



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

Judgment No. 2021-UNAT-1154

**Marius Mihail Russo-Got
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge John Raymond Murphy Judge Sabine Knierim
Case No.:	2020-1509
Date:	29 October 2021
Registrar:	Weicheng Lin

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

JUDGE GRAEME COLGAN, PRESIDING.

1. The Appellant appeals against the Judgment of the United Nations Dispute Tribunal (Dispute Tribunal or UNDT), which concluded that his application challenging his non-appointment to one position was not filed within time, and that his application challenging his non-selection for a variety of positions were dismissed as unmeritorious. Although before the UNDT the Secretary-General (Respondent) challenged, unsuccessfully, three applications as having been made out of time, the Dispute Tribunal concluded that two of these were receivable and there is no cross-appeal by the Secretary-General against those findings.

2. For the following reasons, we dismiss the Appellant's appeal.

Facts and Procedure

3. The Appellant is a former staff member working for the United Nations Office for Project Services (UNOPS) as a Project Manager at the P-3 level in New York. He was separated from service with effect from 31 January 2019 upon the expiry of his fixed-term appointment.

4. From 3 October 2018 to 17 January 2019, the Appellant applied for the following seven positions that UNOPS had advertised. We have added, after each, a single-lettered identifier, each of which we will use subsequently in this Judgment.

(a) United Nations Technology Innovation Lab (UNTIL) Thematic Lead in Peace and Security (P-3) (position A)

(b) UNTIL Thematic Lead in Circular Economy (P-3) (position B)

(c) UNTIL Thematic Lead in Education (P-3) (position C)

(d) UNTIL Thematic lead in Health (P-3) (position D)

(e) UNTIL Programme Management Officer (P-4) (position E)

(f) Senior Enterprise Resource Planning (ERP) Change and Coordination Officer (P-5) (position F) and

(g) UNTIL Lab Manager (P-5) (position G)

5. Subsequently, at different times from 3 April 2019 to 22 August 2019, UNOPS notified the Appellant of his non-selection for all of the seven positions.

6. On 3 June 2019, the Appellant filed a request for management evaluation of the decision to not select him for position G. On 8 September 2019, he filed another request for management evaluation of the decisions to not select him for the other six positions. UNOPS did not respond to his requests for management evaluation.

7. On 24 October 2019, the Appellant filed an application with the UNDT contesting the decisions to not select him for all seven positions.

8. In Judgment No. UNDT/2020/194 dated 17 November 2020, the Dispute Tribunal rejected his application. It found that his application in respect of position G was not receivable *ratione temporis*, that is because he had missed the statutory deadline for doing so when he had filed his UNDT application on 24 October 2019. In the view of the UNDT, as UNOPS did not respond to his request for management evaluation and the dispute arose from Headquarters, the Appellant should have filed his UNDT application by 1 October 2019.

9. The Dispute Tribunal found that his claims in respect of the other six positions were receivable, but dismissed them on their merits, concluding that the decisions to not select him had been lawfully taken. Specifically, in respect of positions A and E, the UNDT found that the administration of the written tests had been procedurally correct, the tests had been graded anonymously, but the Appellant had failed to obtain the minimum passing scores. As for positions B, C, and D, the Dispute Tribunal reviewed the personal history form submitted by him for those positions and found that there was no indication that he possessed the desired experience in the field of circular economy or education, or that he had listed any experience in the relevant field of health. Finally, regarding position F, the UNDT found that the decision not to shortlist him for that post was reasonable and supported by facts.

10. The Appellant appealed the UNDT Judgment to the United Nations Appeals Tribunal (the Appeals Tribunal or UNAT) on 13 January 2021, and the Secretary-General filed an answer to the appeal on 22 March 2021.

11. On 27 April 2021, the Appellant filed a motion seeking leave to file additional pleadings along with the evidence of a report dated 18 January 2021 issued by UNOPS' Internal Audit and Investigations Group (the IAIG Report). In Order No. 416 (2021) dated 1 July 2021, the President of the Appeals Tribunal granted his motion out of an abundance of caution because "[n]ew evidence on any possible implications of forgery into an element that was taken into

consideration by the UNDT Judgment ... could possibly have an impact on the determination of [the Appellant's] appeal". We have accordingly had regard to this additional evidence.

12. On 7 August 2021, the Appellant filed a second motion for leave to file additional pleading and additional evidence. The Secretary-General objected to the motion. In Order No. 425 (2021) dated 22 September 2021, the Appeals Tribunal denied the Appellant's second motion.

Submissions

The Appellant's Appeal

13. The Appellant requests that the Appeals Tribunal reverse the UNDT Judgment, rescind the contested decisions, and remand his case to the Dispute Tribunal for additional findings of fact.

14. He submits that the UNDT erred in declaring his UNDT application not receivable (because it was filed out of time) in respect of the post of UNTIL Lab Manager, position G. First, it was a mistake to consider his disputes with UNOPS as arising from Headquarters and thus conclude that the applicable time limit for UNOPS to complete the management evaluation of his request was 30 days. According to the Appellant, "in fact in this case the time period is 90 days". Second, he argues that starting in April 2019, both parties were engaged in mediation, which continued through 28 October 2019, and "the [time limitation] clock was stopped" between those two dates.

15. In respect of the other six positions, he makes the following specific contentions and comments. As for positions A and E, the Appellant maintains that the Administration has failed to demonstrate that his written test was ranked third for position A and sixth for position E. He claims that the difference in the grades given by the assessors was significantly and discriminatorily higher than that for the other candidates. He claims that "two independent [...] internationally recognized reviewers" have given both of his tests passing scores. As regards positions B, C, and D, the Appellant states that he met fully the requirements for those vacancies; that he exceeded the other candidates in experience and education; that he demonstrated strong knowledge, experience and personal networks; and that he showed through clear and convincing evidence that he had been denied a fair chance of promotion. Concerning position F, he states that he was an outstanding candidate with extensive senior-

level experience at some supra-national organizations and met all the requirements listed in the job description. He alleges that none of the shortlisted candidates held SCOR-P certification, and two of them did not even meet the minimum educational level for the role.

16. The Appellant contends that the Dispute Tribunal erred in its evaluation of the central issues. Based on an inappropriate rationale, it found erroneously that UNOPS had properly conducted the selection exercises for all the posts at issue in accordance with the applicable legal framework; and that there were procedural irregularities such as the failure to provide the correct contemporaneous evidence or the evaluation matrix. He alleges that, according to his sources, more than 87 per cent of the shortlisted or selected candidates did not meet the minimum requirements of the posts; and that up to 90 per cent of the selected candidates invited to the written tests had plagiarised their responses and some of them had even submitted identical tests. The Appellant also contends that the UNDT denied him a full access to justice by failing to give him an opportunity to submit a final closing statement after other closing statements had been submitted.

The Secretary-General's Answer

17. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the UNDT Judgment.

18. The Secretary-General submits that the Dispute Tribunal correctly held that the Appellant's claims related to his non-selection for position G were not receivable *ratione temporis* (for lateness) because his application filed on 24 October 2019 would have been out of time even if applying the timeframe of 45-day response period to his case, as he advocates.

19. The Secretary-General also submits that the UNDT correctly held that the Appellant's candidature for the other six positions was given full and fair consideration. In respect of positions A and E, he merely disagrees with the anonymous identification of his written assessments, but he could not present any evidence rebutting these facts or supporting any suggestion that such rankings were based on biased assessments. UNOPS fully complied with the applicable regulatory framework. The Appellant was not recommended for selection for those two posts because he had not passed the technical assessments. His claims regarding positions B, C and D are meritless, as he makes general assertions but has failed to demonstrate

how his experience effectively matched the requirements of the vacancy announcements or that he possesses the required relevant experience. Finally, the Appellant's contentions regarding position F are wrong, as his candidature did not match the criteria established in the vacancy announcement for this position at the P-5 level, two levels higher than the post that the Appellant encumbered.

20. The Secretary-General further submits that the general claims made by the Appellant do not demonstrate any error of law or fact on the part of the Dispute Tribunal to warrant the reversal of its Judgment. His allegations of violation of human rights, lack of reasonable efforts to assist him in finding an alternative position, failure to provide an evaluation matrix, plagiarism by most of the candidates and failure to allow him a full access to justice in the form of a final closing statement, are meritless.

Considerations

21. We deal first with the claim relating to position G which the UNDT found to have been non-receivable for reasons of lateness. The relevant provision of the UNDT Statute is Article 8(d)(i)(b) which provides that a claim such as the Appellant's must be filed with the UNDT:

Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices.

22. The different (by 15 days) filing periods turn on whether the dispute "[arises] at Headquarters ... or [at another] office ...". It is not clear, at least from the UNDT Statute, whether "Headquarters" means the United Nations' Headquarters in New York, or the headquarters of the particular Agency involved in the dispute, in this case UNOPS, whose headquarters are in the city of Copenhagen. The Appellant was stationed in New York and so, at least inferentially, not at the Agency's Headquarters.

23. The relevant Staff Rule, which cannot conflict with the statutory provision, was relied on by the UNDT. Under Staff Rule 11.2(d), the response to a request for management evaluation "shall be communicated in writing to the staff member within 30 calendar days of receipt of the request for management evaluation if the staff member is stationed in

New York, and within 45 calendar days of receipt of the request for management evaluation if the staff member is stationed outside of New York”. It may be that this Staff Rule applies to the United Nations Secretariat, which is headquartered in New York, but not to UNOPS (and perhaps also other United Nations agencies).

24. Fortunately, it is not necessary to resolve the interpretation of these provisions because even applying the longer 45 plus 90-day time limit after the submission of the complaint for management evaluation, the Appellant was some days out of time. Although arguably using the wrong 30-day time period instead of the correct 45 days in addition to the 90 days after its expiry, the UNDT did not reach the wrong result for receivability.

25. We are not satisfied that the UNDT erred in law when it concluded that the Appellant’s fresh request for management evaluation of this grievance lodged by him on 8 September 2019 was ineffective. Such a strategy does not stop the clock running on the calculation of the period from when the first request was made.¹

26. The Appellant also challenges the UNDT’s Judgment on the basis that it wrongly concluded that the time for filing his proceeding was not affected by a continuing attempt by the parties to settle his complaints by mediation. In relation to other positions than position G, the Dispute Tribunal concluded, from correspondence produced to it, that efforts at resolution by mediation broke down. The Appellant had contended that he was still in settlement discussions with the Agency in August 2019, thus validating his request for management evaluation on 8 September 2019. The Respondent’s position was that the settlement discussions failed in May 2019 at the latest, as supported by e-mails produced to the UNDT. The Appellant, however, adduced an e-mail from the Office of the Ombudsman purportedly dated 5 August 2019 stating that this Office would inform the parties on the following day that it would consider that mediation attempts had failed because of the fundamental disagreements between them. The UNDT accepted that the position about mediation was settled by the Ombudsman Office’s e-mail of 5 August 2019 and that mediation failed on that date. There is no appeal by the Respondent against this conclusion. We do, nevertheless, address the genuineness and therefore the reliability of this 5 August 2019 e-mail later in this Judgment.

¹ See, for example, *Wesslund v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-959.

27. It is not, however, clear from the impugned Judgment, whether the same reasoning applied to the receivability of the claims in respect of position G, i.e., whether the attempts at alternate dispute resolution included those claims about position G.

28. That is because the extension of time limits for filing proceedings in the UNDT under Article 8(1)(d)(i)(iv) of its Statute is as follows:

Where the parties have sought mediation of their dispute within the deadlines for the filing of an application under subparagraph (d) of the present paragraph, but did not reach an agreement, the application is filed within 90 calendar days after the mediation has broken down in accordance with the procedures laid down in the terms of reference of the Mediation Division.

29. The Appellant says that the mediation attempts in relation to the position G grievance began in April 2019 and continued until 28 October 2019, that is, until shortly after he had filed his claims in the UNDT. It is clear from the impugned Judgment that the UNDT accepted, and concluded, that mediation probably continued until about 5 August 2019, related to the complaints in respect of positions B and C, but not that relating to position G which it had dealt with earlier and separately in the UNDT Judgment. In any event, we consider this immaterial in view of our subsequent findings about the 5 August 2019 e-mail.

30. We now turn to each of the non-appointment challenges that the UNDT dismissed on their merits. As a general statement, the Appellant contended that he was both sufficiently qualified for each of these roles, and should have been appointed to each of them in preference to each applicant who was appointed. In each case, the UNDT examined the documentary evidence relating to the advertised criteria for the role, and the attributes of others who were either shortlisted (when the Appellant was not) or appointed (when the Appellant was shortlisted but not appointed). It concluded that he had been declined appointment on merit and without application of extraneous or other unlawful criteria by the appointing agency.

31. The Appellant bears the onus of establishing that the UNDT erred in fact or law in reaching the conclusions it did about these non-appointments. Appointments of staff members, including by competitive selection among a group of applicants, is a matter most appropriately left to the decision of the Secretary-General's representatives with relevant knowledge and expertise, not only in the particular field in which the recruitment is taking place, but in the field of personnel recruitment and appointment generally. The UNDT's role

is not to undertake a merits-based review of the decisions taken but is rather a jurisdictional and process review.² Considerations in the appointment process that the UNDT is entitled to examine and determine include ones such as fairness, transparency, an avoidance of discrimination, compliance with the rules and regulations and the like. Perhaps even more than in other sorts of cases, the UNDT's role is not to substitute its decision about the appropriate appointee for that of the Administration's experienced and knowledgeable experts. The other guiding principle in such cases on appeal is that the Appellant cannot simply re-run the submissions he did before the UNDT in the hope that this Tribunal will reach a different conclusion on appeal. The Appellant must establish error (of fact resulting in a manifestly wrong decision, or of law) by the UNDT to persuade us to set aside the Judgment on appeal.

32. We have examined each of the positions the subject of the appeal, analysed the UNDT's findings and determined whether error in reaching each of those decisions has been established by the Appellant.

33. Many of the Appellant's submissions on appeal, such as his assertions that he was well qualified for the various positions, fall foul of the prohibition on simply reiterating previously unsuccessful arguments. Although they occupy a significant part of the Appellant's voluminous documentary annexures, we decline to consider these simply repetitious submissions.

34. Addressing positions B, C and D because they share common characteristics, the Appellant was not shortlisted because he was assessed by the Administration and, on review also by the UNDT, not to have had the requisite experience required for appointment. The UNDT compared the "ideal candidate" profiles for each position with the Appellant's own profile and concluded that in each case relevant considerations of desirable or required experience had been applied by the appointers. No process errors were found by the UNDT which could have accounted for the Appellant's failure to be shortlisted for each position. In each case, the Dispute Tribunal confirmed that he had faced better qualified candidates who were shortlisted for the appointments.

35. In relation to positions A and E, the appointment process challenged by the Appellant was different to those just described. He, and other candidates who had gained a place on the shortlist, sat a test. Ranking of those candidates was to be by the attainment of a minimum score success, which would see them move to the interview stage. The completed test papers

² See *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

were presented anonymously and marked by two assessors whose allocated scores were then averaged to ascertain whether that average reached the specified minimum level to enable each candidate to progress further in the appointment process. The Appellant's average scores in each exercise fell below the cut-off score.

36. Finally, in relation to position F, not only was the Appellant's experience similar to those he had in connection with positions A and E, but the UNDT also noted an additional comparative element. The "internal" candidates for this P5 position who moved to the shortlist all held existing P4 or P5 roles with the Respondent. One "external" candidate had significant non-UN experience which ranked that applicant with the P4 and P5 applicants. The Appellant, who was not short-listed, then held a less senior P3 role. Although this was not a determinative factor, it illustrated the Appellant's lesser qualities for appointment than those others.

37. Although not referenced by the Appellant in his submissions on appeal, the UNDT had before it the UNOPS policy addressing selections for appointment. This was the UNOPS Process & Quality Management System (PQMS) 7.3.7. It addressed the preparation of long and short lists of candidates directing that, in preparation for the latter, there is a need to select two to five best candidates who meet the minimum requirements of the vacancy and possibly some or all of the desired skills, competencies, knowledge, experience and education. The important feature of this requirement is the establishment, by inclusion and elimination based on a comparison of candidates, of a limited number of people. There is selectivity even at this preliminary stage. Not everyone with adequate qualities would attain the short-list status.

38. As to anonymity of candidates, the material before the UNDT clearly showed that this was emphasised to candidates preparing for the written tests. It was impressed upon them that their scripts were to contain no individual identifying criteria. Responsibility for this rested on the candidates. This was a fair and policy-compliant measure to ensure equity before the evaluating technical experts who assessed those written examinations.

39. In relation to the Appellant's complaints that he fulfilled the desired experience criteria for the positions, these were set out clearly in the application documentation and alerted applicants to the need to provide information about their own meeting of these expectations. That, too, was a fair and policy-complaint part of the appointment process.

40. The Respondent provided the UNDT with copies of all relevant documents, both those created by the Appellant in support of his applications and those generated by the Agency in the appointment process, albeit with appropriate redactions to protect the privacy of other candidates involved. The UNDT had regard to these to ascertain the Agency's compliance with the rules in the Appellant's case.

41. We conclude that the Appellant has not shown that, in deciding the merits of his claims, the UNDT erred in fact or in law, or that its Judgment was otherwise flawed.

42. We now address the Appellant's allegation that the UNDT erred in law by failing to give, or refusing, him the opportunity to make a final closing statement to it after the parties had made their closing statements. We assume that he means that after he had made his case out to the UNDT, and the Respondent had done likewise, the UNDT disallowed the Appellant from responding to the Respondent's closing remarks. It is for the UNDT to determine its procedures, although these must conform to the principles of natural justice and, in particular, that if a party raises a new issue that the other party has not had an opportunity to address, that other party should be given an appropriate opportunity to do so.

43. The Respondent submits that the UNDT's Rules of Procedure (Rules) do not give the Appellant the right to file closing submissions and that, in any event, he had the Respondent's submissions filed in opposition to the five applications for interlocutory orders made by the UNDT and which formed part of the case record. It is correct that the Rules do not provide for a right of reply in submissions, although nor do they address the making of submissions to the UNDT other than a party's initial application and a respondent's reply, under Articles 8 and 10 respectively. Such matters are left to the Judge assigned to manage each case and, no doubt usually, written final submissions from each party may be allowed or directed at a pre-trial directions conference. But if there are truly fresh and relevant issues that arise in the course of the hearing or even in permitted final submissions, then natural justice requires that the other party have an opportunity to answer these.

44. The Appellant's case does not persuade us that the UNDT improperly deprived him of such a legitimate opportunity. Given his propensity to seek to re-argue points previously made on this appeal, it is likely that if the Appellant was deprived of an opportunity to make further submissions to the UNDT, these would have been ones he had already advanced or at least had had an opportunity to answer before the end of that Tribunal's hearing.

45. We turn now to the new evidence that the Appellant was permitted to introduce and to consider whether this will affect materially his appeal and any grounds of it. The IAIG Report which has been admitted in evidence on the appeal was issued on 18 January 2021, only about five days after the Appellant had filed his appeal against the UNDT's Judgment. He made his application for consideration of the IAIG Report by motion dated 27 April 2021 and the Appeals Tribunal granted it on 1 July 2021. The intent of that motion was opaque. In it, the Appellant criticized as inadequate, repeatedly wrong and even corrupted, the report he wished to have admitted and presumably sought to rely on. The best interpretation we can give to this counterintuitive strategy is that the Appellant may have wished to take an opportunity to attack and demolish the IAIG Report.

46. However, if that is so, we are without jurisdiction to do this on several independent grounds. That appears to be the Appellant's intention, as he arranged for a Romanian Police investigation into, and report on, the IAIG investigation. The Appellant's motion to have this Romanian investigation report introduced in evidence on the appeal was refused in Order No. 425 (2021) on 22 September 2021. We note also the Appellant's claim that other investigative agencies including the US Federal Bureau of Investigation (FBI), the US Securities and Exchange Commission (SEC) and the European Anti-Fraud Office (OLAF) had similarly authenticated his versions of the relevant e-mails. However, their reports (if they exist) were not sought to be introduced in the same manner as the Romanian Police Report and in these circumstances (including of the absence of that latter report), we find that the Appellant has not impeached the credibility of the IAIG Report.

47. As the President of the UNAT described the new evidence in her Order allowing its introduction, she said the following:

[The IAIG Report] ... seems to relate to an investigation into allegations of forgery concerning an e-mail exchange which had been mentioned in the present case. Paragraph 15 of the IAIG Report precisely indicates Case No. UNDT/NY/2019/087 in footnote 14 as being the case in relation to which the email had been filed. Furthermore, while this same paragraph of the IAIG Report states that "[t]he email communication was related to the end of the mediation process and included several emails allegedly exchanged between [the Appellant] and [Mr. DP] between 1 and 5 August 2019", the e-mail dated 5 August 2019 from the Office of the Ombudsman was mentioned in paragraphs 12, 13 and 16 of the UNDT Judgment, leading to its finding that the said e-mail "clearly states that as far as the Office of the Ombudsman is concerned, the settlement discussions concerning the above-referred two selection processes failed on

5 August 2019”. This shows that it was taken into account by the UNDT at least during the receivability assessment of the application.

48. We have, pursuant to the Tribunal’s Order made on 1 July 2021, had regard to the IAIG Report of 18 January 2021. As its Executive Summary confirms, this report concluded that the Appellant had forged the e-mail of 5 August 2019 relating to mediation by modifying its contents and date before relying on it in its dishonestly altered state before the UNDT. The fraudulently altered document was persuasive to the UNDT as it concluded that his complaints about his non-appointment to positions B and C were receivable and it proceeded to review them on the merits.

49. The particular e-mail in question is dated 5 August 2019 and has been referred to already in the impugned UNDT Judgment. It was instrumental in persuading the UNDT to accept that mediation with the Appellant facilitated by the Ombudsman had probably continued up until then or thenabouts before ending so that two of the Appellant’s claims filed in the UNDT were within time.

50. The e-mail was not rejected or impeached by the UNDT in its Judgment: it was produced to the UNDT by the Appellant who asserted its genuineness and the truth of its contents. However, the evidence the Appellant wished to produce on the appeal, and which was allowed to be considered by us, reaches an unfavourable conclusion for the Appellant about the e-mail’s reliability and that genuineness has not been doubted by the IAIG Report. In these circumstances, we cannot see how, upon analysis in the context of the issues on the appeal, it can assist the Appellant in deciding it.

51. The evidence, including especially that called by the Appellant by leave, establishes that by adducing a forged document, he succeeded in persuading the UNDT to conclude that his proceedings in that forum had been filed within time. Even if we had not dismissed his appeal on its merits as we do, this evidence tendered by the Appellant, although also impeached by him, would have meant that the proceedings in the UNDT would have been dismissed as not receivable for lateness of filing. We are satisfied that the correct result was reached by the UNDT.

52. Finally, although the Appellant is apparently no longer a staff member of UNOPS and has not been since 31 January 2019, the UNOPS IAIG Report on his forgery has been referred to UNOPS “for appropriate action”. In these circumstances, there is little, if anything more,

that we can do other than to dismiss the appeal and, although now on additional grounds, affirm the UNDT's Judgment.

Judgment

53. The appeal is dismissed and Judgment No. UNDT/2020/194 is affirmed.

Original and Authoritative Version: English

Dated this 29th day of October 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 6th day of December 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar