

2022-UNAT-1249, Asr Toson

UNAT Held or UNDT Pronouncements

Request for oral hearing: Given Mr. Toson's arguments wherein he wishes to contest evidence before the Dispute Tribunal in a manner that would be essentially a rehearing of the evidence, UNAT held that an oral hearing should not be granted and would not assist in expeditiously and fairly resolving the issues in this appeal. On the merits, UNAT held that the Dispute Tribunal applied the appropriate standard of review. It reviewed the applicable policy of the UNFPA for selection processes (the PPM), reviewed the evidence, and determined that the applicable procedures were followed in the selection exercise for all the relevant positions, giving rise to the presumption of regularity. Mr. Toson was not selected due to various, reasonable reasons including not meeting language requirements, lack of relevant experience, and not meeting required competencies. Mr. Toson submits that the selection exercise was tainted with bias, discrimination, retaliation, and improper motive. These are serious allegations to make against any person and require "clear and convincing" evidence to corroborate those allegations. Mr. Toson did not meet the evidentiary burden of proof in support. Mr. Toson argued that the Dispute Tribunal's finding that the "retaliatory conduct which [Mr. Toson] is complaining about and the Ethic Unit's recommendation arose way after the selection process had ended" was based on additional evidence the DT unfairly requested from the Secretary-General in violation of due process. The UNDT ordered the Secretary-General to provide dates related to management evaluation and dates of Mr. Toson's request for retaliation protection with the Ethics Office, but Mr. Toson was not given a chance to comment or contest the Secretary-General's additional submissions. UNAT held that for the Dispute Tribunal to receive evidence from one party on an ex parte basis without just reason and without giving the other party the opportunity to respond to evidence against them may be a breach of a fundamental principle in administrative law of natural justice and fairness, namely audi alteram partem. The Dispute Tribunal relied on this ex parte evidence in making a finding. As a result, the UNAT found that the Dispute Tribunal erred in procedure. The question is whether this error "affected the decision of the case" and as such was fatal to the Judgment. The

Dispute Tribunal found that the fact that the Rotation Exercise and selection decisions for the positions outlined in the Secretary-General's additional submissions preceded the occurrence of alleged retaliatory conduct rendered Mr. Toson's application moot. This finding was based on facts of the dates of review, reports, transmissions, approvals, and selections for the positions in question. These facts are not controversial or disputable. Therefore, the UNAT held that the Dispute Tribunal's error of procedure was not such as to "affect the decision of the case" as required by Article 2(1)(d) of the Statute and as such, was not a basis for vacating the Judgment.

Decision Contested or Judgment/Order Appealed

In UNDT/2021/070, the Dispute Tribunal dismissed Mr. Toson's challenge to his non-selection for several positions.

Legal Principle(s)

Request for oral hearing: Under Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules), UNAT may grant an oral hearing if it would "assist in the expeditious and fair disposal of the case". An appeal before UNAT is not a rehearing of the matter but an opportunity for parties to appeal on narrow bases, such as errors of law, fact, and jurisdiction of the Dispute Tribunal. Staff selection: UNAT has consistently held that the Secretary-General or the Administration has broad discretion in staff selections. Therefore, in judicially reviewing administrative decisions regarding staff selections, the Tribunal's role is not to substitute its own decision for that of the Administration, but to assess whether the applicable regulations and rules have been applied and whether they were applied in a fair, transparent, and non-discriminatory manner. In so doing, the following factors are considered: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; (2) whether the staff member was given full and fair consideration, and (3) whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner. The Appeals Tribunal's jurisprudence provides that there is a "presumption of regularity" that official acts have been regularly performed. This presumption arises if the management can minimally show that staff member's candidature was given a full and fair consideration. Thereafter the burden of proof shifts to the staff member who must

show through “clear and convincing evidence” they have been denied a fair chance of promotion or selection.

Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Asr Toson

Entity

UN Secretariat

Case Number(s)

2021-1576

Tribunal

UNAT

Registry

New York

Date of Judgement

11 Aug 2022

President Judge

Judge Sandhu

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Full and fair consideration

Staff selection (non-selection/non-promotion)

Applicable Law

Other UN issuances (guidelines, policies etc.)

- UNFPA Policies and Procedures Manual

Staff Regulations

UNAT Statute

UNDT RoP

Related Judgments and Orders

2019-UNAT-932

2016-UNAT-642

2018-UNAT-829

2021-UNAT-1125