

UNDT/2020/192, Miksch et al.

UNAT Held or UNDT Pronouncements

The Tribunal finds that the Applicants were misled in that they were not clearly informed, despite their inquiry, that their non-participation in the written test would be taken into consideration in the evaluation of their candidacies. Thus, the Administration violated its duty to act transparently and in good faith with the Applicants. The Tribunal finds that the Administration cannot reasonably take into consideration the performance of a staff member in separate recruitment exercises, even less so when such exercises took place several years prior. The performance in prior selection exercises is utterly irrelevant to the determination of whether a candidate is suitable for a vacant post. A candidate may very well fail in the written test or interview in one selection exercise and excel in the future after having accumulated years of experience in the relevant field and/or having better prepared for the test and/or interview. Considering past failures would negate the candidate's ability to improve and therefore denies the staff member's right to have his or her candidature fairly considered. The Administration failed to show that the Applicants were afforded fair and full consideration in the selection exercise for the post. The contested administrative decisions are therefore unlawful. The five vacant posts have been filled. This, coupled with the amount of time elapsed since the date in which the decisions were made, renders the rescission of the decisions not to select the Applicants impossible. Two of the Applicants' compensation shall be limited to one year in light of their failure to participate in the next available promotion exercise as they have not fully mitigated their losses.

Decision Contested or Judgment/Order Appealed

Non-selection to five posts of Security Sergeant.

Legal Principle(s)

The Secretary-General has broad discretion in matters of staff selection. When reviewing such decisions, the Tribunal shall examine (1) whether the procedure as laid down in the Staff Regulations and Rules was followed and (2) whether the staff member was given fair and adequate consideration. The role of the Tribunal is to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration. The starting point for judicial review is a presumption that official acts have been regularly performed. If the management is able to minimally show that the applicant's candidature was given a full and fair consideration, the burden of proof shifts to the applicant who then must show through clear and convincing evidence that he or she was denied a fair chance of selection. the Administration has an obligation to act in good faith and comply with applicable laws. Mutual trust and confidence between the employer and the employee is implied in every contract of employment and both parties must act reasonably and in good faith. In examining the lawfulness of an administrative decision, the Dispute Tribunal can consider whether relevant matters were ignored and irrelevant matters considered and examine whether the contested decision was absurd or perverse. Compensation in lieu can only be ordered when the unlawful decision has been rescinded. The Dispute Tribunal's finding that, in that case, the rescission was impossible because the post in question was no longer available. The Tribunal is not only allowed to award compensation for non-pecuniary damages such as moral injury but also compensation for economic loss. Both sorts of damages must be supported by the evidence and must be mitigated. Any irregularity (procedural or substantive) in promotion cases will only give rise to an entitlement to rescission or compensation if the staff member has a significant or foreseeable chance for promotion. The irregularity must be of such a nature that, had it not occurred, the staff member would have had a foreseeable and significant chance for promotion.

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Miksch et al.

Entity

DSS

Case Number(s)

UNDT/NY/2019/041

UNDT/NY/2019/042

UNDT/NY/2019/043

UNDT/NY/2019/044

UNDT/NY/2019/045

UNDT/NY/2019/046

Tribunal

UNDT

Registry

New York

Date of Judgement

16 Nov 2020

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Staff selection (non-selection/non-promotion)

Full and fair consideration

Applicable Law

UNDT Statute

- Article 10.5

Related Judgments and Orders

2011-UNAT-110

2012-UNAT-265

2017-UNAT-762

2011-UNAT-122

2017-UNAT-790

2010-UNAT-084

2011-UNAT-109

2020-UNAT-1040

2019-UNAT-926

2016-UNAT-674