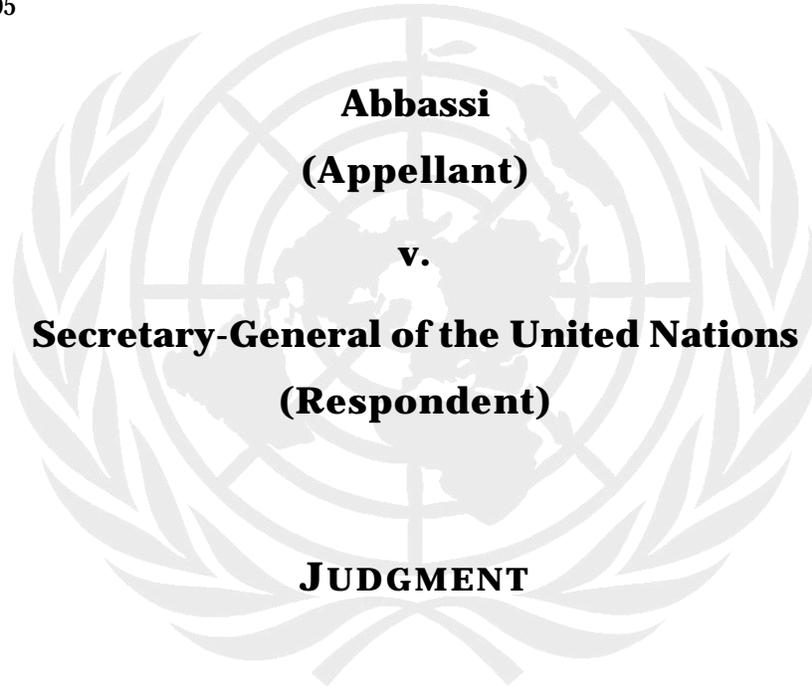




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-105



Before: Judge Sophia Adinyira, Presiding
Judge Kamaljit Singh Garewal
Judge Inés Weinberg de Roca

Judgment No.: 2011-UNAT-110

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Appellant: Bart Willemsen and Anita Saran

Counsel for Respondent: Amy Wood

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. Khadifa Abbassi (Abbassi) challenged the decision not to select her for the post of P-4 Arabic Reviser on the ground that the selection procedure for the consideration of 15-day and 30-day candidates was not followed. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that the selection procedure was followed and Abbassi, a 15-day candidate, was considered and found unsuitable for the post before the 30-day candidates were considered.

2. Abbassi's main arguments on appeal are that the Dispute Tribunal made errors of fact in the Judgment. In order to overturn a finding of fact, the Appeals Tribunal must be satisfied that the finding is not supported by the evidence or that it is unreasonable. Some degree of deference should be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. We hold that there are no grounds for overturning the Dispute Tribunal's findings of fact, and no other reversible errors were made. The appeal is dismissed.

Facts and Procedure

3. Abbassi is a permanent staff member of the United Nations and is an Arabic Reviser at the P-4 level in the Department for General Assembly and Conference Management (DGACM) in New York.

4. In June 2009, Abbassi applied for a vacancy for a P-4 Arabic Reviser in Geneva. At the time of the interviews, she was the only staff member eligible to be considered for a lateral move at the 15-day mark under the former Administrative Instruction on the staff selection system (ST/AI/2006/3). Abbassi was interviewed on 1 September 2009 by a four-member panel. The panel discussed the suitability of Abbassi for the vacancy after her interview and the panel agreed that she was not suitable.

5. On 2 September 2009, the panel interviewed six candidates who were eligible for consideration at the 30-day mark. The panel recommended two 30-day candidates. The successful candidate was informed of the selection on 30 October 2009.

6. On 3 November 2009, Abbassi requested a management evaluation of the decision not to select her for the post of Arabic Reviser. The decision was upheld by the Secretary-General.

7. Abbassi contested the decision before the UNDT. The UNDT dismissed her application in Judgment No. UNDT/2010/086, dated 6 May 2010. The issue in the case was whether Abbassi, a 15-day candidate, was considered and found unsuitable for the post before the 30-day candidates were considered. The UNDT found that Abbassi's suitability for the vacancy was considered immediately after her interview. Based on the panel's conclusions regarding Abbassi's weaknesses with respect to teamwork and communication, the UNDT found that the programme manager's determination that Abbassi was unsuitable was both reasonable and fair. Abbassi's entitlement to be assessed fairly and adequately was satisfied, and because she was not found suitable for the post, there was no error in not selecting her and in interviewing the 30-day candidates.

Submissions

Abbassi's Appeal

8. Abbassi contends that the UNDT erred in fact in finding that she was found to be an unsuitable 15-day candidate. She argues that the panel did not make a final determination of her unsuitability but a determination that she was "provisionally suitable" for the post. She relies on the programme manager's evidence that had none of the 30-day candidates been found suitable, Abbassi would have been given further consideration.

9. Abbassi submits that the UNDT also erred in fact in finding that she was found to be unsuitable prior to the consideration of the 30-day candidates. There was not enough evidence to safely conclude that the panel members's ratings for her were given prior to the interviews of the 30-day candidates, and the documents did not record the conclusion that Abbassi was unsuitable. Abbassi argues that no reasonable trier of fact could accept the evidence of the programme manager that the panel assessed her suitability before interviewing the 30-day candidates.

10. Abbassi further argues that the UNDT erred in fact in finding that she was measured against the same standard as the 30-day candidates. The programme manager gave evidence that a 15-day candidate was expected to obtain a higher score for the required

competencies than a 30-day candidate. Abbassi argues that she was unlawfully assessed against a higher standard than the 30-day candidates.

11. Abbassi contends that the UNDT erred in fact or law by not admitting into evidence an e-mail from the Director of the Documentation Division in DCAGM, New York, concerning the translation workload in New York. She requests that it be received as additional evidence by the Appeals Tribunal under Article 2(5) of the Statute of the Appeals Tribunal (Statute).

12. Abbassi requests that the Appeals Tribunal reverse the Judgment, rescind the contested administrative decision and award her compensation.

Secretary-General's Answer

13. The Secretary-General submits that the evidence established that the panel concluded that Abbassi was not a suitable candidate in the discussions which followed her interview. The evidence of the programme manager that Abbassi may have been given further consideration had none of the 30-day candidates been found suitable was mere speculation.

14. The Secretary-General argues that the panel members' notes supported the testimony of the programme manager that Abbassi's suitability was considered immediately after her interview and before the 30-day candidates. The UNDT's findings of fact were well reasoned and Abbassi repeats arguments that did not succeed at first instance.

15. The Secretary-General submits that a broad range of discretion is granted to decision makers in the evaluation of candidates. Abbassi was treated differently as she was a different candidate – as a candidate seeking a lateral transfer, Abbassi was required to show that she did satisfy the performance requirements, whereas the 30-day candidates seeking a promotion needed to show that they would.

16. The Secretary-General submits that there is no basis for overturning the UNDT's finding on the question of admissibility of evidence or to admit new evidence under Article 2(5) of the Statute. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

Preliminary issue

17. Abbassi requests that this Tribunal receive additional evidence pursuant to Article 2(5) of the Statute. After the conclusion of the hearing before the UNDT, Abbassi requested that an e-mail from the Director of the Documentation Division of DCAGM, New York, regarding the workload in New York be admitted into evidence. The UNDT refused the request for the reason that the e-mail lacked probative value.

18. Abbassi submits that the UNDT made an error of fact in refusing to admit the additional evidence. Abbassi argues that the e-mail is relevant as the programme manager's assessment of her ability to work in Geneva was premised on the programme manager's assessment of the workload in Geneva compared to that in New York.

19. We do not consider that Article 2(5) of the Statute applies in this case as Abbassi applied for the e-mail to be admitted into evidence before the UNDT. The real issue is whether the UNDT erred in law in refusing to admit the evidence because it lacked probative value.

20. There is a difference between admissibility of evidence and the weight attached to the admitted evidence. Evidence is admissible if it is relevant to the facts in issue. The Dispute Tribunal has a broad discretion to determine the admissibility of any evidence under Article 18(1) of its Rules of Procedure. The UNDT exercised its discretion not to admit the evidence because it lacked probative value. This Tribunal is mindful that the Judge hearing the case has an appreciation of all of the issues for determination and the evidence before the UNDT. In order to establish that the Judge erred, it is necessary to establish that the evidence, if admitted, would have led to different findings of fact and changed the outcome of the case.

21. In this case, the interview panel was of the view that it was in Abbassi's dealing with issues raised by work pressure that her weaknesses as a candidate became more evident. At best, the e-mail offered a different opinion regarding the relative workload of the Geneva and New York offices from a person who was not involved in the selection process for the post. The UNDT considered the admissibility of the e-mail in some detail in paragraph 6 of the Judgment and concluded that it was not admissible. We agree with the UNDT's analysis.

Main issues

22. Article 2(1)(e) of the Statute provides that the Appeals Tribunal is competent to hear and pass judgment on an appeal that asserts that the UNDT has “[e]rred on a question of fact, resulting in a manifestly unreasonable decision”. It is the duty of an appellant to demonstrate that the UNDT’s judgment is defective.

23. In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration.

24. The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.

25. Under Section 7.1 of the applicable Administrative Instruction on the staff selection system (ST/AI/2006/3), Abbassi, as a 15-day mark candidate, was entitled to prior consideration before a 30-day mark candidate. If Abbassi was found suitable, she was entitled to a lateral move.

26. Abbassi argues that the UNDT made errors in fact in finding that the consideration of her candidacy for the post, as a 15-day candidate, was in accordance with the procedure set out in ST/AI/2006/3. In order to overturn a finding of fact by the UNDT, the Appeals Tribunal must be satisfied that the finding is not supported by the evidence or that it is unreasonable. The Appeals Tribunal considers that some degree of deference should be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. The UNDT has the advantage of assessing the demeanour of witnesses while they are giving evidence and this is critical for assessing the credibility of the witnesses and the persuasiveness of their evidence.

27. Abbassi has failed to demonstrate that the UNDT erred in finding that there was a determination by the panel that she was unsuitable for the post. The UNDT considered the evidence of the programme manager that Abbassi might have been considered again had the 30-day candidates been found to be unsuitable, and Abbassi’s argument in light of this

evidence that the panel only made a provisional determination as to her suitability. In this appeal, Abbassi simply repeats her arguments before the UNDT, which were rejected. We find that there is no reason to reject the analysis by the UNDT of Abbassi's arguments and overturn the UNDT's finding (see paragraphs 25 and 26 of the Judgment).

28. Abbassi's argument that the UNDT erred in finding that she was found to be an unsuitable candidate before the 30-day candidates were considered must also fail. The UNDT accepted the evidence of the programme manager that the panel discussed Abbassi's suitability immediately after the interview and decided that she was unsuitable. The UNDT considered that the interview notes of the panel members supported this finding. Abbassi has not demonstrated that other evidence contradicted the programme manager's evidence, or that it was unreasonable to accept the programme manager's evidence on this point in light of other evidence. Therefore, there are no grounds for overturning the UNDT's finding on this point.

29. Finally, Abbassi submits that the UNDT made an error in finding that she was measured against the same standard as the 30-day candidates. As a 15-day candidate seeking a lateral move, Abbassi was expected to demonstrate that she did satisfy the performance requirements of the post, whereas the 30-day candidates who were seeking a promotion were expected to demonstrate that they would meet those performance requirements. The UNDT found that Abbassi was assessed differently to the 30-day candidates as she was a different candidate and this did not amount to unequal treatment. We find no error in the reasoning of the UNDT.

30. We find that there is no merit in Abbassi's appeal.

Judgment

31. The appeal fails and it is dismissed. The Judgment of UNDT is affirmed.

Original and Authoritative Version: English

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar