

UNDT/2019/150, Chhikara

UNAT Held or UNDT Pronouncements

Based on these very general principles, and in the lack of any further instruction or guidance—at least, as relevant to the present case—the Tribunal sets out the following basic minimum standards that must apply when administering a written test: a) Generally, while the Administration enjoys a broad discretion on how to administer a written test, it must nevertheless do so in a reasonable, just and transparent manner otherwise, a job candidacy would not receive full and fair consideration. b) As also stated in the Manual, any assessment must be undertaken on the basis of a “prescribed performance scale and response guide” and on a “predetermined passing grade”. Accordingly, before a written test is administered, a proper and reasonable grading methodology must be adopted and shared with the graders. c) If subsequent to the administration of the test, it becomes clear that mistakes were made in this methodology, or the written test turned out to be pointless in that no job candidates managed to pass it in accordance with the predetermined passing grade, then (a) a new written test must either be administered or (b) variations must be made to the assessment methodology that do not prejudice any specific job candidates (the reverse impact of “the no difference principle”). d) Records of the grading must be developed that clearly describe how each job candidate was assessed, which would allow a third party, such as the Tribunal, to review and verify that the entire process was handled in a proper manner e) To avoid the process being perceived as biased, the assessment of the written tests must be conducted on a confidential and anonymous manner where no person with influence over the selection process has access to the names of the job candidates while the grading is pending. In general, the Tribunal finds that the various mistakes that were made when administering the written test were so serious that the process did not comply with the basic standards as set out in the above. Referring to the principle of regularity as adopted by the Appeals Tribunal, the Respondent has therefore failed to demonstrate by a minimal showing that the Applicant’s candidacy for the Post received a full and fair consideration. The Tribunal, however, finds that while the process indeed appears to have been

manipulated, the Applicant has not fully established that as a matter of fact, the decision-maker(s) were in bad faith. The present case has been pending since June 2016 and concerns a selection decision that was taken in late 2015 or early 2016. It therefore now makes no sense to rescind this decision, as the Applicant initially requested in his application under art. 10.5(a) of the Statute of the Dispute Tribunal. Instead, at this point, the Tribunal finds that it would now only be reasonable to allow the Applicant to amend his submissions on relief as he has done in his closing statement and instead seek compensation for his harm. The Tribunal finds that the Applicant had a 50 percent chance of selection for the Post. As the Applicant served on a fixed-term appointment his income loss is to be determined as 50 percent of the difference between his salary at the P-5 level and the salary he would have obtained at the D-1 level for two years, since fixed-term appointments are regularly granted such a time period. While the Tribunal observes that the selection process was indeed extremely poorly executed, the Applicant has, however, not provided any evidence that he suffered any non-pecuniary harm from any such damages and, consequently, the Tribunal must reject the claim. Considering the findings made in the present Judgment, the Tribunal, however, sees no need to refer the present case to the Secretary-General “for possible action to enforce accountability” under art. 10.8 of the Dispute Tribunal’s Statute.

Decision Contested or Judgment/Order Appealed

The decision not to select the Applicant for the post of Chief Aviation Section at the D-1 level at the United Nations Headquarters after he failed a written test.

Legal Principle(s)

The role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. The Dispute Tribunal is not conducting a merit-based review, but a judicial review, and a judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision. Specifically regarding selection and promotion decisions, in light of the Administration’s broad discretion in such matters, these types of decisions are governed by the so-called “principle of regularity”. This means that if the Respondent is able to even minimally show that an applicant’s candidature was

given a full and fair consideration, then the presumption of law stands satisfied. To rebut this minimal showing, the applicant must then show through clear and convincing evidence that s/he was denied a fair chance of promotion in order to win the case. Regarding the quantification of the Applicant's loss, the Appeals Tribunal will generally defer to the Dispute Tribunal's discretion in the award of damages as there is no set way for the trial court to set damages for loss of chance of promotion. Rather, what the Appeals Tribunal would ensure is that the Dispute Tribunal was guided by two elements. The first element is the nature of the irregularity the second is the chance that the staff member would have had to be promoted or selected had the correct procedure been followed. The Appeals Tribunal has further held that each case must turn on its facts" when quantifying a loss of chance. While the Dispute Tribunal is not obliged to quantify an applicant's chance of being selected, if it does so, this may be based on the number of suitable job candidates remaining in the selection process and also be expressed in percentages. A delay, in and of itself, is not a manifest abuse of proceedings, and to award costs against a party, the Dispute Tribunal must be satisfied on the evidence that in causing the delay, a party has "manifestly abused the proceedings". The plain language of those words means that on the evidence, the Dispute Tribunal must be convinced that the delay was clearly and unmistakably a wrong or improper use of the proceedings of the court.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Chhikara

Entity

MONUSCO

Case Number(s)

UNDT/NY/2016/045/R1

Tribunal

UNDT

Registry

New York

Date of Judgement

15 Oct 2019

Duty Judge

Judge Adda

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Compensation

Loss of chance

Non-pecuniary (moral) damages

Remedies

Rescission

Staff selection (non-selection/non-promotion)

Written test

Applicable Law

Administrative Instructions

- ST/AI/2010/3

Other UN issuances (guidelines, policies etc.)

- Manual for the Hiring Manager

UNDT Statute

- Article 10.5
- Article 10.6

UNRWA DT Statute

- Article 10.8

Related Judgments and Orders

2010-UNAT-084

2017-UNAT-762

2017-UNAT-744

2010-UNAT-012

2019-UNAT-900

2012-UNAT-245

2011-UNAT-117

2014-UNAT-429

2015-UNAT-496

2017-UNAT-723

2016-UNAT-691

2013-UNAT-370

2016-UNAT-662