



Judgment No. 2017-UNAT-795



Counsel for Ms. Rehman: Self-represented

Counsel for Secretary-General: Amy Wood/Isavella Maria Vasilogeorgi

**JUDGE MARTHA HALFELD, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/019, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 15 March 2017, in the case of *Rehman v. Secretary-General of the United Nations*. Ms. Rafia Rehman filed the appeal on 13 May 2017, and the Secretary-General filed his answer on 17 July 2017.

**Facts and Procedure**

2. The facts as established by the UNDT are as follows:<sup>1</sup>

... The Applicant joined [the United Nations Children's Fund (UNICEF)], Islamabad, Pakistan, on 1 November 2006, as Project Assistant, GS-5, on a temporary fixed-term contract with the Construction Unit. On 17 March 2010, she was selected as Program Assistant GS-6, Construction Unit, and her appointment expired on 31 December 2012. She was granted a fixed-term contract as Programme Assistant, GS-6, Education Section, on 1 January 2013 and was separated from service on 31 December 2015, upon the expiration of her fixed-term contract.

... The Applicant applied to the post of Programme Assistant (GS-6), Polio Section, UNICEF, Islamabad, Pakistan, and on 18 November 2015, she participated in a written test for it. The test consisted of four questions with a total of eighty points to be awarded, and had a forty points passing mark. The two assessors awarded the Applicant eleven and twelve points respectively, and she was thus not invited for an interview.

... By email of 17 December 2015, the Applicant asked the Chief, Human Resources, UNICEF, Pakistan, to be given the marks she received in the written test for the post of Programme Assistant (GS-6), Polio Section, and those of two other tests she had taken for two other positions.

... By email of 21 December 2015, the Chief, Human Resources, UNICEF, Pakistan, informed the Applicant that while she had scored sufficiently in one of the three tests, and she would therefore be invited for an interview for that post, she had not passed the threshold for the other two posts, including the post of Programme Assistant (GS-6), Polio Section. She was also informed that under UNICEF's selection policy, it was not required to share the results of the written tests.

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<sup>1</sup> Impugned Judgment, paras. 3-15 (emphases in original).

... On 29 December 2015, the Applicant requested management evaluation “to review/examine the process of shortlisting and [the] written test result for the position of Programme Assistant (GS-6)”. She received a response upholding the decision not to select her for the post on 8 January 2016.

... Only two candidates successfully passed the test for the GS-6 post at the Polio Section, and were invited for an interview. However, during the interview, none of them was found suitable and the post was re-advertised on 5 January 2016. The Applicant applied for the re-advertised post and was interviewed, with other candidates, after passing the written test. She was, however, not recommended for the re-advertised post after the interview.

[... By application filed [before the Dispute Tribunal] on 1 February 2016, the Applicant contest[ed] the decision not to select her for the post of Programme Assistant, GS-6, Polio Section, UNICEF in Islamabad, Pakistan, “and [a] non-transparent process”.]<sup>[2]</sup>

... On 7 March 2016, the Applicant filed a request for submission of additional documents by the Respondent, and by Order No. 40 (GVA/2016) of 7 [March] 2016, the Respondent was invited to file comments thereon, which he did on 14 March 2016. The Applicant’s motion was granted by Order No. 52 (GVA/2016) of 17 March 2016, and the Respondent was asked to file the requested documents on an *ex parte* basis.

... By Order No. 243 (GVA/2016) of 14 December 2016, the [Dispute] Tribunal granted the Applicant access to the documents that the Respondent had filed *ex parte*, partly redacted and on an under seal basis. It further invited the Applicant to respond to the disclosed documents by 30 December 2016, and the parties to comment on the need for an oral hearing by 6 January 2017.

... On 29 December 2016, the Applicant filed a motion requesting that the documents disclosed to her be produced in Excel format. The Respondent replied to the motion on 3 January 2017, pursuant to para. 6 of [the UNDT] Practice Direction No. 5 [(On Filing of Motions and Responses)]. The Respondent’s submission and its annexes were filed on an *ex parte* basis, and he requested the [Dispute] Tribunal to order that the Excel files he provided be kept under seal.

... On 6 January 2017, pursuant to Order No. 243 (GVA/2016) of 14 December 2016, the Applicant informed th



5. On 22 May 2017, Ms. Rehman filed with the Appeals Tribunal a “Motion for Correction of Omission” seeking to “replace and omit” a reference to one annex in the text of her appeal brief with a reference to another annex as well as to include an additional annex. On 1 July 2017, the Secretary-General filed his response to the motion stating that he had no objection given the limited scope of the request. On 6 June 2017, the Appeals Tribunal granted the motion by Order No. 281 (2017).

### **Submissions**

#### **Ms. Rehman’s Appeal**

6. The UNDT failed to consider important issues and facts included in the submissions and raised during the oral hearing, which resulted in a manifestly unreasonable decision. The UNDT also erred when it held that there was no mandatory obligation on UNICEF to laterally transfer Ms. Rehman and when it ignored the impact of having a consultant administer the written test in contravention of UNICEF’s administrative instruction on consultants and individual contractors. This “provided [a] cushion to protect wrong[ly]doing” by the competent authorities and “ignored the accountability” of the responsible staff members.

7. The UNDT also erroneously relied upon a “disputed document” (i.e., a version of the written test) to decide the merits of the case in the Secretary-General’s favour. The UNDT neither questioned why this document had not been produced earlier nor defined the limits of the editing and tampering to Ms. Rehman’s test. The UNDT decided the merits based on the Administration’s misleading statements in contravention of the record. The UNDT further erred when it found that she had not “mention[ed] any specific deletion in [her] written test” and that an “organogram” would not have fitted in the white space between the two quotes. The UNDT also ignored the fact that the second selection process “was actually a clever move to deny [her] (...) the strong opportunity for getting selected for being on the status of [an] internal candidate”.

8. Ms. Rehman requests compensation for loss of opportunity and referral for accountability of UNICEF staff members “involved in irregularities (...) in the selection process”.

9. Ms. Rehman submits that the UNDT denied her access to the transcripts of the oral proceedings and that upon access to and perusal of the transcripts, she may require an oral hearing on appeal.

**The Secretary-General's Answer**

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14. Ms. Rehman requested (but did not receive) a copy of the transcripts of the UNDT's recording of its oral hearing. Indeed, by e-mail sent on 2 May 2017, the UNDT stated that "the UNDT systematically provides to [the Appeals Tribunal] access to the electronic case file, including the recordings of the oral hearing", implicitly refusing to give her the transcripts of

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- v) there was no merit to Ms. Rehman’s claim of having been disadvantaged by the timing of the second selection process (occurring when she had lost her status as an internal candidate) given that she failed at the interview stage.<sup>13</sup>

23. We agree with the full, rational and comprehensive approach of the Dispute Tribunal and find no reason to differ from it. The minor edit done to the test when it was coded, before it was sent to the assessors, was necessary to preserve the impartiality of the assessment,<sup>14</sup> which was not contested at all.

24. Notwithstanding the foregoing, and in order to avoid discussions and/or suspicions of this nature in future selection processes, we fully adhere to the UNDT’s recommendation that tests be “protected” against the possibility of editing or alteration.<sup>15</sup> We also recommend that the Organization strictly comply with its Regulations, Rules and administrative issuances, particularly with respect to not entrusting staff functions to consultants and or/individual contractors.<sup>16</sup>

25. Moreover, we suggest that the UNDT in particular, and the Registries in general, grant parties to a case automatic access to the full record, including recordings of hearings (except those filed and kept *ex parte*).<sup>17</sup> This conforms to the need for transparency in the proceedings and is in keeping with the adversarial principle.

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<sup>13</sup> *Ibid.*, para. 47.

<sup>14</sup> The minor edit consisted in the removal of her name and identification, in order to preserve anonymity and to give her the opportunity to have her test assessed (*ibid.*, para. 28).

<sup>15</sup> *Ibid.*, para. 52.

<sup>16</sup> *Ibid.*, para. 33.

<sup>17</sup> While we understand that parties have automatic access to the full record through the Court Case Management System, access to the folder containing the recordings of hearings are only made available upon request.

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25. The appeal is dismissed and Judgment No. UNDT/2017/019 is hereby affirmed in its entirety.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of October 2017 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Murphy

Entered in the Register on this 8<sup>th</sup> day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar