

# UNDT/2021/042, Passarelli

## UNAT Held or UNDT Pronouncements

It is clear from ST/AI/1999/9 and the 11 February 2019 interoffice memorandum: (a) that sending a note to the Executive Office of the Secretary-General when selecting a male candidate instead of a suitable female colleague is a mandatory requirement as the verb “shall” is used (b) that for “review and discussion”, the relevant note to the Executive Office of the Secretary-General is to be submitted before—and not after—any selection decision is taken and (c) that in this note, the hiring entity is to explain and document why the “recommended” male candidate is “clearly superior” to any otherwise suitable female candidates. Before any final selection decisions are made—as the Chief Administrative Officer of the Organization vested with the ultimate authority to make selection decisions pursuant to arts. 97 and 101.1 of the United Nations Charter, the Secretary-General has a legitimate interest in ensuring that the special measures for the achievement of gender equality as per ST/AI/1999/9 and the 11 February 2019 interoffice memorandum are correctly implemented throughout the entire Organization. It is therefore only logical that the relevant note, which aims to explain and demonstrate this, is to be submitted to the Secretary-General’s Executive Office prior to any selection decision. Under sec. 9.3 of ST/AI/2010/3, the official making the selection decision in a given recruitment exercise, in principle, is to select the best candidate. This obligation is somehow modified in ST/AI/2009/9 with the introduction of the “clearly superior” requirement. As the Secretary-General stands as the issuer of both administrative instructions and the ultimate decisionmaker in questions related to staff selection, it is evident that he has the power to make any such variation. Also, the Tribunal notes that, in the present case, the Respondent has not questioned the constitutional legality of the “clearly superior” requirement, which the Tribunal will therefore not review. It is also instructive that in both ST/AI/1999/9 and the 11 February 2019 interoffice memorandum, the preferred male candidate is only described as a “recommended” candidate and as not a selected candidate. This underscores that no final selection decision is to be made before the note has first been presented to, reviewed by and discussed with the Secretary-General, or at least with his Executive Office, as per ST/AI/1999/9 and the 11 February 2019 interoffice memorandum. If the note could lawfully be submitted after the selection was made, ST/AI/1999/9 would be meaningless as the receiver of the note would be presented with a *fait accompli*. In the present case, the circumstances surrounding the irregularity are vastly different from those in Chhikara. While OHCHR’s delay in submitting the note was evidently also negligent and led to an unlawful decision, it has not even as much as been suggested that the contested decision was tainted by any ulterior motives. More importantly, the Tribunal also notes that the candidate, who was selected for the Job Opening, accepted the offer long time ago and cannot now reasonably be forced to relinquish his appointment to the Post, which would be a direct consequence of rescinding the contested selection decision.

## Decision Contested or Judgment/Order Appealed

The decision not to select the Applicant for the post at the P-5 level as Senior Human Rights Officer with the Office of the High Commissioner for Human Rights (“OHCHR”) in New York

## Legal Principle(s)

The Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review. When defining the issues of a case, the Dispute Tribunal may consider the application as a whole. The Dispute Tribunal’s judicial review is limited. The principle of regularity. Rescission of non-selection decision. Compensation for loss of opportunity.

## Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Passarelli

Entity

OHCHR

Case Number(s)

UNDT/NY/2020/032

Tribunal

UNDT

Registry

New York

Date of Judgement

27 Apr 2021

Duty Judge

Judge Adda

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Compensation

Loss of chance

Discrimination and other improper motives

Gender

Remedies

Rescission

Staff selection (non-selection/non-promotion)

Selection decision

Applicable Law

Administrative Instructions

- ST/AI/1999/9

Other UN issuances (guidelines, policies etc.)

UNDT Statute

- Article 10.5

Related Judgments and Orders

2017-UNAT-765

2018-UNAT-876

2010-UNAT-084

2017-UNAT-762

2020-UNAT-1014

UNDT/2019/150

2013-UNAT-379

2015-UNAT-553

2012-UNAT-245

2011-UNAT-117

2014-UNAT-429

2014-UNAT-439

2015-UNAT-496

2017-UNAT-723

2011-UNAT-109