UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2016-UNAT-635

Neocleous

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Sophia Adinyira Judge Luis María Simón
Case No.:	2015-844
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Mr. Neocleous:	Self-represented
Counsel for Secretary-General:	Simon Thomas

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2015/042, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 27 May 2015, in the matter of *Neocleous v. Secretary-General of the United Nations*. Mr. Marios Neocleous filed his appeal on 24 July 2015, and the Secretary-General filed his answer on 5 October 2015.

Facts and Procedure

2. The facts as found by the Dispute Tribunal read as follows:[1]

> ... In 2013, the Applicant was serving as [an] Information Technology ("IT") Technician [with the] Information and Communication Technology Service [of the United Nations Peacekeeping Force in Cyprus (UNFICYP) at the GS-6/10 level[], in Nicosia, Cyprus, on a fixed-term appointment against a locally-recruited post.
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> ... On 2 August 2013, two positions [Position] of National Professional Officer [(NPO), in the Civil Affairs Section (CAS)], UNFICYP, at the NO-B level [(Position)], were advertised under [Job Opening (JO)] No. 8/2013; one position was reserved for the hiring of a Greek-Cypriot and the other for that of a Turkish-Cypriot.
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> ...
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> ... The JO specified:
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> > Education: Advanced degree (Masters or equivalent) in public administration, political science, international relations or social sciences. A first university degree (Bachelor or equivalent) with a combination of exceptional professional experience may be accepted in lieu of the advanced degree.
> >
> > Experience: At least 3 years following the completion of a Bachelor's degree or 2 years following completion of a Master's degree, of progressively responsible experience in the field of public administration, governance, peace-building, and community relations.
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> ... The Applicant, a Greek-Cypriot, applied for the Position, and his application included a Personal History Profile ("PHP").

[1] Impugned Judgment, paras. 8-9, 12-15, 17, 19-35.

... The Civilian Personnel Office conducted the initial screening, and on 30 August 2013 it produced a list of candidates who met the criteria for the Position and another list of candidates who did not. The Applicant was on the list of candidates not meeting the job criteria. On the same day, the then Chief Civilian Personnel Officer ("CCPO") wrote to the Hiring Manager [who was the Chief Civil Affairs Officer] and to [the Senior Political Adviser, UNFICYP], who was the latter's supervisor, explaining that his office had been very "liberal" in the screening to get as many eligible candidates as possible, but that all the local staff of the Mission who had applied to the Position were nonetheless screened out for not having the required professional level experience.

... [The Senior Political Adviser] testified that [...] he told the CCPO that in light of the great interest in the two posts among local staff, it would be a pity not to give any of them a chance to compete. He therefore asked the CCPO to have another look at the list to see if at least one Greek-Cypriot and one Turkish-Cypriot local staff member could be included, and mentioned the Applicant as one of two good internal candidates. [...]

...

... [After further exchanges], the CCPO added the Applicant and another local candidate to the list of eligible candidates. On 11 September 2013, a third local UNFICYP staff member was also included in the list of eligible candidates.

...

... The [...] shortlisted candidates took a written test on 20 September 2013. [...]

... [On 6 October 2013, f]ollowing her predecessor's departure, [a new person] took up the post of CCPO [...], becoming responsible for [UNFICYP's] Human Resources Management Section [...]. She told the Tribunal that on her second day on duty, the Hiring Manager came to see her to express her concerns that [the Senior Political Adviser] had influenced the selection of eligible candidates for the JO. [The new CCPO] reassured the Hiring Manger that she would do everything possible to ensure integrity and compliance with the rules, but she took no immediate steps as she did not have all the relevant facts and information.

... Having passed the test, the Applicant and the other seven shortlisted candidates were invited to a competency-based interview on 17 October 2013. The interview panel consisted of the Hiring Manager, [the Senior Political Adviser] and another UNFICYP staff member. [The new CCPO] attended as an *ex officio* observer. In that role, her responsibility was to ensure that the correct procedure was followed at the interview and interfere only if the procedure was not followed correctly and consistently.

... In the course of the interview, [the new CCPO] checked the Applicant's PHP and observed that he did not appear to have the required work experience since obtaining his degrees to make him eligible for the Position. She raised her concerns with the interview panel at the end of the Applicant's interview, and again during the panel's deliberations after completion of all the interviews.

... After the round of interviews, the interview panel members could not agree on the suitability of the Applicant for the Position and, moreover, did not reach consensus on recommending him for the Position.

... Following the interviews, [the new CCPO] carried out a second review of the Applicant's PHP. Taking into account his declared verifiable work experience relevant to the JO, she concluded that he did not have the minimum length of professional work experience required for the Position. She calculated that he had relevant work experience totalling 14.5 months obtained after the completion of his Bachelor's degree, and three months relevant experience since completion of his Master's degree.

... It also became apparent to [the new CCPO] that the JO had misstated the years of relevant work experience required for the Position. The *Guidelines for Determination of Level and Step on Recruitment to the Professional Category and Above*, issued by the Office of Human Resources Management ("OHRM"), required four years' experience for such kind of positions. [...]

... While the interview panel was considering its decision on the Position, [the new CCPO] advised it that the Applicant had been wrongly deemed eligible for the N[P]O post and should not be considered. [...]

... On 23 October 2013, the Applicant was informed [...] that his name would be removed from the list of eligible candidates for the Position's recruitment process because, as a result of a mistake made by the Administration, he had been inadvertently ruled as eligible for the Position although he did not meet the minimum work experience requirement as stipulated in the JO.

... On 24 and 25 October 2013, the Applicant and [the new CCPO] exchanged emails about the reasons for the decision. On 28 October 2013, [... the new CCPO] met with the Applicant in the presence of the [Chief of Mission Support (CMS)], UNFICYP [and] reiterated that her predecessor was in error to find the Applicant eligible.

... [The new CCPO] noted that the Applicant's work experience was mostly as an IT Assistant, whereas the Position was in Civil Affairs. The Applicant claimed that he had been technically cleared for posts in the Professional category on several occasions, but [the new CCPO] stated that the technical clearance system no longer applied and that his previous clearance(s) had no bearing on the determination of his eligibility, which was screened strictly against the requirements in the JO—a determination that did fall within her remit as CCPO. The Applicant said at the meeting that while working as an IT Assistant with the United Nations Mission in Liberia ("UNMIL"), between November 2003 and September 2005, he carried out

> tasks related to Civil Affairs. [The new CCPO] explained that since such tasks were not formalized, notably in his terms of reference or in the workplan of his e-Performance document, the discharge of these tasks by the Applicant could not be proven and could not count towards experience. Further, as the Applicant stressed that the work he had done prior to obtaining his Bachelor's had not been taken into account, it was recalled that the JO made it clear that only post-qualification experience would be counted. Finally, [the new CCPO] strongly denied having any "personal reasons" for declaring the Applicant ineligible.
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> ... At the meeting, [the new CCPO] offered [the Applicant ...] a temporary lateral transfer to CAS to allow [him] to gain experience for future eligibility purposes.
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> ... On 29 October 2013, the Applicant requested management evaluation of the impugned decision.
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> ... The Applicant [...] accepted the [lateral transfer] offer by email dated 30 October 2013. [... although] the Applicant's reassignment never materialised.
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> ... At the end of 2013, two external candidates were selected for the Position.
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> ... [On 27 February 2014, t]he contested decision was upheld in management evaluation [...].
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> ... In May 2014, a fact-finding panel was set up to investigate alleged irregularities in the recruitment process for the Position. The corresponding investigation report has been concluded, but a final decision based on the recommendations has not yet been made.

3. On 20 May 2014, Mr. Neocleous filed an application with the Dispute Tribunal contesting the decision of 23 October 2013 advising him that he was ineligible for the NPO post, and was thus excluded from the recruitment process for the Position, because he allegedly lacked relevant experience. He claimed that the contested decision violated his right to full and fair consideration for the Position, and was affected by improper motivations on the part of the new CCPO. By way of remedy, Mr. Neocleous sought reassignment to another United Nations office, financial compensation for moral damages, including damage to his reputation and integrity, as well as his career development, and requested disciplinary action against those responsible for misconduct and abuse of authority.

4. On 27 May 2015, the Dispute Tribunal rendered the Judgment now under appeal, and dismissed Mr. Neocleous' application. As a preliminary matter, the UNDT noted that it would not take into account the report of the investigation conducted with regard

to the alleged irregularities.[2] It also considered that the additional evidence submitted with Mr. Neocleous' closing submissions did not constitute substantive proof of verifiable work experience in the relevant field, and did not affect the outcome of his case.[3] In relation to the merits, the UNDT found that:

a) the new CCPO was entitled to verify whether the candidates for the Position met the minimum requirements specified in the JO;[4]

b) while experience at the GS-6 level could be counted as qualifying experience for the purpose of the Position,[5] it was proper for the Administration to take into account only the experience in the areas identified in the JO in calculating Mr. Neocleous' years of qualifying experience;[6]

c) the Administration correctly assessed and calculated both Mr. Neocleous' post-qualification experience,[7] and relevant professional experience;[8]

d) there was no evidence that the new CCPO's evaluation of Mr. Neocleous' work experience was biased or that she intended to exclude him from the recruitment process;[9]

e) Mr. Neocleous did not have any legal entitlement or legitimate expectation to be awarded the Position just because he had taken the written test and had been interviewed;[10]

f) the new CCPO's determination was reached after a proper process and an unbiased exercise of discretion, and she was obliged to correct the error and would have acted unlawfully had she let it stand.[11]

[2] Impugned Judgment, para. 5.
[3] *Ibid.*, para. 6.
[4] *Ibid.*, para. 53.
[5] *Ibid.*, para. 58.
[6] *Ibid.*, para. 62.
[7] *Ibid.*, para. 64.
[8] *Ibid.*, para. 74.
[9] *Ibid.*, paras. 79, 84-85.
[10] *Ibid.*, para. 94.
[11] *Ibid.*, paras. 53, 84-85.

5. On 24 July 2015, Mr. Neocleous appealed Judgment No. UNDT/2015/042, and the Secretary-General answered on 5 October 2015.

6. On 16 October 2015, Mr. Neocleous filed a motion, seeking leave to respond to the Secretary-General's answer, and made additional submissions. The Secretary-General filed his observations on 30 October 2015, requesting the Appeals Tribunal to deny the motion.

7. On 27 October 2015, Mr. Neocleous filed a second motion, seeking leave to provide the Appeals Tribunal with nine additional documents or materials as evidence supporting his appeal. The Secretary-General filed his observations on 23 November 2015, requesting the Appeals Tribunal to deny the motion.

Submissions

Mr. Neocleous' Appeal

8. Mr. Neocleous submits that the UNDT Judgment was biased in favour of the Administration, was based on assumptions rather than legal arguments, and ignored important facts. In particular, Mr. Neocleous alleges a number of factual errors by the UNDT in its wording of the facts and its consideration of the merits of his claims.

9. Mr. Neocleous contends that the Secretary-General failed to call the former CCPO, the Hiring Manager or the Senior Political Adviser to give evidence about the events in question.

10. The UNDT erred and reached a contradictory conclusion in holding that the Administration was properly correcting a "mistake" given that the Secretary-General's argument had been that the Senior Political Adviser had improperly pressured the former CCPO to include him in the shortlist for the Position.

11. The UNDT erred and reached a contradictory conclusion in holding that the Administration enjoyed a wide discretion in selection matters, yet upholding the new CCPO's determination that he was ineligible. The UNDT incorrectly evaluated the evidence before it and improperly accepted the new CCPO's determination that he was not eligible over the prior determination of the Hiring Manager and other witnesses that

he *was* eligible. If, as the UNDT contended, the Administration had a duty to correct its wrongs, the UNDT should have corrected the new CCPO's erroneous decision.

12. The UNDT contradicted itself insofar as it stated at paragraph 48 of the Judgment that "[i]t is not for the Tribunal to conduct a new the assessment of candidates substituting its own judgment to that of the Organization", yet agreed with the Administration's assessment of his work experience at paragraph 65 of the Judgment.

13. The UNDT erred in rejecting Mr. Neocleous' own calculation of his work experience which takes into account his work experience gained prior to his Bachelor's degree, given that the Dispute Tribunal in *Korotina* held that it was unlawful not to count a candidate's experience prior to the completion of a degree for the purpose of determining a staff member's experience when applying for a post.[12]

14. The UNDT erred in finding that Mr. Neocleous did not hold a legitimate expectation just because he had gone through the entire recruitment process, given that the Administration has previously hired someone without conducting any recruitment process at all.

15. Mr. Neocleous requests that the Appeals Tribunal correct the UNDT Judgment and compensate him for moral damages, loss of income and any legal costs, as well as assign him to an equivalent position in the same occupational group in a family duty station.

The Secretary-General's Answer

16. The Secretary-General contends that the Appeals Tribunal should limit the scope, page limit and admissibility of aspects of the appeal, which are contrary to the Appeals Tribunal's jurisprudence and administrative requirements. Mr. Neocleous improperly attempts to introduce before the Appeals Tribunal matters falling outside the scope of his management evaluation request, which was confined to challenging his ineligibility to participate in the selection process. Therefore, the Appeals Tribunal should declare as not receivable those matters relating to Mr. Neocleous' proposed transfer to the CAS, his sick leave and his allegations of misconduct against the new CCPO.

[12] *Korotina v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/178.

17. Further, as Mr. Neocleous' pleadings contravene the Appeals Tribunal's filing requirements, which only provide for the filing of an appeal form and appeal brief, the Appeals Tribunal should disregard the annexes to his appeal, and only consider his appeal brief.

18. The UNDT correctly found that the required procedures were followed in respect of the decision to exclude Mr. Neocleous from further consideration for the Position. Having regard to the Organization's staff selection system, the new CCPO was competent to assess Mr. Neocleous' eligibility and to find him ineligible during the selection process.

19. The UNDT also correctly determined that Mr. Neocleous failed to substantiate his claim that the contested decision was tainted by bias. While Mr. Neocleous continues to assert this on appeal, he does not offer any justification why.

20. The UNDT correctly determined that Mr. Neocleous did not establish that he had a legitimate expectation to further consideration, because, regardless of his claim that he was the best performing candidate, he did not have the requisite experience. To accept Mr. Neocleous' argument that he could not be excluded from the recruitment process would imply that the Administration is not entitled to correct a mistaken decision, which is contrary to the Appeals Tribunal's jurisprudence.

21. The UNDT correctly determined that the Administration properly assessed Mr. Neocleous' eligibility for the Position, and found no error in the manner in which the Administration calculated his professional experience and educational qualifications. Mr. Neocleous has not established that the UNDT erred in this regard. His reliance on *Korotina* as authority for the proposition that all professional experience can be counted, regardless of when one gained one's educational qualifications, is also misplaced. Nonetheless, even if the experience Mr. Neocleous had obtained before and during his studies was counted in full, he would still fail to meet the minimum professional work experience requirement outlined in the Position's job opening, as he would still have only two years and three months of professional experience following completion of his Bachelor's degree, and three months of professional experience after completion of his Master's degree.

22. Mr. Neocleous has also failed to establish that the UNDT committed any error in procedure, such as to affect the decision of the case warranting reversal of the Judgment. While Mr. Neocleous submits that the UNDT erred by failing to adequately address his arguments, including by not seeking evidence from additional potential witnesses, or not answering other hypothetical questions he had posed, he has not adduced any persuasive argument as to what specific matters the UNDT failed to consider, much less how any unspecified evidence might have affected the decision in the case.

23. In view of the foregoing, Mr. Neocleous has also failed to demonstrate that the UNDT erred in declining to order compensation, or in establishing any legal basis for an award of compensation on appeal.

24. The Secretary-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

Considerations

Preliminary matter – request for an oral hearing

25. Mr. Neocleous requests an oral hearing, claiming that "additional witnesses [are] need[ed] to testify to provide more relevant information". Oral hearings are governed by Article 8(3) of the Appeals Tribunal Statute (Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. We do not find that an oral hearing would "assist in the expeditious and fair disposal of the case", as required by Article 18(1) of the Rules. As a result, the request for an oral hearing is denied.

Preliminary matter – motions to file additional pleadings and additional evidence

26. Article 31(1) of our Rules, Section II.A.3 of Practice Direction No. 1, and our jurisprudence provide that the Appeals Tribunal may allow an appellant to file a pleading after the answer to the appeal when there are exceptional circumstances justifying the motion.[13]

[13] *Harrich v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-576, para. 19, citing *Nielsen v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-542, para. 51; *Utkina v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-524, para. 16; *Wu v. Secretary-General*

27. Article 10(1) of our Rules which provides for additional documentary evidence to be submitted to the Appeals Tribunal reads as follows:

> A party may seek to submit to the Appeals Tribunal, with an appeal or an answer, documentary evidence, including written testimony, in addition to that contained in the written record. In exceptional circumstances and where the Appeals Tribunal determines that the facts are likely to be established with such additional documentary evidence, it may receive the additional evidence from a party. On its own volition, the Tribunal may order the production of evidence if it is in the interest of justice and the efficient and expeditious resolution of the case, provided that the Appeals Tribunal shall not receive additional written evidence if it was known to the party seeking to submit the evidence and should have been presented to the Dispute Tribunal.

28. In the present case, Mr. Neocleous has not demonstrated existence of exceptional circumstances to justify the need to file additional pleadings or to submit additional evidence. His motion for additional pleadings presents factual and legal contentions that reiterate the arguments made in his appeal brief. There is nothing "new" about the documents attached to his second motion as they are mostly from 2013 and one from 2014. In the circumstances, the motions are not granted.

Merits of Mr. Neocleous' claims

29. We accept the submissions of the Secretary-General that Mr. Neocleous failed, in his grounds of appeal, to identify any errors of fact, law, jurisdiction, procedure or competence on the part of the UNDT. The claims which are made on appeal by Mr. Neocleous are a repeat of his arguments that did not succeed at the Dispute Tribunal. The Appeals Tribunal, as stated in *Ilic*, has ruled that:[14]

> When the Appeals Tribunal hears an appeal, it does not simply re-try the case. The function of the Appeals Tribunal is to determine if the Dispute Tribunal has made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Statute. The appellant has the burden of satisfying the Appeals Tribunal that the judgment rendered by the Dispute Tribunal is defective. It follows that the appellant must identify the alleged defects in the judgment and state the grounds relied upon in asserting that the judgment is defective. It is not sufficient for an appellant to state that he or she disagrees with the outcome of the case or repeat the arguments submitted before the Dispute Tribunal.

of the United Nations, Order No. 225 (2015) of 1 July 2015; *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 36.

[14] *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051, para. 29.

In *Al-Moued*, the Appeals Tribunal reiterated further:[15]

> It is apparent that [the Appellant] is not aware of his onus as an appellant. He is not correct in thinking that a person bringing an appeal does not have any onus of establishing that the Tribunal below erred in its decision and that an appeal is an opportunity to present the same arguments for decision by a higher Tribunal. That is a totally misconceived notion of the nature of an appeal.

Similarly, Mr. Neocleous has repeated the arguments, which he presented to the Dispute Tribunal, as his grounds of appeal.

30. We uphold the reasoning of the UNDT:[16]

> The fact that the Applicant took the written test and underwent the interview for the Position did not confer him any legal entitlement or legitimate expectation, nor did the fact that he had been cleared for similar posts in the past. The minimum requirements for the Position were unequivocally set out in the JO and, thus, any candidate was from the onset in a position to know that no one lacking those particular requirements could be considered for selection.

31. We have reviewed the Judgment under appeal and find that Mr. Neocleous' case was fully and fairly considered. We can find no error of law or fact in the decision rendered by the Dispute Tribunal.

32. We also wish to emphasise that in instances where the eligibility criteria have been wrongly applied, the Administration has a duty and is entitled to rectify its own error. In *Cranfield*, a staff member's fixed-term contract was converted to an indefinite contract retroactively. The Administration claimed they made a mistake and notified the staff member. The Appeals Tribunal held that the Administration was entitled to correct erroneous decisions:[17]

> In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of

[15] *Al-Moued v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-458, para. 18. See also *Dumornay v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-097 and *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-096.
[16] Impugned Judgment, para. 94.
[17] *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 36.

> staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.

33. We find that there is no merit to this appeal.

Judgment

34. The appeal is dismissed and the Judgment of the UNDT is affirmed.

Original and Authoritative Version: English

Dated this 24th day of March 2016 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Thomas-Felix, Presiding	Judge Adinyira	Judge Simón

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar