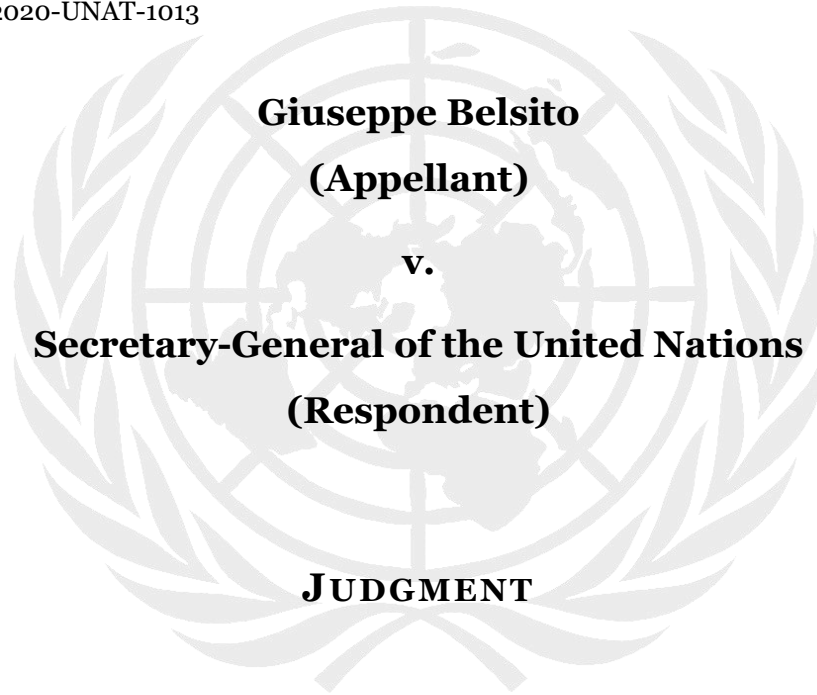




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2020-UNAT-1013



**Giuseppe Belsito
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Sabine Knierim, Presiding Judge Martha Halfeld Judge Jean-François Neven
Case No.:	2020-1348
Date:	26 June 2020
Registrar:	Weicheng Lin

Counsel for Mr. Belsito:	George Irving
Counsel for Secretary-General:	Noam Wiener

JUDGE SABINE KNIERIM, PRESIDING.

1. The Appeals Tribunal has before it an appeal filed by Mr. Belsito against Judgment No. UNDT/2019/183 issued on 19 December 2019 in which the UNDT dismissed Mr. Belsito's application against the decision to cancel a selection process for a D-1 position at the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) in July 2017 and not to select him for this position in July 2018. For the reasons set out below, we remand the case to the UNDT.

Facts and Procedure

2. Mr. Belsito, who has since resigned, joined the service of the United Nations in 1994. On 30 November 2012, he was transferred to a position with the UN Women Jordan Country Office as Representative to Jordan, at the P-5 level.

3. On 6 October 2016, UN Women advertised an opening for the D-1 position of UN Women Regional Director for Europe and the Commonwealth of Independent States. On 22 October 2016, Mr. Belsito applied for the position (first selection process).

4. The selection process was conducted by a selection panel including Ms. V., who was the Programme Director, the Hiring Manager for the position and also Mr. Belsito's supervisor.

5. On 6 February 2017, all candidates took a written examination. Three candidates, among them Mr. Belsito, were invited to a competency-based interview which took place on 24 March 2017.

6. On 3 May 2017, Mr. Belsito and his supervisor exchanged the following text messages:

Supervisor: I am talking with MARIE Elena so we can see ED Friday ok? She was *[sic.]* criticized the ED for not having enough men!!! So we have a good arguments *[sic.]*.

Mr. Belsito: you are a genius *[sic.]* all this is so surreal. We are supposed to fight gender discrimination and engage men through heforshe to support our agenda, and the ED does exactly the contrary. Where is the consistency? Imagine if the SG and member states find out what is happening in the house right now against men? Its *[sic.]* too much of a political risk for her.

Supervisor: I will not allow this discrimination.

7. On 12 May 2017, the selection panel recommended Mr. Belsito as primary candidate to the Senior Review Group (SRG) along with another (female) candidate.

8. By e-mail dated 18 May 2017, Mr. Belsito *inter alia* wrote to his supervisor:

I was just told that I should apply now for the post of Rep. in Palestine, which is in total violation of the Rotation Policy.

... I was proposed to go as Rep. to Albania, a country office which does not even qualify to remain as such in accordance with the country office typology and with such a dramatic financial situation bringing about the perspective that this would be just a one year assignment before it is downgraded to a programme presence with subsequent abolishment of my post.

I applied and successfully recommended as well as endorsed for the post of Regional Director for Europe and CIS but now I am under the threat that this will not be approved by the [Executive Director (ED)] for reasons that have nothing to do with UN Staff Rules.

9. On the same day, she answered:

As I told you before please let's not project the future until it comes. We don't know what will be the ED's decision if she will embrace or not the recommendation of the panel. The ED has the prerogative to decline and this is her management decision. We are not there.

We are preparing the JD for Palestine to be ready. Sabine will leave mid-July so we need to ensure a leadership before she leaves. I hope decisions are taken before and we can have clarity.

You need to be being patience this is a very important decision for the organization to appoint a RD.

10. On 22 May 2017, the SRG, endorsing the opinion of the selection panel, submitted its recommendations to the ED.

11. On 11 June 2017, Mr. Belsito and his supervisor exchanged the following WhatsApp messages:

Supervisor: I explained all and she feels you will be better in Palestine. She talked with Mohammad and instructed him to start the process so you can go there before Sabine leaves.

Mr. Belsito: Thanks [*sic.*] for letting me know.

Supervisor: Are you up? Do you want to talk?

12. Mr. Belsito also proffered as evidence before the UNDT an overview of incoming calls according to which, on 11 June 2017, he had received a phone call from his supervisor. To this effect he stated in his application before the UNDT:

On 11 June 2017, [Mr. Belsito] received a call from Ms. [V.] while she was on mission with the ED in Ukraine/Moldova. ... She informed [Mr. Belsito] that she had spoken to the ED who advised that she did not intend to select [Mr. Belsito] because she preferred a female in the role of Regional Director. Ms. [V.] added that she tried her best to convince the ED to reconsider her decision, which she said she viewed as discriminatory and unfair. She stated that as a consolation the ED was prepared to offer [Mr. Belsito] the position of Special Representative in Palestine.

13. On 12 June 2017, the ED of UN Women became aware that information regarding the recruitment process had been passed on to Mr. Belsito.

14. On 13 June, Mr. Belsito wrote to his supervisor requesting that the offer of UN Women Special Representative to Palestine be confirmed in writing, but he received no response.

15. On 14 June 2017, Mr. Belsito requested the UN Women Office of Human Resources to provide information on the status of his candidature for the D-1 position. On 15 June 2017, he was informed by the Office of Human Resources that they were not aware of any formal decision about the recruitment process.

16. On 19 June 2017, the ED decided to cancel the first selection exercise. On the same day, Mr. Belsito requested management evaluation of the cancellation decision. On 6 July 2017, the Human Resources Section informed all candidates, including Mr. Belsito, that the selection process for the D-1 Post had been cancelled and that the position would be re-advertised in a new recruitment process.

17. On 17 August 2017, after he had been informed that the ED of UN Women had decided to uphold the cancellation decision, Mr. Belsito filed an application with the UNDT (first application).

18. On 4 September 2017, Mr. Belsito joined the UN Women Albania Country Office as Representative at the P-5 level.

19. On 13 October 2017, the D-1 Post was re-advertised in a second recruitment process. On 29 October 2017, Mr. Belsito applied for the D-1 Post.

20. On 19 December 2017, a vacancy for a temporary detail assignment for six months for the D-1 Post was issued. Mr. Belsito's request for prior clearance to apply for the temporary position was refused on the grounds that he had only been in his post as the UN Women Representative in Albania for a period of four months, and he was needed there in a managerial capacity.

21. On 12 April 2018, following the administration of a written test and interviews, the selection panel (which consisted of new and other panel members than in the first selection process) recommended two candidates (a female candidate fully without reservations and Mr. Belsito with reservations) to the Compliance Review Board which, on 31 May 2018, submitted its recommendation endorsing the panel's views to the ED.

22. On 5 July 2018, the ED approved the Compliance Review Board's recommendation and selected the female candidate who subsequently accepted the position. The selected candidate was Mr. Belsito's supervisor in Albania who had refused his clearance to apply for the temporary position for the D-1 post.

23. On 20 July 2018, Mr. Belsito was informed that he was not selected for the post.

24. On 13 August 2018, he filed a request for management evaluation of the decision not to select him for the position. On 28 November 2018, after Mr. Belsito had been notified that the ED of UN Women had decided to uphold the decision not to select him for the position, he filed an application with the UNDT requesting that it overturn the non-selection decision (second application).

25. Pursuant to Mr. Belsito's request, his applications contesting the first and second (cancellation and non-selection) decisions were consolidated into one case.

26. On 18 November 2019, the parties filed a joint submission in which Mr. Belsito requested an oral hearing in order to hear testimony relevant to the cancellation decision. He proposed to call as witnesses the UN Women Regional Director for Latin America, the UN Women Regional Director for Asia/Pacific, the ED of UN Women as well as himself. The Secretary-General informed the UNDT that he did not request a hearing because he had put before the UNDT all available facts and disclosed all available information to enable the Tribunal to reach a decision in this case.

27. On 20 November 2019, by Order No. 166 (NY/2019), the UNDT refused Mr. Belsito's request for an oral hearing because he had failed to adequately identify how oral evidence would assist in clarifying or rebutting the narrow issue in contention over and above what was available on the record.

28. On 19 December 2019, the UNDT issued its Judgment. It held that the ED of UN Women had acted within her authority when she decided to cancel the first selection exercise, which had been tainted due to the breach of confidentiality. The UNDT did not find any extraneous factors, particularly no evidence that the ED had discriminated against Mr. Belsito based on his gender. In this context, the UNDT held in paragraphs 33 and 34:

... The Tribunal finds that the information and views provided to the Applicant by the Hiring Man[a]ger, in breach of her duty of confidentiality, do not establish the existence of discrimination. On the contrary, the record demonstrates that the Hiring Manager advised him to not speculate on the [ED]'s decision. The Tribunal notes that the Hiring Manager stated in her email on 18 May 2017 "[a]s I told you before please let's not project the future until it comes. We do not know what will be the [ED]'[s] decision if she will embrace or not the recommendation of the panel. The [ED] has the prerogative to decline and this is her management decision. We are not there. []". Although the Applicant attempts to characterize the Hiring Manager as a whistleblower, the Tribunal finds no indication that she ever claimed that she was acting in that capacity or that her personal views on the outcome of the recruitment process were based upon any concrete facts. It remains, contrary to what the Applicant claims, that no final selection decision regarding the D-1 Post was made by the [ED] at this stage.

... Moreover, the Tribunal notes the Applicant was invited to apply for the second recruitment exercise, which he did, and his candidacy was considered afresh. Following the assessment phase, the second selection panel recommended the Applicant to the [ED] as one of the recommended candidates for the D-1 Post. The Tribunal finds that it follows that the Applicant not only suffered no prejudice from the cancellation decision but that his claims of discrimination are undermined by the subsequent recommendation of his candidacy in the second recruitment exercise.

29. The UNDT further held that Mr. Belsito's candidacy had been given full and fair consideration in the second selection exercise, and that the decision not to select him for the position was, therefore, also within the authority of the ED of UN Women. Consequently, the UNDT rejected the Appellant's application in its entirety.

30. On 10 January 2020, Mr. Belsito filed his appeal, and the Secretary General filed his answer on 13 March 2020.

Submissions

Mr. Belsito's Appeal

31. Mr. Belsito alleges that any cancellation of vacancy announcements must occur before the assessment exercise is completed and at least one candidate is placed in the recommended list. In the present case, the evaluation process had been fully concluded, the SRG had affirmed the integrity of the process and Mr. Belsito had been recommended as the sole primary candidate. The Selection Guidelines of UN Women provide that the ED reviews the Appointment and Promotion Committee [in this case the SRG] report and endorses the recommended candidate or records specific reasons for not endorsing their selection and shares them with the panels. There has never been any explanation for the ED's excessive delay in making a decision other than that provided in the exchanges between Mr. Belsito and his supervisor.

32. Mr. Belsito further contends that the second selection exercise, which resulted in the promotion of another candidate, was void *ab initio* because the cancellation of the first selection process was unlawful. He alleges, that although he had requested full documentation of the second selection exercise noting the discrepancy between being recommended with reservations only a few months after being fully recommended for the same post, the results of the written exam and the final report of the CRB were never disclosed. At the Tribunal's request the Secretary-General merely submitted the subjective comments in the second interview report which is not sufficient.

33. The UNDT erred in rejecting Mr. Belsito's request for witness testimony opining that he had failed to adequately identify how oral evidence would assist in clarifying or rebutting the narrow issue in contention, but without specifying what that narrow issue entailed. In his request for a hearing he had gone into some detail on the evidence to be adduced and how it was relevant to the issues in the case. There were relevant questions as to the reasons for the initial cancellation which could only be addressed by calling the ED and Ms. V. to the witness stand. The question as to when the ED actually made her decision and on what basis remained unanswered due to the refusal to hold hearings.

34. Instead of addressing this, the Tribunal was sidetracked into considering whether Ms. V.'s disclosure of possible misconduct by the ED violated the confidentiality of the already completed selection process. While apparently accepting the *post facto* excuse for the cancellation, the

Tribunal prevented any inquiry including why Ms. V. had never been subjected to any disciplinary action for her alleged breach of confidentiality. Mr. Belsito feels that Ms. V. in fact had a duty to speak up and report an injustice and was therefore entitled to assist him in challenging a decision she found discriminatory. In reality, the information provided was no different from that to which any staff member is entitled if he or she is challenging a selection process as it concerned the results of a competitive selection process that had been completed. It has never been argued or demonstrated that this information, provided after the selection process had been concluded, in any way compromised the Organization. In particular, no information as to the confidential deliberations of any of the panels involved in the review was disclosed. It is also significant that the argument regarding the breach of confidentiality did not appear until 18 September 2017.

35. The Tribunal never addressed the reasons for the initial refusal to endorse the outcome of a duly certified selection procedure. The Tribunal drew its own opposing conclusions from the communications of Ms. V. without permitting her to clarify or amplify her statement. On 11 June Ms. V. conveyed in a telephone call to Mr. Belsito the ED's decision rejecting his selection because of his gender. The Tribunal did not comment on that unrebutted evidence. The Tribunal never queried why Mr. Belsito was being solicited for his interest in the Palestine post unless a decision had already been made not to select him for the Regional Director's post. Without addressing these fundamental questions, the acceptance of violation of confidentiality as the motive for the cancellation is unwarranted.

36. The Tribunal also accepted as a "sound rationale", the reason proffered for not allowing Mr. Belsito to apply for the TJO for the D-1 post while at the same time arguing that he was not prejudiced because he could apply for the re-advertised job opening. The obvious conflict of interest involved in having the decision excluding his candidacy for the TJO taken by another candidate for the position, who was eventually selected for this post, was overlooked in the Judgment.

37. A fundamental contradiction appears in the Judgment over the conclusions drawn from the evidence that was available. In paragraph 12, the Tribunal cites as a fact that in May and June 2017 Ms. V. affirmed that although the Appellant had been recommended for the D-1 post, the ED might still reject his candidacy due to gender concerns. Yet in the analysis in paragraph 33 of the Judgment, the Tribunal concludes that this does not establish the existence of

discrimination because no final decision had been made at this stage. But this is precisely what oral testimony would have clarified.

38. Mr. Belsito requests the Appeals Tribunal to sustain his appeal, to order a summary finding on the evidence in his favor or, alternatively, to remand the case to a different judge for a hearing on the merits.

The Secretary-General's Answer

39. The Secretary-General contends that the UNDT correctly held that the first selection exercise had been lawfully cancelled as the parties had all acknowledged that confidential information had been leaked to Mr. Belsito, and, consequently, it was within the authority of the ED of UN Women to determine that such leak of confidential information had constituted an irregularity in the selection process which justified its cancellation and re-advertisement of the position.

40. The Appeals Tribunal has held in *Kinyanjui*¹ that the Administration is not under an obligation to pursue a recruitment procedure once begun, by filling the position which has become vacant. The rule is nonetheless that, in filling the post, the Administration must proceed with the appointment of successful candidates in accordance with the recruitment results. However, it can deviate from that rule for sound reasons, justifying its decision clearly and fully, i.e. on account of irregularities occurred in the recruitment process or for reasons connected with the interests of the service, which are subject to judicial review.

41. Mr. Belsito's conclusion from the UNDT judgment in *Verschuur*² (that "the evaluation process had been fully concluded" and that "any cancellation of vacancy announcements must occur before the assessment exercise is completed and at least one candidate is placed in the recommended list") is in error. The situation in *Verschuur* was different as the selection process in that case had been cancelled because 180 days had lapsed from the announcement of the vacancy and the selection of a candidate. The UNDT ruled that the cancellation of the selection process had been made to cover up for the hiring manager's lack of compliance with the relevant administrative instruction and that his attempt to cover up this failure by cancelling the selection exercise was unlawful. Nowhere in the *Verschuur* judgment did the UNDT hold that it was

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

² *Verschuur v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/153.

unlawful to cancel a selection exercise. The case was appealed to the Appeals Tribunal, which affirmed the UNDT's judgment, and did not address the lawfulness of the cancellation of a selection exercise. Contrary to Mr. Belsito's assertion, the UNDT and Appeals Tribunal judgments in *Verschuur* do not hold that it is unlawful to cancel a selection exercise "after the assessment exercise is completed and at least one candidate is placed in the recommended list".

42. In light of the Appeals Tribunal's jurisprudence holding that a selection exercise may be cancelled for "sound reasons ... on account of irregularities occurred in the recruitment process", the UNDT was correct to hold in this case that the cancellation of the first selection exercise had been lawful because a breach of confidentiality had damaged the integrity of the selection process. Because the UNDT correctly held that the first selection exercise was lawfully cancelled, Mr. Belsito's claim that the lawfulness of the second selection exercise was tainted by the first selection exercise is untenable.

43. The UNDT was acting within its authority when it ordered that the evidence before it was sufficient for the disposition of the case. The denial to convene an oral hearing for the purpose of hearing witness testimony and to compel the production of additional documents related to the second selection process was within the wide discretion in case management afforded to the UNDT under its Statute. The UNDT did not err in denying Mr. Belsito's requests to summon witnesses and to require the Respondent to produce documents related to the second selection exercise.

44. The UNDT did not exceed its authority when it refused to allow witness testimony on the cancellation of the first selection exercise. The UNDT clearly stated that the decision to cancel the first selection exercise had been "based on sound reasons, namely the undisputed fact that the Applicant's supervisor, who was also the Hiring Manager in the first selection exercise, disclosed confidential information the Applicant". The UNDT stated that "the evidence clearly show[ed] that the ED decided to cancel the selection exercise on the grounds of breach of confidentiality". The UNDT was well within the ambit of its discretion when it refused to hear the additional oral testimony, finding that there was no disagreement on the fact that confidential information had been made available to Mr. Belsito and that therefore any additional information provided by such testimony would not alter the disposition of the dispute before the UNDT.

45. The UNDT did not exceed its authority when it refused to order the production of documentary evidence related to the second selection exercise. There is no disagreement between the parties that the Appellant passed the written exams and was otherwise qualified for the position. It was precisely the determination by the interview panel of the Appellant's competencies that differentiated Mr. Belsito from the candidate who was eventually selected for the position. Thus, while the Appellant may consider that the notes of the interview panel were "subjective," it is these notes and the conclusions reached by the interview panel that determined the final selection decision. Consequently, the UNDT was correct to hold that the notes of the interview panel, which were detailed and conclusive, provided sufficient evidence of the full and fair consideration the Appellant received. Absent any showing by the Appellant, other than general speculation, that additional documentary evidence would yield any additional useful information, the UNDT was correct to refuse the Appellant's request to order the Respondent to produce additional documents related to the second selection exercise.

46. The UNDT examined two questions: (i) whether the first selection exercise had been lawfully cancelled because the disclosure of confidential information to the Appellant created a procedural irregularity; and (ii) whether the Appellant's candidacy received full and fair consideration in the second selection exercise. The evidence before the UNDT was sufficient to make both of these determinations. Therefore, the UNDT correctly refused the Appellant's request to produce additional evidence. In doing so, the UNDT was acting within its authority under the Statute.

47. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Belsito's appeal and uphold the UNDT Judgment.

Considerations

48. We find that the UNDT committed an error of procedure, such as to affect the decision of the case (Article 2(1)(d) of the Appeals Tribunal Statute).

49. When reviewing whether the first selection process had been lawfully cancelled, the UNDT, contrary to the Secretary-General's contentions, did not only look at the disclosure of confidential information to Mr. Belsito. Additionally, the UNDT examined whether the decision to cancel the first selection process was tainted by extraneous factors. Relying on the documentary evidence before it, the UNDT concluded that the cancellation decision was not

motivated by gender discrimination and, consequently, was not tainted by extraneous factors. However, the UNDT ignored that Mr. Belsito had stated, in his application, that, on 11 June 2017, a telephone conversation took place between him and his supervisor in which his supervisor told him that she just had met and spoken to the ED who had informed her that she, the ED, had decided not to select Mr. Belsito for the D-1 post because she preferred a woman for the position. In this situation, it was an error in procedure, such as to affect the decision of the case, not to hold an oral hearing and call both women into the witnesses stand. If the ED had indeed decided on 11 June 2017 not to select Mr. Belsito only because of his gender, although he was the best qualified and proposed candidate for the position, and although men were underrepresented in such managing positions at UN Women, the UNDT could well have come to the conclusion that the following decision to cancel the selection process was tainted by extraneous factors and thus unlawful.

50. As the Appeals Tribunal is in no position to receive such oral testimony itself (Article 2(5) of the Appeals Tribunal Statute), the case has to be remanded to the UNDT for the production of further evidence, additional findings of fact, and the issuance of a new judgment.

51. To give advice to the UNDT, we add that, given the circumstances of the case at hand, it seems prudent and necessary to request the Secretary-General to submit before the UNDT all documents related to the second selection process including the results of the written exam and the final report of the CRB as requested by Mr. Belsito.

Judgment

52. The case is remanded to a different judge of the UNDT.

Original and Authoritative Version: English

Dated this 26th day of June 2020.

(Signed)

Judge Knierim, Presiding
Hamburg, Germany

(Signed)

Judge Halfeld
Bournemouth, United Kingdom

(Signed)

Judge Neven
Brussels, Belgium

Entered in the Register on this 9th day of July 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar