



Judgment No. 2014-UNAT-471



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**JUDGE RICHARD**

and internet technologies. In view of this I do not recommend her for this position.

... In July 2011, DHRM, at a final recommendation meeting, recommended an internal candidate other than the Applicant and the internal candidate recommended by the DIST Director in her aforementioned memorandum of 30 June 2011. As the candidate recommended by DHRM for job opening No. 6242 was subsequently recommended for another post, DHRM decided, at another final recommendation meeting in September 2011, to readvertise job opening No. 6242. The DIST Director was then invited once again to submit her views on the candidates, which she did in a memorandum dated 6 October 2011. She again recommended the same internal candidate, Mr. S. M., and did not recommend the Applicant, for the same reasons given in her memorandum of 30 June 2011.

... As the internal candidate recommended by the DIST Director for job opening No. 6242 was monolingual, DHRM decided on 11 November 2011 to readvertise the post both internally and externally.

... On 28 October 2011, the Applicant filed a management evaluation request to the High Commissioner in relation to the decision not to select her for the post advertised as job opening No. 6242. Subsequently, she filed a submission with the Tribunal, registered as No. UNDT/GVA/2012/018, seeking an extension of time to complete her application pending receipt of the decision on her management evaluation request. The Applicant later withdrew her application and the Tribunal took note of that fact by Order No. 72 (GVA/2012) of 12 April 2012.

*Job opening No. 6916*

... On 22 November 2011, the post of ICT Officer (Infrastructure - HQ), at the P-3 level, was readvertised as job opening No. 6916, this time both internally and externally, in the addendut27 T3tTde2011, t2hhpost both7w addei TD.0002 Tc.076 9 Tw[(Offi2867(On 28 Oc)52



... On 2 October 2013, the Applicant's counsel filed a new request for permission to hear an "expert witness", submitting that the witness could objectively enlighten the Tribunal as to the technical and scientific aspects of the case and could give an opinion on the qualifications of the selected candidate, in light of his university education and professional experience.

... By Order No. 146 (GVA/2013) of 3 October 2013, the Tribunal recalled the contested decision and rejected the new request for permission to hear an expert witness. It also recalled the Applicant's contentions with respect to her qualifications for the post and the reason given by the Respondent for not selecting her, namely her lack of experience in certain technical areas. The Tribunal noted that the Applicant, as a computer expert, should be able to answer any technical questions related to her qualifications for the post concerned. The Tribunal also ordered the Respondent to make arrangements to ensure that it would be able to answer any technical questions that the Judge might ask during the hearing and, if necessary, to be accompanied by a UNHCR staff member who would be able to answer such questions.

... A hearing was held on 8 October 2013 in the presence of the Respondent's counsel and the Applicant. The Applicant's counsel participated via video link. The Respondent's counsel was accompanied by the DIST Director. At the hearing, the Applicant's counsel asked questions of the Applicant. The Tribunal asked technical questions of the Respondent, to which the DIST Director replied. At the Tribunal's invitation, the Applicant's counsel asked questions of the DIST Director.

3. On 17 October 2013, the UNDT rendered its Judgment, dismissing the application. In its "Consideration" section, the UNDT gave "[a]n explanation of the procedure followed at the hearing". The UNDT recalled that "[i]n view of the highly technical nature of the grounds for the decision not to recommend [Ms. Landgrafitrlau ohe8c(n)-4.8s4(nT121.6(ce)TJ-3.27871 06995-8 TD-8007

recommendation and therefore a party to the defence”. Further, the facts of the case were not at issue.

5. Turning to the merits of the case, the UNDT rejected Ms. Landgraf’s claim that the decision not to select her was vitiated by procedural irregularities. The UNDT held that under the applicable legal framework, there was no requirement that Ms. Landgraf needed to be interviewed. The UNDT also found that Ms. Landgraf’s allegation that the other internal candidates were interviewed was denied by the Secretary-General and was unsupported by the evidence.

6. Finally, the UNDT examined the validity of the grounds for the DIST Director’s decision not to recommend Ms. Landgraf. Considering the wording of the vacancy announcement for the position, the 12 April 2012 memorandum and the DIST Director’s testimony, the UNDT concluded that it had not been established that “the Administration abused its discretion in the selection process or that the decision not to select her was based on an error of fact or a manifest error of judgment”.<sup>3</sup>

### **Submissions**

#### **Ms. Landgraf’s Appeal**

7. Ms. Landgraf submits that the UNDT denied her the opportunity to call an expert witness on a matter requiring expertise and instead invited the Administration to call its own expert witness. Ms. Landgraf contends that the jurisprudence of the European Court of Human Rights (ECHR) prescribes the right to call expert witnesses, provided that the request is both relevant and essential. Accordingly, the UNDT had an obligation to allow her to call an expert witness, since the expert evidence was both relevant and necessary: relevant, given that, as the UNDT itself recognized, the main issue revolved around highly technical matters, and necessary for the Dispute Tribunal’s understanding of the intricacies of the impugned decision and Ms. Landgraf’s ability to fairly establish her case.

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<sup>3</sup> Ibid., para. 41.

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**The Secretary-General's Answer**

13. The UNDT correctly concluded that Ms. Landgraf did not establish that the Administration abused its discretionary powers in deciding not to select her for the position. The vacancy announcement emphasized the critical nature of specific expertise in complex networking environments and in communication infrastructures. Such criteria were objectively assessed. However, Ms. Landgraf's letter of motivation and Fact Sheet did not reveal such specific expertise.

14. The Secretary-General contends that Ms. Landgraf has not established any error by the UNDT warranting a reversal of the Judgment. Under Articles 17(6) and 18(5) of the UNDT Rules, the UNDT has discretion to decide whether the presence of witnesses is required and it may limit oral evidence as it deems fit. In the present case, the UNDT did not exceed its discretion by limiting oral evidence to Ms. Landgraf and the DIST Director. Furthermore, Ms. Landgraf did have additional means of presenting her expertise and



17. Ms. Landgraf has failed to substantiate her view that the UNHCR rules expressly require that a written test or interview be administered to candidates shortlisted by DHRM before the candidates are reviewed by the Hiring Manager. Also, any claims regarding other candidates fall outside the scope of appellate review, since they were not contested in the management evaluation request.

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

**Considerations**

19. The following is a majority Judgment, Judge Inés Weinberg de Roca partially dissenting.

20. Ms. Landgraf requests that the UNDT Judgment be set aside and the case remanded to the UNDT for a hearing *de novo* before a different judge.

21. This prayer is based on three alleged procedural errors. Two of these alleged errors relate to witnesses, namely: (i) that the UNDT



Article 19 of the UNDT Rules of Procedure provides:

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

25. These provisions are sufficiently comprehensive to give the UNDT the discretion to allow a party to the proceedings to give oral evidence as it deems necessary. If a party is permitted by the UNDT to give oral evidence, then that party becomes a witness in the case and must make the declaration prescribed in Article 17(3) of the UNDT Rules.

26. In the present case, it was within the discretion of the UNDT to refuse to allow Ms. Landgraf and the DIST Director to testify as witnesses. However, the UNDT did in fact take evidence from both of them and then relied on the evidence given by the latter. In our view, this procedure qualified both of them as witnesses and, as such, they were required to make the declaration prescribed in Article 17(3) of the UNDT Rules. We find that the UNDT erred in failing to administer this declaration.<sup>5</sup> However, in the instant case, it is our view that this error would not, of itself, be of such seriousness as to affect the decision of the case.

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29. The UNDT recognised that the grounds for the decision not to recommend Ms. Landgraf for the post of ICT Officer (Infrastructure – HQ) were of a highly technical nature. It therefore invited a technical expert from the Administration to explain details of the technical grounds on which such decision was based. However, notwithstanding that the burden of proof rested upon Ms. Landgraf and that a party may call witnesses and experts to testify pursuant to Article 17(1) of the UNDT Rules, the UNDT rejected Ms. Landgraf's application to call an expert witness. Ms. Landgraf had sought to call an expert in order to assist her case that the Administration was wrong to conclude that she did not possess the technical qualifications for the post.

30. The rejection of Ms. Landgraf's application to call expert evidence meant that the only expert evidence before the Dispute Tribunal was the evidence produced by the party opposing her application (which evidence was in fact given by the DIST Director whose decision Ms. Landgraf challenges). According to Ms. Landgraf, her expert witness would have been able to "demonstrate that the Director of DIST had erroneously excluded the Appellant from the selection process on the basis she 'does not have the relevant experience in ICT infrastructure, video and IP telephony protocol and WLAN technology'". Due process required that Ms. Landgraf be permitted to effectively challenge the expert evidence given on behalf of the Secretary-General by presenting expert evidence of her own.<sup>8</sup>

31. In our view, the UNDT's refusal to allow Ms. Landgraf to call expert evidence was a clear violation of due process, resulting in Ms. Landgraf being denied fair and equal treatment under the law. We find that the UNDT committed an error in procedure such as to affect the decision of the case. Consequently, the Judgment of the UNDT must be annulled and the case remanded for hearing before a different judge.

### **Judgment**

32. The appeal is allowed in part and the Judgment of the UNDT is set aside. The case is remanded to the UNDT for hearing *de novo* before a different judge.

33. Judge Inés Weinberg de Roca appends a partially dissenting opinion.

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<sup>8</sup> Cf. *Kacan v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-426, paras 25 and 26; *Hepworth v. Secretary-General of the United Nations*, Judgment 2011-UNAT-178, paras 30 and 31.

Original and Authoritative Version: English

Dated this 17<sup>th</sup> day of October 2014 in New York, United States.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Faherty

Entered in the Register on this 22<sup>nd</sup> day of December 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

**Judge Weinberg de Roca's Partial Dissenting Opinion**

1. I differ from the approach taken in the Judgment arriving at the conclusion that the UNDT Judge erred in refusing to hear Ms. Landgraf and the DIST Director as witnesses in the case.
2. The Statute and the Rules of Procedure allow the UNDT to manage a case, give directions to the parties, determine a case in the absence of a party and examine witnesses and experts called by either party and any other witness or expert it deems necessary.
- 3.

6. The UNDT Judge determined that he wanted to hear what both parties had to say regarding the non-selection of Ms. Landgraf. The UNDT Judge exercised his discretion and

Original and Authoritative Version: English

Dated this 17<sup>th</sup> day of October 2014 in New York, United States.

*(Signed)*

Judge Weinberg de Roca

Entered in the Register on this 22<sup>nd</sup> day of December 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar