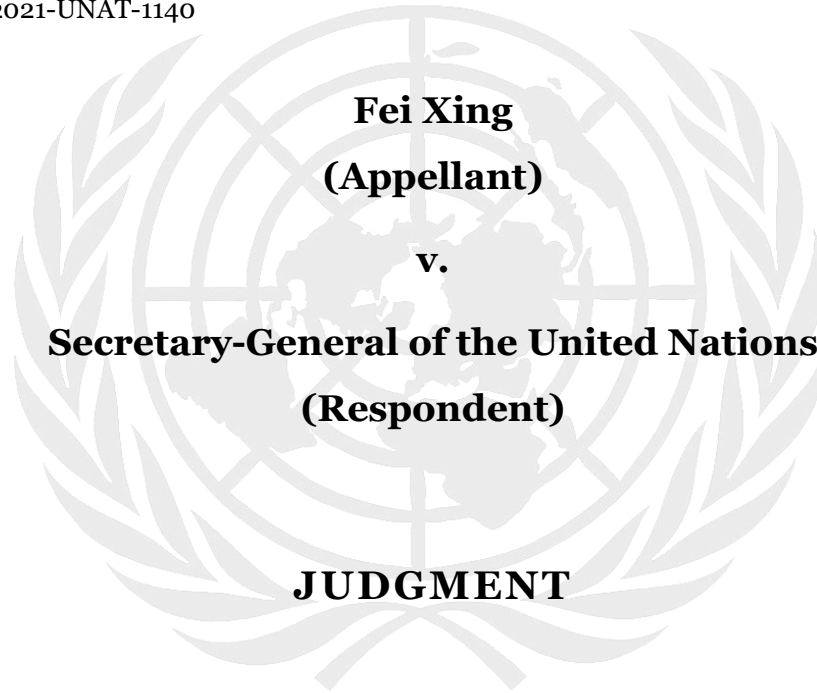




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2021-UNAT-1140



**Fei Xing
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge John Raymond Murphy Judge Sabine Knierim
Case No.:	2020-1453
Date:	25 June 2021
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Secretary-General:	André Luiz Pereira de Oliveira

JUDGE GRAEME COLGAN, PRESIDING.

1. Fei Xing, a United Nations staff member, appeals against the Judgment¹ of the United Nations Dispute Tribunal (“UNDT” or the “Dispute Tribunal”) dismissing her challenge to her non-appointment to another role within the Organisation.
2. For the reasons set out below, we dismiss Ms. Xing’s appeal.

Facts and Procedure

3. The Appellant is a staff member of the United Nations Security Council Counter-Terrorism Committee Executive Directorate. She applied for a Political Affairs Officer position at the P-3 level (“Post”) in the Asia and Pacific Division of the Department of Political and Peacebuilding Affairs and Department of Peace Operations (“APD/DPPA-DPO”). The Post was advertised on the United Nations jobsite “Inspira” from 11 February to 28 March 2019.
4. Ms. Xing applied for the Post through Inspira on 14 February 2019. At the time she applied, the Appellant had been on temporary assignment as Political Affairs Officer at the P-3 level in the APD/DPPA-DPO for four years.
5. On 25 February 2019, the Director, APD/DPPA-DPO, who was also the Hiring Manager in relation to the position, informed the Appellant in person that she had not been selected for the Post because she had not applied. The Appellant stated that she had applied for the Post and met with the Hiring Manager to express her concerns that she had not been fairly considered.
6. The Hiring Manager immediately halted the recruitment process to address the concerns raised by the Appellant. On 26 February 2019, several applications for the Post marked “screen” by Inspira, including the Appellant’s, were manually released to the Hiring Manager. The Hiring Manager reviewed these additional applications.
7. On 4 March 2019, the Hiring Manager submitted a memorandum to the Head of Department, containing a comparative analysis of the four most suitable candidates, including the Appellant. On 12 March 2019, the Hiring Manager informed the Appellant in person that

¹ *Xing v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/120.

she had not been selected for the Post. On 13 March 2019, the Appellant requested management evaluation of the decision not to select her for the Post.

8. On 7 May 2019, the Management Evaluation Unit (“MEU”) informed the Appellant that it recommended upholding the non-selection decision. Responding to the Appellant’s grounds for review, the MEU found that the administrative instruction on gender parity (ST/AI/1999/9) did not apply because there were more women than men working in APD/DPPA-DPO at the time the decision was taken. The MEU further noted that even if ST/AI/1999/9 had applied, it would have still recommended upholding the decision because the Hiring Manager met the minimum requirements of the instruction. Lastly, the MEU rejected the Appellant’s submission that the successful candidate came from a country that was over-represented in the United Nations.

9. On 21 May 2019, the Appellant filed her application with the Dispute Tribunal. On 20 June 2019, the Respondent filed his Reply.

10. On 24 June 2019, the Appellant submitted a request that the UNDT order production of evidence. The Appellant requested a copy of the record of job opening 108082 in the Inspira system (the Post listing), a copy of the Appellant’s status in the Inspira system, and other internal memoranda and communications related to the Post. The Appellant sought these documents because of her suspicion that her superior may have been reluctant to consider her application due to past disagreements between them.

11. On 26 June 2020, the Respondent filed a response to the Appellant’s request, arguing that the UNDT should not grant the Appellant’s request for production of evidence, and should reject the Appellant’s request to amend her application, which we infer was intended to add bias as a ground of challenge.

12. On 27 June 2019, the Appellant filed a supplement to her 24 June 2019 submission. On 5 July 2020, the Appellant filed an additional statement in response to the Respondent.

13. On 15 July 2020, the UNDT issued the impugned decision by Judgment No. UNDT/2020/120 (“Judgment”), in which it rejected the Appellant’s application. It reasoned that the Secretary-General had broad discretion in the selection and appointment of staff, and that the UNDT’s role was only to review the challenged selection process for fairness and adherence to the applicable rules and regulations. The UNDT also noted that the

Secretary-General's decisions enjoyed a presumption of regularity, which was satisfied if the Respondent could show, even minimally, that a job applicant's candidature was given full and fair consideration.

14. The UNDT found that the Appellant's claims of ulterior motive in not selecting her for the Post were unsubstantiated. The UNDT found that the Respondent had sufficiently supported his explanation that the Appellant's application, among others, had been screened out in error. The UNDT accepted that the Administration acknowledged its error and took immediate measures to correct it.

15. The UNDT also addressed the Appellant's claims regarding the gender parity policy ST/AI/1999/9, finding that the Appellant was not entitled to preferential consideration. The UNDT noted that the policy only applied when women were under-represented in a department. At the relevant time, the APD/DPPA-DPO in New York comprised six male staff members and ten female staff members, and all P-3 level posts were then held by women.

16. Ms. Xing filed her appeal against the UNDT's Judgment on 16 September 2020 and the Secretary-General filed his answer on 13 November 2020.

Submissions

The Appellant's Grounds of Appeal

The Appellant's candidacy for the Post

17. The Appellant submits that the UNDT wrongly concluded that her application for the Post had been screened out "in error". The Appellant contends that her application met Inspira's screening criteria, and thus the screening out of her application was suspicious and was possibly done intentionally rather than erroneously and innocently.

18. The Appellant argues that the UNDT erroneously stated in its Judgment that the Appellant requested, in her 27 June 2019 submission, documents that would allow her to compare her application to that of the selected candidate. Instead, the Appellant says she requested disclosure of evidence about why her own application was withheld for screening.

19. The Appellant argues that the UNDT erred in stating that the Appellant distrusted the Respondent's explanation of the recruitment process and that she should have been selected because she was the only qualified female candidate. The Appellant takes issue with the UNDT's characterisation of her arguments on these two points.

20. The Appellant contends that the UNDT made errors in fact and law and failed to exercise jurisdiction vested in it.

The "Gender Parity" Memo

21. The Appellant argues that the UNDT erred in finding that ST/AI/1999/9 did not apply. She submits that the Secretary-General's Memo of 11 February 2019 ("Secretary-General Memo") requires that, if a male candidate is considered clearly superior to a female candidate, a note must be sent to the Executive Office of the Secretary-General, which we assume to confirm and explain this, but that no such note was sent in this case.

22. The Appellant argues that a plain reading of paragraph 3(c) of the Secretary-General Memo mandates that the policy shall apply to all posts throughout the Secretariat. According to the Appellant, the phrase "where women are under-represented" refers to the United Nations Secretariat as a whole, not to a specific division or department.

23. The Appellant argues that by not granting her 24 June 2019 request to revise her application before issuing its final Judgment, the UNDT denied her the opportunity to present her substantive opinions on how the gender parity policy should apply to this case.

Relief Sought

24. The Appellant requests clarification of the facts as to why her application for the Post went through "HR Assessment" in the Inspira system. She requests appropriate compensation for "potential discrimination and abuse of authority". The Appellant requests an interpretation of the application of the Secretary-General Memo on the implementation of ST/AI/1999/9 entitled "Special Measures for the Achievement of Gender Parity". The Appellant further requests a decision as to whether the Administration applied the United Nations policy on gender parity in good faith with regard to the challenged recruitment decision for Post 108082.

The Secretary-General's Answer

The Appellant's candidacy for the Post

25. The Respondent argues that the UNDT correctly held that the Appellant's candidacy for the Post was given full and fair consideration. The Respondent states that the UNDT found that women were not under-represented in the New York APD/DPPA-DPO office, and that there was no evidence that any improper motive tainted the non-selection decision.

26. The Respondent argues that the Secretary-General has broad discretion in matters of staff selection under the United Nations Charter, and that the person making allegations of bias or discrimination has the burden of proving improper motives.

27. With regard to the screening of the Appellant's application, the Respondent states that the application had been assigned the status of "HR Assessment Required" in compliance with ST/AI/2012/2/Rev.1 ("Young Professionals Programme"). On 25 February 2019, the Appellant informed the Hiring Manager that she had in fact submitted an application for the Post. On 26 February, the Appellant's application was manually reviewed in Inspira and the status was changed to "Screen" and released to the Hiring Manager.

28. The Respondent further argues that the Appellant failed to demonstrate any error of law or fact by the UNDT warranting the reversal of its Judgment.

29. The Respondent contends that the Appellant failed to demonstrate that the provisions of ST/AI/1999/9 apply to the case.

Relief Sought

30. The Respondent requests that the Appeals Tribunal uphold the UNDT Judgment and dismiss this Appeal.

Issues

31. We discern that the following issues arise for decision.

32. Did the UNDT err in holding that the Appellant's candidacy for the Post was given full and fair consideration?

33. Did the UNDT err in finding that the Appellant's claims of ulterior motive in not selecting her for the Post were unsubstantiated?

34. Did the UNDT err in finding that the administrative instruction on gender parity (ST/AI/1999/9) did not apply in this case?

35. Does ST/AI/1999/9 only apply to departments in which women are underrepresented? Or does it apply throughout the United Nations to jobs at any level where parity has not been achieved?

36. Did the UNDT err in not granting the Appellant's request to amend her application?

Considerations

37. We declined Ms. Xing's request for an oral hearing and now give our reasons for doing so. The Appellant said that such would "provide an opportunity to clarify the crucial facts directly decisive on the outcome of the judicial process" and would allow for "a proper debate on the positions of the parties". Whether there is an oral or in-person hearing, an appeal must be decided by applying the statutory criteria in Article 8 of the United Nations Appeals Tribunal Statute. It is left to the Judges' discretion whether a personal appearance is required at oral proceedings, and, if so, the appropriate means to achieve that. Article 18 of the Tribunal's Rules of Procedure defines the criteria as being whether an oral hearing will assist in the expeditious and fair disposal of the case.

38. Other than by the broad assertions set out above, the Appellant did not explain how an oral hearing, now necessarily held remotely (by electronic communications) before Judges and parties in multiple different time zones, would assist in the expeditious and fair disposal of the case. Further, the nature of an appeal and the elements of the UNDT's Judgment in question for consideration as to error do not seem to us to meet those tests. In these circumstances the request for an oral hearing was declined.

39. We turn now to the substance of the appeal and address the issues identified above. We start with a reminder of the legitimate scope of such an appeal. Pursuant to Article 2(1) of the Statute of the United Nations Appeals Tribunal, there are five grounds which will support an appeal from the UNDT which we summarise as follows: excess of jurisdiction or competence;

failure of exercise of jurisdiction; error of law; procedural error affecting the decision of the case; and error of fact leading to a manifestly unreasonable decision.

40. We move to stating general principles for the appointment of staff. Article 101 of the United Nations Charter specifies that the paramount consideration in the employment of staff (we infer including their appointment) "... shall be the necessity of securing the highest standards of efficiency, competence, and integrity". Due regard must also be had to the importance of recruiting staff "... on as wide a geographical basis as possible". These criteria are repeated in Staff Regulation 4.2.

41. Attention was drawn to issues of discrimination in, among other things, staff appointments, by ST/SGB/2008/5. Discrimination included unfair treatment or arbitrary distinction based, among other things, on race, sex, ethnic origin, social origin or other status. This also dealt with abuse of authority (use of influence, power, or authority to improperly influence the career or employment conditions of another) in respect, among other things, of appointments, assignments and promotions, prohibiting these.

42. In 1.1 of ST/AI/1999/9, the General Assembly set a goal of equal gender distribution in all posts in the Professional category and above, to be achieved by the year 2000. This goal was to apply "throughout the Organization, and in every department, office or regional commission, overall and at each level". It was to apply to all categories of posts, irrespective of the type or duration of the appointment, irrespective of which of the Staff Rules Series the appointment was made under, and irrespective of the source of funding.

43. Particular and pertinent provisions of ST/AI/1999/9 included:

1.8 (a) Vacancies in the Professional category and above shall be filled, when there are one or more women candidates, by one of those candidates provided that:

(i) Her qualifications meet the requirements for the vacant post;

(ii) Her qualifications are substantially equal or superior to those of competing male candidates;

...

1.8 (d) When the qualifications of one or more women candidates match the requirements for the vacant post and the department or office recommends a male candidate, the department or office shall submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation, indicating how

the qualifications and experience of the recommended candidate, when compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended;

44. ST/AI/2010/3 (Staff Selection System) provides pertinently:

6.10 A staff member holding a temporary appointment who is recruited in the Professional and above categories, on a temporary appointment, and placed on a position authorized for one year or longer may not apply for or be reappointed to his/her current position within six months of the end of his/her current service. This provision does not apply to staff members holding temporary appointments and placed on positions authorized for one year or more in peacekeeping operations or special political missions.

9.3 When recommending the selection of candidates for posts up to and including at the D-1 level, the hiring manager shall support such recommendation by a documented record. The head of department/office shall select the candidate he or she considers to be best suited for the functions. Prior to selection of an external candidate, that decision must be justified in writing to, and approved by, OHRM. In the final selection due consideration should also be given to staff members who are victims of malicious acts or natural disasters; serving staff members who have served under the former 200 and 300 series of the Staff Rules; candidates from troop- or police-contributing countries for positions in a peacekeeping operation or Headquarters support account-funded positions in the Department of Peacekeeping Operations, the Department of Field Support and other departments with support account resources; and prior service or employment of candidates in field duty stations, for positions for which relevant field experience is highly desirable, as applicable and as stipulated in General Assembly resolution 63/250.

45. The “System-Wide Strategy on Gender Parity”² provides:

ST/AI/1999/9 “Special Measures for the Achievement of Gender Equality” is the most current Administrative Instruction on special measures and it is valid and applicable to the UN Secretariat. It mandates that vacancies in the Professional category and above (at levels where gender parity had not been met), “be filled when there are one or more women candidates, by one of those candidates”, when “her qualifications are substantially equal or superior to those of competing male candidates”. The measures put forward by ST/AI/1999/9 are to be taken into account once the conditions of merit have been met and are not in conflict with the application of Article 101

² *System-Wide Strategy on Gender Parity* (United Nations publication, 2017), fn. 24.

46. ST/AI/2012/2/Rev.1 (Young Professionals Programme) states at 7.11:

7.11 Selected candidates shall be required to serve at any of the duty stations of the United Nations Secretariat worldwide, except as provided for in section 7.5 above. Selected candidates shall be required to serve for a minimum of two years in the position of their initial assignment before being eligible to apply to another position. Selected candidates will be expected to serve in two different assignments: the initial assignment and a second, additional assignment. Upon completion of their initial assignment, selected candidates will be invited to participate in a rotation exercise in accordance with section 8.2 below. The second assignment shall normally be at a different duty station. Selected candidates whose initial appointments are at the P-2 level may apply to P-3 positions through the staff selection system only upon completion of two years in their initial assignment and provided that all other eligibility criteria are met in accordance with ST/AI/2010/3. Successful candidates appointed at the P-1 level shall be promoted to the P-2 level following a minimum of two years of satisfactory performance at the P-1 level.

47. Finally, in this round-up of relevant directory provisions, from 11 February 2019, a Secretary-General Memo on the Implementation of ST/AI/1999/9 operated. Paragraph 3(c) of this memo emphasised that ST/AT/1999/9 was to apply to “the selection of staff for posts throughout the Secretariat and irrespective of the source of funding, where women are unrepresented”.

48. We turn next to authoritative statements of this Tribunal on these issues in analogous cases. Very recently, we confirmed that it is incumbent on a staff member alleging improper motive (including bias) to establish this and surmount the presumption of regularity.³ In other words, the extraordinary (in the sense that decisions such as in issue in this case are most commonly made lawfully) must rebut the ordinary by clear and convincing evidence. The Administration has broad, but not unfettered or non-judicially reviewable, discretion in matters of staff selection. The appellate role is to determine whether applicable rules and regulations have been applied in a fair, transparent and non-discriminatory manner. If so, the Tribunal is not to substitute its decision for that of the Administration.⁴ The judgement in *Savado* confirms that, in non-appointment cases, we can consider whether the staff

³ *Russo-Got v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1100, para. 42.

⁴ *Kinyanjui v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-932, para. 14.

member's application was considered fairly and adequately and whether the applicable rules and regulations were applied in a fair, transparent and non-discriminatory manner.⁵

49. In *Zhao, Zhuang and Xie*, this Tribunal confirmed that the obligations on selectors, appointers or promoters of staff to provide a written analysis of respective candidates are mandatory (the word "shall" is used) so that a failure to comply with this will render the selection process flawed. The Judgment confirms that the requirements of the Secretary-General under ST/AI/1999/9 are onerous, and are to be taken in all cases, seriously and fully.⁶

50. We move now to decision of the issues we set out at paragraphs 32–36 above. First, did the UNDT err in holding that the Appellant's candidacy for the Post was given full and fair consideration? Ms. Xing's essential argument here is that as she was the only qualified female candidate of four who were shortlisted, the application of ST/AI/1999/9 means that she should have been appointed. The UNDT concluded at paragraph 21 of its Judgement that the Hiring Manager conducted a comparative review of all four candidates who met the requirements of the post. The Hiring Manager summarised in a memorandum to Head of Department the qualifications and competencies of the four candidates and recommended another for appointment. That recommendation was approved by the Head of Department.

51. Attached to that memorandum was what was described as an "organigram" of DPPA in New York showing the gender of all staff members holding all the posts in APD/DPPA-DPO in New York. This showed that at the time of its preparation, that is before the appointment the subject of this case, ten of those posts were held by females, six by males and two posts were vacant. All P-3 level posts were female-held.

52. The UNDT considered that preferential consideration of female candidates in such circumstances would only apply when women were under-represented, following 3(c) of the Secretary-General's memorandum of 11 February 2019 to which we have referred in paragraph 47 above. Because the UNDT assessed that there was no under-representation of women in the applicable circumstances, Ms. Xing was not entitled to preferential treatment.

⁵ *Savado v. Registrar of the International Tribunal for the Law of the Sea*, Judgment No. 2016-NAT-642, para. 40.

⁶ *Zhao, Zhuang and Xie v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-536, paras. 51, 53–57.

53. The UNDT did not err in deciding that Ms. Xing's candidacy was given a full and fair consideration.

54. Did the UNDT err in finding that the Appellant's claims of ulterior motive in not selecting her for the Post were unsubstantiated? Ms. Xing's concerns about the apparent loss of her application and initial failure to be appointed raised no more than a suspicion of ulterior motive by someone or some persons in the hiring process. Although she may genuinely have believed this, more was required than such subjective suspicion, but no evidence to support it was adduced by her. In these circumstances the UNDT has not been shown to have erred in requiring credible evidence of a clear and compelling nature of such allegations, but which was absent.

55. Did the UNDT err in finding that the administrative instruction on gender parity (ST/AI/1999/9) did not apply in this case? No, for two reasons. First because Ms. Xing's qualifications were not substantially equal or superior to those of the successful applicant and appointee (that is there was a better qualified male candidate); and second, because this instruction was only applicable in circumstances in which there was a predominance of male staff, which was not the case in the relevant office and among P-3 post holders.

56. Does ST/AI/1999/9 only apply to departments in which women are underrepresented? Or does it apply throughout the United Nations to jobs at any level where parity has not been achieved? As per paragraph 52 above, we answer yes to the first question and no to the second.

57. Did the UNDT err in not granting the Appellant's request to amend her application? No, because this was in essence a speculative application for the disclosure of documents relating to an error that was accepted and corrected by the Respondent by, in effect, re-starting the appointment process to include Ms. Xing in that process and in which she was both shortlisted and effectively the runner-up for selection.

Judgment

58. The appeal is unsuccessful and is dismissed. Judgment No. UNDT/2020/120 is upheld.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 19th day of August 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar