNDT awarded compensation to Mr. Verschuur without giving the Administration a choice between, on the one hand, either rescinding the irregular decision or performing an obligation **and**, on the other hand, paying compensation as an alternative to the rescission or performance of the obligation. In principle, in cases of appointments and promotions, the Tribunal should not limit itself to awarding compensation. It has to give the Administration a choice between rescinding the decision or performing an obligation and paying compensation. The Tribunal can not limit itself to awarding compensation only under exceptional circumstances, and after informing the

parties of its intention in order to allow them to discuss the issue when, owing to the passage of time, a rescission of the decision would serve no purpose, or the performance of an obligation would be impossible, or one of those options would affect the rights of a third party. As such, the UNDT did not give reasons for its decision, but the United Nations Appeals Tribunal (Appeals Tribunal) considers that owing to the passage of time, the rescission of the decision or performance of any obligation would have served no purpose, or at least no useful purpose. Furthermore, the parties have not contested that point. The Secretary-General's appeal is dismissed.

#### **Facts and procedure**

4. Mr. Verschuur started working for the United Nations Settlement Programme (UN-HABITAT) on 2 February 1991 at the L-3 level. Furthermore, at the time of the contested decision, he held a P-4 level post.

5. In 2001, Mr. Verschuur applied for a post at the P-5 level. He was shortlisted, interviewed, recommended for the post and placed on the roster for future vacancies of similar positions.

6. On 2 August 2007, a vacancy announcement was advertised on *Galaxy* for chief of section at UN-HABITAT, a P-5 post. Mr. Verschuur applied for the post. The vacancy announcement having been cancelled, and a new vacancy announcement for the same post was advertised on 17 December 2007. Mr. Verschuur applied on 14 January 2008. His application was eligible for consideration at the 30-day mark, but was examined along with the applications for consideration at the 60-day mark.

7. The Programme Manager convened a panel to interview the candidates. The panel interviewed Mr. Verschuur and five other candidates. It prepared a report containing a list of five candidates, two of whom were strongly recommended and three of whom, including Mr. Verschuur, were merely recommended. At a meeting with the Programme Manager and the chair of the interview panel, the Executive Director expressed her surprise that the panel had recommended five candidates. She said that she wanted no more than three candidates of appointable calibre, pointing out that the report showed that some were very good while others were average. She asked that the panel look at their report again and decide whether the recommendation of the five

candidates was what the panel had actually wanted to say. The panel reconvened and made a new recommendation of only the two candidates who had previously been strongly recommended. On 9 May, the Executive Director appointed one of the candidates who had thus been recommended; the second was included in the roster of approved candidates. On 15 May 2008, Mr. Verschuur was informed of the decision not to recommend him and hence not to include him on the roster of approved candidates.

8. Mr. Verschuur filed an appeal before the Joint Appeals Board. On 1 July 2009, the appeal was transferred to the UNDT.

9. On 26 August 2010, the Dispute Tribunal issued judgment No. UNDT/2010/153. It found that according to section 7.7 of administrative instruction ST/AI/2006/3, the duty of the head of department, who in this case was the Executive Director, is to transmit the proposal submitted to him or her by the Programme Manager to the Central Review Body. The UNDT took the view that a process conducted for the purpose of evaluating candidates for promotion or appointment had to be conducted independently. According to the UNDT, even when an interview panel has been set up by a programme manager, the panel is independent of the latter in doing its job as long as it acts within its mandate. It is equally independent of the head of department.

10. The UNDT found that the Executive Director had unlawfully intervened in the establishment of the interview panel's recommendation by substituting her own opinion with that of the panel, and that she had manipulated the selection process by influencing the interview panel to drop the names of Mr. Verschuur and of two other candidates from the list of recommended candidates. According to the UNDT, that interference and manipulation impinged on the integrity of the selection process. Mr. Verschuur having not been included on the roster of approved candidates, he consequently incurred a prejudice.

11. The Dispute Tribunal also found that the original vacancy announcement had been cancelled because of lack of compliance with the relevant administrative instructions.

12. It further found that the Programme Manager did not have the mandate to decide considering eligible 30-day candidates along with 60-day candidates. He had a duty to consider candidates who were eligible at the 30-day mark but failed to do so.

13. Finally, the UNDT found that the selection process had not been conducted in accordance with the provisions of administrative instruction ST/AI/2006/3, and that Mr. Verschuur's right to a fair and full consideration had not been respected. It ordered the Secretary-General to pay him compensation equivalent to six months' net base salary.

14. The Secretary-General filed an appeal against the judgment.

### Submissions

#### The Secretary-General's appeal

15. The Secretary-General contends that the Dispute Tribunal erred on a question of law in finding that the actions of the Executive Director were *ultra vires* and had disregarded ST/AI/2006/3. He submits that the error stems from a narrow interpretation of section 7.7 of ST/AI/2006/3, without reference to the other provisions outlining the authority of the head of department in the staff selection system, in particular paragraph 3 of Annex I to administrative instruction ST/AI/2006/3, paragraphs 14 and 16 of the *Staff Selection Guidelines*, and step 3 of the *Guide to Workflow and Rules for Processing Vacancies in the Galaxy*. The Secretary-General holds it against the UNDT for not taking into account these texts that are an integral component of the legal framework governing the staff selection system.

16. The Secretary-General maintains that the Dispute Tribunal erred in considering that the actions taken by the Executive Director were not fully consistent with the provisions relevant to the role of a head of department in the staff selection system. He submits that the head of department has the right and the responsibility to confirm compliance with established procedures, as non-compliance with those procedures may subsequently expose the department to liability towards unsuccessful candidates. Since the head of department is responsible for the execution of mandated programmes and activities, he or she must ensure that the recommended candidates sent to the central review bodies are not simply "suited" for the functions of a vacant position, but that such

individuals are “ the best suited” to perform these functions, as set out in paragraph 3 (b) of Annex II to ST/AI/2006/3.

17. The actions taken by the Executive Director were in conformity with the applicable legal provisions governing the role of the head of department in the staff selection system. She had received a list containing two candidates who were strongly recommended and three who were only recommended. The list was at odds with ST/AI/2006/3 which expressly requires that the list of recommended candidates must be unranked. The Executive Director took action in order to ensure compliance with the applicable procedures. Furthermore, it was valid for her to question the evaluation report submitted by the interview panel that included a list of very good candidates when the others were only average, to request the interview panel to provide her with a list of candidates of appointable calibre or to confirm that the panel actually intended to recommend five candidates.

18. The Secretary-General further contends that the UNDT erred on a question of fact in concluding that the actions of the Executive Director constituted a manipulation of the selection process. Contrary to the judgment of the UNDT, there is no evidence that the Executive Director singled out Mr. Verschuur in order to exclude him from the list of recommended candidates. The Secretary-General maintains that the Executive Director did not force the panel to submit a new report. The panel was at liberty to affirm or amend its recommendations.

19. Ultimately, the Secretary-General submits that the UNDT erred on questions of law and fact, and exceeded its competence in ordering him to pay compensation to Mr. Verschuur. He submits that the UNDT erred on a question of law and fact in reaching the conclusion that the contested decision had been tainted by the Executive Director's interference in and manipulation of the process. Accordingly, any remedy ordered on the basis of those conclusions is unfounded. The Secretary-General requests that the Appeals Tribunal reverse or significantly reduce the order contained in the contested judgment.

**Mr. Verschuur's answer**

20. Mr. Verschuur begins by noting that the Secretary-General's arguments appear not to involve neither the cancellation of the original vacancy announcement, nor the pooling of Mr. Verschuur with the 60-day mark candidates, nor the quantum of the award. They dispute the judgment's determination that the Executive Director improperly interfered in the selection and its impact on the roster of approved candidates.

21. While, the Appellant attempts to base his argument on the role of the head of department in the annexes to the administrative instruction on the staff selection system, *Staff Selection Guidelines* and the *Galaxy Workflow Guide*, those texts are of no assistance to him.

22. The Appellant selectively emphasizes a portion of paragraph 3 (b) of Annex I of the administrative instruction on the staff selection system that requires the head of department to ensure that the candidates best suited for the functions are selected for vacancies. However, it would be contrary to the objective of section 7.7 of the administrative instruction, which provides that a list of qualified unranked candidates should be sent to the central review body rather than a proposal regarding one candidate, to infer that the head of department has a role to play in evaluating the suitability of the candidates whose names should be submitted to the central review body. Moreover, immediately following that passage, Annex I emphasizes that the head of department must only participate in staff selection in strict compliance with the requirements of the new system.

23. Mr. Verschuur also maintains that the role of the head of department to which Annex I refers is contained in section 9.1 of the administrative instruction. That section grants the head of department the ultimate responsibility for choosing a single candidate. The head of department does not have to exercise his duty prior to the interview panel having evaluated the candidates and the central review body having approved the evaluation process. It is not for the head of department to remove, or induce the removal of, candidates from the roster of approved candidates.

24. Mr. Verschuur then contends that if the head of department was free to veto at any time and on any basis, the recommended candidates, the pre-approved criteria for candidate evaluation would risk becoming meaningless, as would the convening of a panel and the role of the central review body. The head of department would not be able to fulfil his function of selecting the best suited candidate if he was not provided with the opportunity to choose from a list of independently evaluated candidates based on procedures validated by the central review body. With regards to the roster of approved candidates, whose importance is vital for the efficiency of the staff selection process and staff mobility, its utility would be undercut.

25. Mr. Verschuur maintains that neither the *Galaxy Workflow Guide* nor the *Staff Selection Guide* contemplates a different procedure. To the extent that the *Staff Selection Guidelines* contemplate a substantive evaluation of candidates by the head of department before the review of the central review body, such a procedure would be inconsistent with the system put in place by the administrative instruction. Such an interpretation, even if reflected in the *Guidelines*, should be regarded as incorrect.

26. Mr. Verschuur maintains that the fact that the jury submitted a list of ranked candidates did not mean that the head of department could require a shorter list of unranked candidates.

27. Mr. Verschuur further contends that the Dispute Tribunal did not make a factual error in finding that the Executive Director had improperly interfered with the selection process. The Executive Director had no reason for determining that the five candidates originally recommended were not of appointable calibre. The Secretary-General himself concedes that the Executive Director was not aware of the scores that the panel had attributed to the candidates when she intervened. Furthermore, each candidate is to be evaluated against the pre-established criteria and not against one another. The finding of the UNDT, namely that the Executive Director sought to exclude candidates and that it was not a decision made solely by the interview panel, is reasonable.

28. The Respondent submits that one does not need to single out a staff member by name or expressly seek to exclude him or her from the list for there to be an irregular interference in the selection process. Even in the absence of any malice, this was a breach of the prescribed procedure that adversely affected the rights of the appellant.

The Respondent adds that this concerns a determination of the facts made by the Dispute Tribunal that is not manifestly unreasonable.

29. Lastly, Mr. Verschuur submits that the Dispute Tribunal committed no error that would cause the judgment to be reversed or the quantum of compensation to be altered. He concludes that the appeal should be dismissed and submits a request for an oral hearing in order to be able to attend the deliberations of the Appeals Tribunal.

### **Considerations**

30. At the outset, this Court believes that oral submissions do not appear to be necessary for a fair and expeditious disposal of the proceedings in a case where the facts are clearly established in the judgment of the Dispute Tribunal and are not contested by the parties. The Appeal Tribunal does not grant Mr. Verschuur's request for oral proceedings.

31. This Court notes that the Secretary-General does not contest the conclusions of the Dispute Tribunal judge regarding the irregularity in the selection process resulting from the Programme Manager's decision to examine the 60-day mark candidates along with the 30-day mark candidates. The rights of Mr. Verschuur, whose application was eligible for priority consideration within the 30-day mark in accordance with sections 5 and 7 of administrative instruction ST/AI/2006/3 establishing a staff selection system, were overlooked.

32. The Tribunal further notes that the Secretary-General does not criticize the Dispute Tribunal judge's determination that the first vacancy announcement of 2007 had been cancelled because it was inconsistent with the administrative instructions. However, seeing that the Dispute Tribunal judge did not draw any clear or specific conclusions from the cancellation, this Court will not do so either.

33. The Appellant focuses his case on a challenge of the Dispute Tribunal's judgment with regards to the role of the head of department during the selection process.

34. According to the Appellant, the Dispute Tribunal judge should have taken into consideration all of the provisions and procedural guidelines that make up the legal framework of the staff selection process. He invokes Annex I of administrative

instruction ST/AI/2006/3, the *Staff Selection Guidelines* and the *Guide to Workflow and Rules for Processing Vacancies in Galaxy*.

35. The Appellant maintains that the judge disregarded paragraph 3 of Annex I to administrative instruction ST/AI/2006/3, entitled "Responsibilities of the head of department/office", which provides that

[i]n the discharge of his or her responsibility to deliver mandated programmes and activities, the head of department/office works in close cooperation with the programme managers and other responsible officials in the department/office concerned to ensure that: (...) (b) The candidates best suited for the functions are selected for vacancies in strict compliance with the requirements of the new system, having taken into account the Organization's human resources objectives and targets as reflected in the departmental human resources action plan, especially with regard to geography and gender, and after giving the fullest regard to candidates already in the service of the Organization [.]

36. The annexes to administrative instruction ST/AI/2006/3 cannot be interpreted independently, out of context and irrespective of the provisions of the administrative instruction itself. Paragraph 2.5 of the administrative instruction provides that:

The instruction sets out the procedures applicable from the beginning to the end of the staff selection process. For ease of reference, the responsibilities of those concerned are summarized in the annexes, focusing on the head of department/office (Annex I), the programme manager (Annex II), .....

does not state any differently. The annexes are intended to summarize and comment on the provisions concerning the respective parties, not to set forth new provisions.

37. As for the *Staff Selection Guidelines* and the *Guide to Workflow and Rules for Processing Vacancies in Galaxy*, they are merely comments and guidelines issued with a view to facilitate the implementation of the applicable law. Those comments and guidelines can in no way prevail over the administrative instruction.

38. In that regard, it is useful to examine section 2, "General provisions", which outlines the general legal framework of the staff selection process. Paragraph 2.3 provides that

[s]election decisions are made by the head of department/office when the central review body is satisfied that the evaluation criteria have been properly applied and

that the applicable procedures were followed. If a list of qualified candidates has been approved, the head of department/office may select any one of those candidates for the advertised vacancy, subject to the provisions contained in section 9.2 below. The other candidates shall be placed on a roster of pre-approved candidates from which they may be considered for future vacancies with similar functions.

39. Paragraph 9.4 provides that the head of department or office may select a candidate from the roster, without checking with a central review body in order to fill a subsequently available vacancy, once the programme manager has reviewed the applications of new candidates for a vacancies included in the compendium together with the candidates on the roster. Paragraph 9.3 provides that candidates shall remain registered on the roster for one year. In other words, although inclusion on the roster does not amount to a right to be selected for a similar post in the future, it does mean, for the candidate, that he is deemed to be qualified without having to undergo a new evaluation for a period of one year. That system allows the Organization to save time, energy and funds.

40. What arises from the aforementioned provisions and the administrative instruction taken as a whole, in particular sections 7 and 9, is that it is not for the head of department to intervene in the evaluation process conducted by the programme manager, the central review body and, where applicable, the panel. At that stage, up to and including the approval of a list of qualified candidates, the duties of the head of department are only to ensure that the aims and objectives of the Organization with regard to human resources planning are taken into consideration, particularly with regards to geographic distribution and parity; to ensure that established procedures are respected; and, at the final stage of the procedure, to appoint the candidate that he or she believes is best qualified. The head of department is not entitled to drop a candidate from the list of qualified candidates and, consequently, from the roster of candidates who have been recognized as qualified.

41. It follows that if the head of department is entitled to ask the programme manager and panel to modify a proposal consisting of a list of ranked candidates for submission to the central review body, with a view to ensure compliance with the requirement contained in paragraph 7.7 of the administrative instruction that the candidates on such a list must be unranked, the modification must be limited to that purpose. In other words,

the modification should consist of presenting the list in such a manner that it no longer distinguishes between strongly recommended candidates and recommended candidates.

42. However, the Executive Director did not limit herself to that. She asked the panel to provide a shorter list of candidates of appointable calibre. Such an action clearly interfered with the evaluation process, resulting in the exclusion of candidates who had originally been recommended by the panel, i.e. candidates who, even if not ultimately selected for the vacant post, would have been included on the roster for similar positions. In so doing, the Executive Director disregarded Mr. Verschuur's right to benefit from the advantage of being included on the roster for a year and she acted against the interests of the Organization, which she deprived of candidates whose qualification had already been recognized in order to fill vacancies for similar positions.

43. It is irrelevant that the Executive Director did not ask the chair of the panel to provide her with a new report. The Dispute Tribunal judge rightly found that the manner in which the changes to the list of candidates had been requested clearly amounted to improper interference in the evaluation process.

44. With regards to the question of compensation, the Appellant requests on the basis of article 10(5) of the Statute of the United Nations Dispute Tribunal that this Court rescind or significantly reduce the compensation awarded to Mr. Verschuur by the Dispute Tribunal.

45. The judge of first instance ordered that the Secretary-General should pay Mr. Verschuur compensation equivalent to six months net base salary.

46. This Court recalls that the selection procedure was tainted by the improper nature of the Programme Manager's decision, which disregarded Mr. Verschuur's priority as a 30-day candidate under sections 5 and 7 of administrative instruction ST/AI/2006/3 by considering all of the candidates together, without distinguishing between 30-day mark and 60-day mark candidates. Such an irregularity is in-itself serious enough to justify rescinding the administrative decision not to select a candidate whose priority has been disregarded or granting compensation as an alternative to rescission. In addition to the first irregularity, the Executive Director's interference in the evaluation process gave rise to a second irregularity that resulted in Mr. Verschuur's exclusion from the roster of

approved candidates and thus prevented him from applying in that capacity for future vacancies with similar functions.

47. Mr. Verschuur contested the decision not to include him in the roster of approved candidates. The Dispute Tribunal granted him compensation without giving the Administration a choice between, on the one hand, either rescinding the invalid decision or performing an obligation or, on the other hand, paying compensation as an alternative to the rescission or performance of the obligation.

48. Article 10(5)(a) of the Statute of the United Nations Dispute Tribunal provides that the Tribunal may order the rescission of the contested decision or specific performance. Where the contested decision concerns appointment, promotion or termination, the Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to rescission of the contested administrative decision or specific performance ordered. It follows that, in principle, in cases concerning appointment, promotion or termination, the Tribunal should not limit itself to only granting compensation. It has to provide the Administration with a choice between on the one hand, rescinding the decision or performing an obligation and, on the other hand, paying compensation. The Tribunal can't limit itself to awarding compensation only under exceptional circumstances, and only after informing the parties of its intention in order to allow them to discuss the issue when, owing to the passage of time, a rescission of the decision would serve no purpose or the performance of an obligation would be impossible, or when one of those options would affect the rights of third parties.

49. In this case, the Dispute Tribunal did not give reasons for its decision but the Appeals Tribunal considers that, owing to the passage of time, the rescission of the decision or performance of any obligation would serve no purpose, or at least no useful purpose. And the parties have not contested the UNDT on that point.

50. With regards to the quantum of compensation determined by the Dispute Tribunal, the Court notes that the Appellant has not formulated arguments to contest it in the light of the criteria set forth in *Solanki*<sup>1</sup>. It considers that, in this case, the judge of

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<sup>1</sup> *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044.

first instance is the best placed to determine the level of compensation and that there is no reason to call that amount into question.

**Judgment**

51. The appeal is dismissed.

Original and Authoritative version: French

Dated this 8 July 2011 in Geneva, Switzerland.

*(Signed)*

Judge Courtial, President

*(Signed)*

Judge Garewal

*(Signed)*

Judge Faherty

Entered in the Register on this 29th day of August 2011 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar