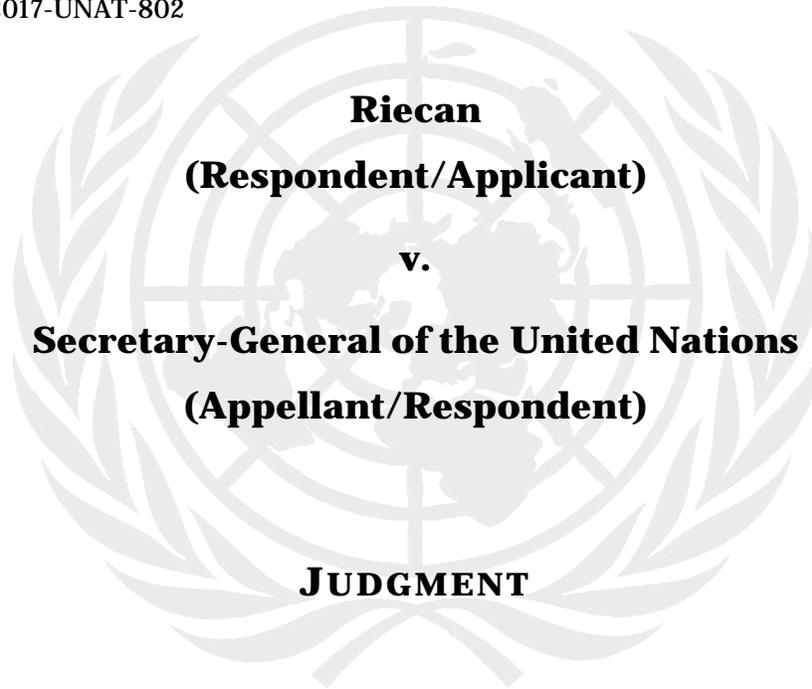




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-802



**Riecan
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Richard Lussick Judge Sabine Knierim
Case No.:	2017-1087
Date:	27 October 2017
Registrar:	Weicheng Lin

Counsel for Mr. Riecan:	Marisa MacLennan, OSLA
Counsel for Secretary-General:	Francisca Lagos Pola

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/029, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 26 April 2017, in the case of *Riecan v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 27 June 2017, and Mr. Juraj Riecan filed his answer on 21 August 2017.

Facts and Procedure

2. The following facts are uncontested:¹

... On 8 July 2013, the United Nations Conference on Trade and Development (UNCTAD) advertised the position of Chief, Development Statistics and Information Branch on INSPIRA. The Applicant applied for the said position on 9 August 2013. [...]

... Eight other candidates and the Applicant were invited to participate in a written test. He sat for and passed the written test on 28 November 2013 and was later invited to participate in a competency-based interview.

... The Applicant's interview for the position took place on 10 January 2014 by audio and video Skype conference.

... In its report, the assessment/interview panel rated the Applicant as only partially meeting the requirements in the competencies of Professionalism and Leadership.

... On 24 April 2014, he was informed by the hiring manager, Mr. Richard Kozul-Wright, that his application to the position would not be considered further. This meant that he was neither recommended nor selected for the position.

... Two candidates were finally recommended for the position by the assessment/interview panel. One of them was selected for the position by the Head of office while the other was placed on the roster.

... Thereafter, the Applicant submitted a request to the Management Evaluation Unit (MEU) on 24 April 2014. On 30 May 2014, the MEU responded and upheld the administrative decision not to recommend him for the said position.

¹ Impugned Judgment, paras. 2-8.

3. On 26 April 2017, the UNDT issued its Judgment finding that Mr. Riecan was not given full and fair consideration in his candidacy for the position and awarded Mr. Riecan three months' net base salary with interest, but refused Mr. Riecan's request for rescission of the impugned decision and that he be placed on a roster of candidates for D-1 positions. The UNDT held that the interview panel committed a material failure when it did not consider Mr. Riecan's e-PAS reports and did not address them in the context of the disparity between its ratings and those of the applicant's reporting officers on the same competencies. The UNDT held that where performance records of a staff member were available to an assessment panel, the panel had a duty to consider them and reflect that consideration in its own assessment report. Based on this serious flaw and material failure, the UNDT concluded that Mr. Riecan was not given full and fair consideration.

4. As noted above, the Secretary-General filed an appeal on 27 June 2017. Mr. Riecan filed his answer on 21 August 2017.

Submissions

The Secretary-General's Appeal

5. The Secretary-General requests that this Tribunal vacate the UNDT's Judgment in its entirety as Mr. Riecan was fully and fairly considered in the selection process. In the alternative, should this Tribunal find that the UNDT was correct, the Secretary-General requests that Mr. Riecan's award of compensation be vacated as there was no evidence of harm adduced. The Secretary-General argues that the UNDT erred on a question of law and exceeded its competence by limiting the Secretary-General's discretion on selection matters and by not following the case law of the Appeals Tribunal. The Secretary-General also argues that the UNDT erred in law in finding the assessment panel had a duty to consider Mr. Riecan's performance records. This contradicts the wide discretion afforded to the Secretary-General in selection matters as set out in applicable law and case law, and specifically in *Nikolarakis*,² wherein the Appeals Tribunal held that the Administration does not have a duty to consider a candidate's performance records in a selection exercise. The Secretary-General also submits that the UNDT erroneously relied upon *Simmons*³ when it concluded the interview panel had a duty to consider the performance documents. As affirmed on appeal, the *Simmons* case does not support the

² *Nikolarakis v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-652.

³ *Simmons v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-222.

UNDT's finding that an e-PAS must be considered. To the contrary, the *Simmons* ruling supports the proposition that candidates can be required to demonstrate competencies through an interview.

6. There is also no legal requirement to consider performance documents in the Administrative Instruction on Staff Selection (ST/AI/2010/3). The UNDT, therefore, erred in inserting a step into the assessment process that is not required under the staff selection system.

7. Lastly, the Secretary-General argues that the UNDT erred in law in awarding compensation to Mr. Riecan as the UNDT disregarded the principle that not every violation of a staff member's legal rights or of the staff member's due process rights leads to an award of compensation. The jurisprudence provides that compensation will not be approved when absolutely no harm has been suffered. The evidentiary threshold for awarding compensation is set out in revised Article 10 of the UNDT Statute, which provides that the UNDT may only order compensation for harm supported by evidence. In this matter, the UNDT awarded compensation merely because of a purported violation of Mr. Riecan's due process rights in the selection process. However, no harm was put forth by Mr. Riecan nor considered by the UNDT.

Mr. Riecan's Answer

8. Mr. Riecan requests the Appeals Tribunal to dismiss the Secretary-General's appeal. In support of this request, Mr. Riecan argues that the UNDT did not contravene applicable law by recognizing a duty to consider e-PAS reports by an interview panel. Mr. Riecan argues that the Secretary-General confounds the specific finding of a duty to consider e-PAS reports with the method of assessment. The UNDT was not requiring the assessment panel to assess the candidates by using solely the e-PAS nor did the UNDT require the assessment panel to add or replace this assessment method to one already chosen. The UNDT, rather, merely found that where the e-PAS was provided, the panel had a duty to consider it. This is not akin to limiting the Secretary-General or the panel's discretion as they are free to decide how to assess candidates. ST/AI/2010/3 requires consideration of performance material in selection for lateral promotional recruitment. It would appear illogical to refuse to consider material that has been requested by the Organisation. Therefore, the UNDT did not exceed its competence or infringe upon any provisions within ST/AI/2010/3.

9. Mr. Riecan also argues that the UNDT did not contravene the jurisprudence of the Appeals Tribunal as the UNDT Judgment is not at odds with *Nikolarakis*, wherein the Appeals Tribunal found that the UNDT erred in requiring additional weight be given to a candidate's e-PAS. In the instant matter, the UNDT correctly found the panel's failure to even consider an e-PAS was material. The Judgment is also congruent with *Abbassi*,⁴ wherein the Appeals Tribunal upheld the UNDT in its finding that where an inconsistency exists between an assessment panel's views of what was required for the post and the opinion of the candidate's supervisor, it was reasonable for the panel to prefer its own views. The impugned Judgment leaves the finding in *Abbassi* undisturbed as it does not render the e-PAS supreme over the panel, but merely finds there is a duty to consider it.

10. Lastly, Mr. Riecan argues that the UNDT did not err in law in awarding him compensation as the UNDT is best situated to determine the remedy. The fact that Mr. Riecan was not selected and that he did no progress past the interview stage is the harm he suffered. The UNDT Statute does not require a doctor's reports or financial loss. The awarded compensation is low and is not manifestly unreasonable. Relying on *Andersson*⁵ and *Asariotis*⁶ a procedural violation could, in and of itself, give rise to an award of compensation. Thus, his award of compensation is supported on multiple grounds.

Considerations

11. In the instant case, the UNDT did not correctly apply the law in considering Mr. Riecan's challenge to the selection process for the post. As discussed in more detail below, the UNDT made errors of law and fact in accepting Mr. Riecan's application.

12. Before embarking on a consideration of the specific arguments made on appeal in this case, it is apposite to reprise the jurisprudence of the Appeals Tribunal as to how the UNDT should exercise its powers of judicial review in relation to matters of appointments and promotions.

13. In terms of the discretion which vests in the Administration, under Article 101(1) of the Charter of the United Nations and Staff Regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. The jurisprudence of this Tribunal has clarified

⁴ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110.

⁵ *Andersson v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-379.

⁶ *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309.

that, in reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent, and non-discriminatory manner. It is not the Tribunals' role to substitute their decision for that of the Administration.⁷

14. We have also stated:⁸

... The Dispute Tribunal possesses jurisdiction to rescind a selection or promotion process, but may do so only under extremely rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the Dispute Tribunal shall uphold the selection/promotion.

... All candidates before an interview panel have the right to full and fair consideration. A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case.

... There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that [he/] she was denied a fair chance of promotion.

15. The Secretary-General submits that the UNDT erred on a question of law in substituting its own judgment for that of the Administration regarding how the selection process should have been conducted.

⁷ *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, para. 30, citing *Schook v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-216 and cites therein; *Al-Mussader v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-771, paras. 15-16; *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 27; *Niedermayr v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-603, para. 21; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508, para. 39.

⁸ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, paras. 20-21 and 26; *Niedermayr v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-603, para. 23. See also *Al-Mussader v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-771, para. 16, and *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 27.

16. With regard to this specific issue, the UNDT held that:⁹

... both ST/AI/2010/3 and the pronouncements of UNAT affirm that where the e-PAS reports of a staff member are available to an assessment panel in the course of a selection process, the panel has a duty to consider the e-PAS reports and reflect that consideration in its own assessment report.

... This duty becomes even more critical in a situation like that of the Applicant where his e-PAS reports show that for three out of the past five reporting cycles, he was rated as outstanding for professionalism by different reporting officers whereas the interview panel rated him as only partially meeting the requirements.

17. The UNDT based its findings principally on the purpose of the Performance Appraisal System within the United Nations, by stating that:¹⁰

... One of purposes of the Performance Appraisal System within the United Nations is to recognize successful performance and to address underperformance in a fair and equitable manner. Performance ratings that show successful performance on the part of the staff member in question justify the award of salary increment.

... Successful performance ratings shall be considered during the selection process for a staff member for a post at the same level or at a higher level, without prejudice to the Secretary-General's discretionary authority to appoint staff members.

18. Finally, resting upon these findings, the UNDT went on to conclude:¹¹

... In the present case there was a material failure by the interview panel to consider relevant material, that is, the Applicant's e-PAS reports, especially in the context of the disparity between its ratings and those of the Applicant's reporting officers on the same competencies and within the same organization. The [Dispute] Tribunal finds and holds that the Applicant's candidacy for the position of Chief, Development Statistics and Information Branch was not given full and fair consideration.

19. We are not satisfied with the UNDT's conclusion for the reasons stated below.

⁹ Impugned Judgment, paras. 50-51.

¹⁰ *Ibid.*, paras. 46-47.

¹¹ *Ibid.*, para. 61.

20. First, the UNDT does not make any reference to a specific provision of ST/AI/2010/3, or any other authority, providing for a duty of the assessment panel in the course of a selection process to consider the e-PAS reports of the candidate staff member and reflect that consideration in its own assessment report.

21. Second, in applying the above principles of our jurisprudence, we find that the mere fact that the interview panel did not take into consideration Mr. Riecan's e-PAS reports, which were available to them, while relying on their own assessment of his competencies during the competency-based interview, does not render the selection process unreasonable or unfair. Nor does the failure of the interview panel to address Mr. Riecan's e-PAS reports especially in the context of the disparity between its ratings and those of his reporting officers on the same competencies.

22. As already alluded to, the Administration has wide discretion to choose the best evaluation method in order to assess which candidates are most qualified for selection.¹² In the instant case, the UNDT erred on a matter of law and exceeded its competence by ruling that the interview panel was under a duty to consider Mr. Riecan's e-PAS reports and reflect that consideration in its own assessment report, even after Mr. Riecan had failed the interview. In finding so, the UNDT improperly assumed the role of deciding which evaluation method should have been used and adopted an approach which is not institutionalized in the existing staff selection system established under the Staff Regulations and Rules.

23. The UNDT's reliance on the ratio of *Simmons*¹³ to conclude that where the e-PAS reports of a staff member are available to an assessment panel in the course of a selection process, the panel has a duty to consider the e-PAS reports and reflect that consideration in its own assessment report is incorrect. In that case, the Appeals Tribunal solely addressed the issue of delays in completing the e-PAS reports of the staff member and the compensation awarded to her in the context of a selection process. In the course of its Judgment, this Tribunal offered *obiter dicta* on the importance of annual e-PAS reports for the staff member's professional career development and the aid they provide to interview panels when the staff member is being

¹² *Nikolarakis v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-652, paras. 30-31; *Dhanjee v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-527, para. 29.

¹³ *Simmons v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-222.

considered for promotion or selection to a higher post or a fresh post. Thus, *Simmons* is distinguishable from the present case.

24. Since the UNDT based its award of damages on the erroneous and unsupported conclusion that the Administration's decision not to select Mr. Riecan was unlawful, that award must be vacated. Because no illegality was found, there is no justification for the award of any compensation or moral damages. As this Tribunal stated before, "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrong-doing in need of repair".¹⁴

25. Accordingly, the Secretary-General's appeal should be granted and the impugned Judgment should be vacated.

¹⁴ *Muwambi v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-780, para. 66; *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508, para. 27; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-095.

Judgment

26. The appeal is granted and Judgment No. UNDT/2017/029 is hereby vacated.

Original and Authoritative Version: English

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

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Knierim

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

(Signed)

Weicheng Lin, Registrar