



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

Judgment No. 2014-UNAT-477



**Charles
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Luis María Simón, Presiding Judge Inés Weinberg de Roca Judge Sophia Adinyira
Case No.:	2014-550
Date:	17 October 2014
Registrar:	Weicheng Lin

Counsel for Mr. Charles:	Self-represented
Counsel for Secretary-General:	Amy Wood

JUDGE LUIS MARÍA SIMÓN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Lestrade Charles against Judgment No. UNDT/2013/142, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 15 November 2013. Mr. Charles appealed on 6 January 2014, and the Secretary-General of the United Nations filed his answer on 4 March 2014.

Facts and Procedure

2. The following facts are uncontested:¹

... The job opening [of Procurement Officer (P-4) in Nairobi] was advertised on 11 July 2012, with a closing date of 9 September 2012. A total of 177 candidates applied. Twenty-two applicants, including the Applicant, were invited to take a two-hour written test, which was scheduled to take place on 3 December 2012, from 3 to 5 p.m. (Nairobi time). At the Applicant's request, he was permitted to take the test from 5 to 7 p.m. (Nairobi time) on 3 December 2012. Two other candidates were similarly permitted to take the test later.

... The Applicant experienced some difficulties in receiving the email test papers and submitting his answer. He did, however, receive the test [...], following several emails between himself and [the United Nations Office at Nairobi (UNON)]. Although he appears to have submitted his answers after the two-hour deadline, they were accepted and evaluated.

... The test consisted of two sections: the first section consisted of an essay and the second section had 14 short questions. The test instructions clearly stated that the answers would be evaluated anonymously and, for this reason, if any candidate were to include any information that would make it possible to identify them, it would lead to their disqualification. The test instructions further stated that each of the short questions should be answered and that the answers to each question would be graded on: knowledge of UN procurement policies; comprehensiveness of the response; composition and language; and adherence to instructions.

... Each candidate was assigned an alphabetical letter by Ms. CG, who was administering the test, to ensure that their names would not be seen during the test evaluation process. Their written answers, identified by their assigned alphabetical letters, were transmitted on 4 December 2012 to the Chief, Procurement Section, UNON, for evaluation. There is no evidence to suggest that the Chief knew the

¹ Impugned Judgment, paras. 9-22.

identities of the candidates to whom the alphabetical letters were assigned until after the assessment.

... The responses to the test were evaluated against pre-determined criteria. A passing mark consisted of an acceptable essay (with assessments ranging from “poor” to “very good”) and 13 out of 44 points on the questions section. Each question was allotted a rating of three points, with the exception of question number 12, which carried a rating of five points. Also, six questions were identified as “key questions”, although they were rated on the same three-point scale. Each candidate received a score in relation to each individual question and a combined total score.

... The review of the answers to the test proceeded in several rounds. The first round consisted of a review of compliance with the basic test requirements (such as not writing their name on the test answers). One candidate was disqualified.

... The second round consisted of a review of responses to the essay. Two candidates were disqualified, leaving 19 candidates standing, including the Applicant.

... The third round consisted of the elimination of candidates who scored below 13 points on the short questions and whose essays were rated as poor. Five candidates were eliminated. Thus 14 candidates remained in the running. Although the Applicant and two other candidates scored below 13 points on the short questions, they progressed to the next stage on the strength of their essays.

... The fourth round concentrated on the essays and resulted in the elimination of three candidates, thus leaving 11 candidates, including the Applicant, in the running.

... The fifth round included the evaluation of the six “key questions”. The total maximum score for the “key questions” was 20. The Applicant received a score of 2.5 for his answers to the “key questions”. The Applicant and three other candidates were eliminated due to their low scores on the six key questions. Seven candidates thus remained.

... On 12 December 2012, the Chief of the Procurement Section, UNON, sent an email to Ms. CG, asking her to release the names of the remaining seven candidates in order to invite them for competency-based interviews. The interviews were conducted by a panel of three staff members. Up to that point, the candidates were known to the Chief only by alphabetical letters assigned to them.

... Four candidates were recommended for the job following the interviews. The selected candidate, who apparently was also on the roster of P-4 candidates pre-approved for similar functions, was notified of his selection on 11 February 2013.

... On 22 February 2013, the Applicant was informed that he was not successful. He filed a request for management evaluation on 28 February 2013.

... On 1 March 2013, the Applicant filed an application for suspension of action, pending management evaluation, of the decision not to select him for the P-4 vacancy in Nairobi. On 8 March 2013, the Tribunal issued Order No. 68 (NY/2013), dismissing the Applicant's application for suspension of action, finding that the Applicant did not satisfy the requirement of *prima facie* unlawfulness.

3. On 17 April 2013, Mr. Charles filed an application before the UNDT "contesting what he described as the 'unfair, biased, improper and incomplete evaluation of [his] candidature for the advertised job opening of Procurement Officer (P-4)' in Nairobi, Kenya".²

4. On 15 November 2013, the UNDT rendered its Judgment, dismissing the application. The UNDT found that Mr. Charles failed to substantiate his claim that the selection process was tainted by bias or improper motive. The UNDT was satisfied that the selection process, including the manner in which the written exam was transmitted and evaluated as well as the selection of the successful candidate, was proper and fair. The UNDT also dismissed Mr. Charles' claim that the delay in receiving a response from the Management Evaluation Unit caused him "loss or damage".

Submissions

Mr. Charles' Appeal

5. Mr. Charles alleges that the UNDT committed the following errors of fact:
- a. The UNDT stated that he received the test 30 minutes after the scheduled time. However, contrary to the UNDT's conclusion, he received the test approximately 45 minutes after the scheduled time.
 - b. The UNDT's finding that "[c]andidates had full access to the assessment methodology and the scoring criteria that would be used to evaluate the answers" is false and unsupported by the evidence. The instructions Mr. Charles received gave the incorrect impression that all 14 short answer questions were weighed and would be evaluated equally. He was unaware that priority would be assigned to sections of the test or to certain questions later evaluated as "key questions".

² Impugned Judgment, para. 1.

- c. There is no evidence before the UNDT that supports its finding that “[t]he test was evaluated against pre-determined criteria”. If the test had been evaluated based on pre-determined criteria, there would have been no need to further evaluate Mr. Charles’ candidature after determining that he had scored poorly in the previous round.
 - d. The UNDT’s finding that the answers of the candidates were not based on a comparison with other candidates is contrary to the facts and evidence on record. The Secretary-General clearly stated before the UNDT that Mr. Charles’ candidature was compared with the other candidates, in violation of the staff rules.
 - e. The UNDT erred in rejecting Mr. Charles’ claim that the selected candidate did not meet the required number of years of experience. The UNDT should not have required him to produce evidence about the selected candidate’s work experience, especially since in the past, the UNDT has repeatedly dismissed his motions for disclosure of information on successful candidates.
6. Mr. Charles further contends that the UNDT committed the following errors of law:
- a. The UNDT erred in finding that the significant delay in transmitting the test had no negative impact on Mr. Charles’ mental and emotional state.
 - b. The UNDT erred in law by failing to take any actions on Mr. Charles’ motion for disclosure of pertinent information, filed by him as part of his pleadings. “As early as April 2013”, he requested that the UNDT order the disclosure of the tests of the interviewed candidates as well as other documents. The UNDT erred by declining to take any action on Mr. Charles’ requests and proceeding without an oral hearing.
 - c. The UNDT “may have failed” to apply the proper test of “apparent bias”. Mr. Charles has produced reasonable evidence to show that senior members of the management of the Procurement Division had a “negative attitude” towards him and the UNDT erred in finding that his allegations of arbitrariness, bias and retaliation by the Chief, Procurement Section against his candidature were unsubstantiated and not supported by the evidence.

7. Mr. Charles requests that the Appeals Tribunal reverse the UNDT Judgment and order the Secretary-General to pay compensation for moral damages for “the harm caused to [him] by the failure to afford him full and fair consideration and for the consequential pain and suffering experienced”.

The Secretary-General’s Answer

8. The UNDT properly concluded that the selection process was correctly conducted and lawful in all respects. The UNDT fully considered each of Mr. Charles’ claims that the selection process was vitiated due to the manner in which the selection exercise was conducted, but found no evidence to support his claims.

9. Mr. Charles has failed to substantiate his claim that he was prejudiced by any delay in transmitting the exam. The evidence on record reflects that he received the test no later than 5:35 pm, but more importantly and regardless of the length of the delay, he suffered no harm because he was provided with additional time to complete the exam.

10. Mr. Charles has failed to demonstrate that he was prejudiced by an alleged lack of clear exam instructions. The Administration acted within its discretion to assign different weights to particular questions and evaluated all candidates based on the same scoring system which was determined before the exam was administered. In any event, Mr. Charles failed to answer one-third of the exam questions and therefore did not perform well enough to qualify for the competency-based interview process.

11. Furthermore, contrary to Mr. Charles’ contention, the UNDT properly found based on the record of the case that all candidates were evaluated anonymously and treated equally. He failed to substantiate his assertion that he was disadvantaged and prejudiced because his candidature was compared with the other candidates.

12. Mr. Charles’ assertion that the selection process was flawed because the selected candidate did not have the required years of experience for the post is irrelevant and contradicted by the evidence. The selected candidate was on the roster of P-4 preapproved candidates for similar functions and therefore, his qualifications and competencies as well as the integrity of the selection exercise had been confirmed by a central review body. Moreover, even if Mr. Charles could demonstrate that there was an irregularity

in the selection process, such alleged irregularity would have no effect on his chances to be selected since his candidacy was rejected at an earlier stage of the selection process.

13. Mr. Charles has failed to present any evidence in support of his claims of bias or prejudice.

14. Mr. Charles has failed to establish that the UNDT committed any procedural error such as to affect the decision of the case. He does not substantiate his assertion that the UNDT erred in declining to order the production of certain documents. Furthermore, Mr. Charles is estopped from claiming that the UNDT erred in procedure in deciding the case on the papers, since he stated before the UNDT that he did not want an oral hearing.

15. Mr. Charles has failed to establish any basis for an award of compensation. The UNDT correctly found that the selection process was conducted properly and the selection of the rostered candidate was legitimate. The UNDT also considered Mr. Charles' claim that he suffered emotional harm and correctly found that he failed to demonstrate that he had suffered "mental anguish".

16. The Secretary-General requests that the Appeals Tribunal affirm the UNDT's dismissal of Mr. Charles' application and dismiss the appeal in its entirety.

Considerations

17. This Court holds that Mr. Charles did not succeed in establishing any error of fact or law which would warrant the reversal of the UNDT Judgment under appeal.

18. With regard to the alleged errors of fact or errors related to the fact-finding, we hold that the UNDT conducted an adequate review of the impugned selection proceedings and their outcome. The contested Judgment correctly concluded that the non-selection of Mr. Charles was supported by the evidence and was not vitiated by any improper motive. Also, even if the alleged flaws were to be considered irregularities, they would not be important enough to render the proceedings null or to reflect a violation of rights and actual harm or discrimination suffered by Mr. Charles.

19. Thus, the findings made by the UNDT cannot be disturbed within the narrow scope of Article 2(1)(e) of the Statute of the Appeals Tribunal, which requires errors of fact resulting in a manifestly unreasonable decision, which is not the present case.

20. Certainly, the delay in transmitting the exam to Mr. Charles did not prevent him from submitting his answers and the Administration accepted his test as timely submitted. Consequently, whether the delay amounted to 30 or 45 minutes becomes immaterial. Delays can happen frequently when dealing with international communications over the Internet. Therefore, that circumstance does not constitute grounds for actual tension, anguish or stress of an average person which would warrant not taking the test or considering it irregular if submitted with delay.

21. Neither were irregular the instructions given about the examination or its evaluation. The content was specific enough to allow the candidates to understand that the essay part and the 14 questions constituted the whole test. Any average candidate would then try to do his or her best to complete the test, despite any previous announcement that certain questions were considered more important or carried more weight. The applicable Administrative Instruction just contemplates the possibility that the candidates' qualifications may be assessed by written tests and does not require such advanced notice about the evaluation methods as claimed by Mr. Charles.

22. It was established at the first instance that the examination and its evaluation were conducted without identifying the candidates, and that the Appellant did not answer five out of the 14 questions, receiving a poor score and an overall evaluation that excluded him from proceeding to the following step in the selection procedure. As the tests and their evaluations were anonymous, all the candidates received the same treatment. Hence, the procedure was not flawed nor was substantiated any bias against Mr. Charles, as correctly concluded by the UNDT. The lack of previous advice about different weights assigned to certain questions or some of the evaluation's criteria in no way affects the lawfulness of the procedure and Mr. Charles rights.

23. The Appellant has failed to persuade this Tribunal that he is a victim of discrimination due to his various claims against the Administration and his appeals of different selection procedures.

24. A claim about the non-selection resulting from a contested competitive process must be decided on a case by case basis, by assessing if the selection methods applied during the different stages of the process were in accordance with the applicable norms and provided a fair, objective, and non-discriminatory treatment of all the candidates. If the analysis of this issue leads to an affirmative answer, the contestation cannot succeed, irrespective of whoever was selected, because what counts is that the non-selected candidate's rights were not violated.

25. Thus, we share the view of the Administration about the irrelevance of the issue of the years of experience of the successful candidate. Even if the UNDT had been incorrect in its finding of fact about this issue, the outcome of the case would have been the same, due to the overall lack of negative impact of the alleged irregularities on the chances of Mr. Charles being selected.

26. We find no merit in the procedural errors attributed to the UNDT. The UNDT was entitled to decline the request for production of documents related to other candidates, whose relevance and utility for the case were submitted merely in a generic way and never clearly exposed by Mr. Charles. The UNDT could also rely on its Statute and Rules of Procedure to decline holding a hearing in the case, and to consider no evidence other than the evidence already submitted by the parties and the illustration of the case as put forward in the parties' contentions. Specifically, Mr. Charles himself stated before the UNDT that he did not propose a hearing, a circumstance that prevents him from introducing this issue as ground for his appeal, under the universal Roman principle *venire contra factum proprium non valet*" (no one may set himself in contradiction to his own previous conduct).

27. Lastly, this Tribunal is also satisfied that no compensation should be awarded to Mr. Charles, since no illegality or breach of his rights was found.

Judgment

28. For the foregoing reasons, the appeal is dismissed and the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Adinyira

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar