

Case No.: UNDT/GVA/2010/010
(UNAT 1572)

1. The Applicant unsuccessfully applied for a promotion in 2004. She appealed against the decision first to the Joint Appeals Board (JAB) and then to the United Nations Administrative Tribunal (UNAT). The case was transferred to the United Nations Dispute Tribunal (UNDT) on 1 January 2010 as it could not be completed by UNAT before that body ceased to exist.

2. The issues in the present case are:

- a. What is the scope of the Secretary-General's discretion in selection of staff for promotion?
- b. Where does the burden of proof lie in promotion cases?
- c. Was the Applicant's candidacy given full and fair consideration?

3.

Case No.

- c. To formulate an appropriate indication of OHCHR Administration aiming at favourable consideration for an early promotion of the Applicant to the G-6 level.”
10. The Respondent requests the Tribunal to find that:
 - a. “The Applicant was given full and fair consideration for the G-6 post. The non-selection of the Applicant constituted a proper exercise by the Secretary-General of his discretionary powers”;
 - b. “The decision not to select the Applicant was not based on arbitrariness, discrimination or other improper motivation.”
11. Hence, the Respondent “requests the Tribunal to dismiss each and all of

years in the case of the Applicant and one other, to over 8 and 9 years for two other candidates, all were given the same score of 20 for experience.

16. The scores for language also varied. The Applicant and the successful candidate were fluent in both English and French. The Applicant was described as having very limited Spanish, while it was said that the successful candidate had limited Spanish. In spite of those similarities and the fact that she, unlike the successful candidate, had a certificate in Spanish, the Applicant received only 20 points for language while the successful candidate received 25. The difference was enough to give the successful candidate more points than the Applicant.

17. The narrative section of the evaluations, which described competencies, noted some negative aspects of the Applicant's inte

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staff members who have served satisfactorily is not unreasonably delayed”; she

Former staff regulation 4.4:

- The need for geographical and gender balance;
- The qualifications and experience of persons already in the service of the UN;
- The importance of experience, knowledge and institutional memory in the selection process;
- Evaluations of candidates must be reasoned and objectively justifiable;
- Candidates are to be given full and fair consideration of their requisite qualifications and experience.

27. It is apparent that the regulations and associated instructions highlight the need for objective evaluation as part of the selection process. While there is an element of discretion involved in selection of candidates for advertised vacancies, it is necessarily constrained by the prescriptive elements referred to above.

Issue 2: Where does the burden of proof lie in promotion cases?

28. The Applicant submitted that the burden of proof lies on the Administration which must show why a staff member w

Discussion

30. The case now before the Tribunal has been transferred from the now defunct UNAT. There is a body of jurisprudence being developed by the UNDT in the context of the new cases coming before it but that jurisprudence was not in existence at the time the present case was brought before UNAT. It is doubtful that such jurisprudence should be applied retroactively.

31. The test to be applied is that articulated in UNAT Judgement No. 1122, Lopes Braga: “Where a staff member has raised a challenge as to whether he or she has been fully and fairly considered, the burden of proving that such full and fair consideration has taken place rests upon the Respondent.”

Issue 3: Was the Applicant’s candidacy given full and fair consideration?

32. The Applicant submitted that her candidacy was not given the full and fair consideration to which she was entitled in accordance with article 101, paragraph 3, of the UN Charter, former staff regulations 4.2 and 4.4 and UNAT jurisprudence.

33. She maintains that she fulfilled all the requirements of the vacancy announcement and even exceeded them; as a previous incumbent of the post, she was fully familiar with and had the required competency for the post; the selected candidate did not have experience comparable to hers and did not merit a promotion. The Applicant also submits that the selected candidate did not have proficiency in Spanish, whereas the Applicant is a native English speaker and had passed the United Nations Language Proficiency Examination in Spanish and French.

34. The Applicant made it very clear in her submissions that, contrary to the JAB findings, she was not alleging prejudice or discrimination in the failure to promote her but was alleging arbitrariness in circumstances where her qualifications, experience and competence fully matched and even exceeded the qualifications called for in the vacancy. Her case is not about discrimination, but

rather about arbitrariness; she alleged that the system of promotion is deficient in that it puts an emphasis on interviews in which candidates have to oversell themselves, implying the abandonment of objective c

received the same points for language, but because the Applicant's certificate confirmed her knowledge of Spanish, an objective evaluation would have given her more points.

46. The apportionment of points for languages was also not done fairly or objectively.

47. The Respondent therefore breached the requirements of the regulations governing staff selection, in particular the requirement that evaluations of candidates must be reasoned and objectively justifiable and that candidates are to be given full and fair consideration of their requisite qualifications and experience.

48. In view of the foregoing, the Tribunal decides that the Respondent did not carry out the evaluation of the Applicant's candidacy for the position of Secretary in a full and fair manner. To that extent, the Applicant's claim that the decision was made in an arbitrary manner is upheld. The Applicant is entitled to a remedy for this illegal action which affected her directly.

49. Of the three remedies sought by the Applicant the only one within the jurisdiction of the Tribunal is the claim for compensation. Having regard to the range of compensation awarded in similar, although not identical, cases decided by UNAT, the Tribunal decides that the Respondent s

