

# UNDT/2024/017, Hosali

## UNAT Held or UNDT Pronouncements

ST/AI/2020/5 only applies to selection decision where the selection decision is made from either (a) “a list of candidates” that was “endorsed by a central review body” or (b) a competitive examination roster. None of these situations apply in this case. It is unchallenged that the contested selection decision was governed by ST/AI/2010/3/Rev.1 (Staff selection system), which in sec. 3.1 provides that “[t]he process leading to selection and appointment to the D-2 level shall be governed by the provisions of the present administrative instruction”. As per sec. 7.7 of ST/AI/2010/3/Rev.1, for a selection decision at the D-2 level like the one in the present case, the relevant review body is the “Senior Review Group”, and not “the appropriate central review body” in accordance with its sec. 7.5. Also, the selection decision was not made from a roster under ST/AI/2010/3/Rev.1.

The provisions of ST/AI/2020/5 are not applicable analogously (*mutadis mutandis*) to a selection process at the D-2 level. The legislator made a deliberate and explicit effort to limit its application to selection decisions reviewed by “a central review body” and did not mention the Senior Review Group. In this regard, the Appeals Tribunal has stated that the Dispute Tribunal is not “a constitutional court” (see, for instance, *Lloret Alcañiz et al.* 2018-UNAT-840, para. 98) and therefore, cannot assess the reasonableness of the legislator’s choice in a situation like the present one.

The legal framework for assessing the lawfulness of the contested selection decision in terms of gender parity and geographical representation was therefore rather the general notions of equality and non-discrimination as pronounced in many international human rights and other resolutions and conventions. Reference was made to the “Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels” of 24 September 2012 (A/RES/67/1), para. 2.

No specific provision is made in ST/AI/2010/3/Rev.1 concerning preferential treatment, or the opposite, regarding candidates from certain regional groups of the United Nations, such as WEOG, or with reference to gender or racial background. On the other hand, art. 101.3 of the United Nations Charter provides that “[d]ue regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible”.

Whereas the figures and statistics on the gender and geographical balance at the D-1 and D-2 levels of the Department of Global Communications spoke for themselves, the Tribunal found that, as relevant to the present case, no legal provisions exist that, in and by themselves, prohibited the USG from recruiting a male from the United Kingdom instead of the Applicant based on their respective gender, racial and geographical backgrounds. Rather, it follows from the 7 November 2022 interoffice memorandum that the gender, nationality and geographic and regional background of the selected candidate and the Applicant were indeed considered along with their performance at the competency-based interview.

With reference to the notion of presumption of regularity, the Respondent has minimally demonstrated the lawfulness of the contested decision and the Applicant has failed to rebut this finding with clear and convincing evidence. Accordingly, it follows that relevant procedures were followed, the Applicant’s candidature received a full and fair consideration, and relevant legal provisions were applied in a fair, transparent and non-discriminatory manner.

## Decision Contested or Judgment/Order Appealed

The Applicant, a Deputy Director at the D-1 level in the News and Media Division (“NMD”) of the Department of Global Communications (“DGC”), is contesting her not being selected for the post of NMD Director at the D-2 level (“the Post”).

### Legal Principle(s)

Article 101.1 of the United Nations Charter and staff regulations 1.2(c) and 4.1, endow the Secretary-General with broad discretion in matters of staff selection (in line herewith, see the Appeals Tribunal in, for instance, *Abbassi* 2011-UNAT-110, para. 24 and *Krioutchkov* 2022-UNAT-1248, para. 28).

When reviewing matters of staff selection, the Appeals Tribunal has held that the Tribunal shall examine (a) “whether the procedure as laid down in the Staff Regulations and Rules was followed”, (b) “whether the staff member was given full and fair consideration”, and (c) “whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner” (see, for instance, *Toson* 2022-UNAT-1249, para. 28).

When judicially reviewing administrative decisions regarding staff selections, the Appeals Tribunal has held that “the Tribunal’s role is not to substitute its own decision for that of the Administration” (see, for instance, *Toson*, para. 27 and *Verma* 2018-UNAT-829, para. 13). Also, in reviewing “any selection decision the standard of review is one of rationality. The decision must be supported by the information before the decision-maker and the reasons given for it. The question to be asked is whether there is a rational and justifiable connection between the information available to the administrative decision-maker and the conclusion he or she eventually arrived at” (see, *Krioutchkov*, para. 28).

Generally, on the Dispute Tribunal’s judicial review, the Appeals Tribunal held in its seminal judgment *Sanwidi* 2010-UNAT-084 that “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker’s decision” (see para. 42). “When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him” (see, para. 40).

In staff selection cases, the Appeals Tribunal’s has further provided that “there is a ‘presumption of regularity’ that official acts have been regularly performed. This presumption arises if the management can minimally show that the 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” (see *Toson*, para. 29, and similarly, the Appeals Tribunal in many other judgments following *Rolland* 2011-UNAT-122).

More specifically, the Appeals Tribunal has held that, “A candidate challenging the denial of promotion must prove through clear and convincing evidence that procedure was violated, the members of the panel exhibited bias, irrelevant material was considered or relevant material ignored. There may be other grounds as well. It would depend on the facts of each individual case” (see, *Verma*, para. 14, and similarly in *Kinyanjui* 2019-UNAT-932, para. 15, affirmed in *Toson*, para. 27).

### Outcome

Dismissed on merits

Full judgment

[Full judgment](#)

Applicants/Appellants

Hosali

Entity

UN Secretariat

Case Number(s)

UNDT/NY/2023/015

Tribunal

UNDT

Registry

New York

Date of Judgement

1 Apr 2024

Duty Judge

Judge Adda

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Non-disciplinary

Gender

Central Review Body

Full and fair consideration

Staff selection (non-selection/non-promotion)

Standard of review (judicial)

Burden of proof

Discrimination and other improper motives

Staff selection (non-selection/non-promotion)

Applicable Law

Administrative Instructions

Staff Regulations

- Regulation 1.2(c)
- Regulation 4.1

UN Charter

- Article 101.1

Related Judgments and Orders

2011-UNAT-110

2022-UNAT-1248

2022-UNAT-1249

2018-UNAT-829

2010-UNAT-084

2011-UNAT-122

2018-UNAT-840