UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2015-UNAT-536

Zhao, Zhuang and Xie

(Respondents/Applicants)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

[redacted]

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/036, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 28 March 2014, in the matter of *Zhao, Zhuang, Xie v. Secretary-General of the United Nations*.[1] The Secretary-General filed his appeal on 27 May 2014, and Mr. Junxiang Zhao, Mr. Mingliang Zhuang and Ms. Qiong Xie (the staff members) filed their individual answers on 28 July 2014.

Facts and Procedure

2. The three staff members are interpreters at the P-4 level in the Interpretation Service, Division of Conference Management (DCM) with the United Nations Office at Geneva (UNOG). Each of them contests the decision not to select him or her for the position of Senior Interpreter (Chinese) at the P-5 level, which had been advertised on 16 April 2013 as Job Opening No. 13-LAN-UNOG-27762-R-Geneva (L).

3. Five candidates, including the three staff members, were shortlisted to participate in the competency-based interview that took place on 3 July 2013. The interview panel comprised of five members from UNOG's DCM: the Hiring Manager, who was the Chief of the Interpretation Service; the Chief of the Chinese Interpretation Section; the Chief of the Arabic Interpretation Section; the Chief of the French Translation Section; and a Senior Interpreter in the Chinese Interpretation Section.

4. The Chief of the Arabic Interpretation Section was the record-keeper and took the interview notes. After the interview, she prepared the first draft of the evaluation report reflecting the results of the panel's interviews. The report was thereafter finalised by the Chief of the Chinese Interpretation Section, approved by all the panel members, and provided to the Hiring Manager. Ultimately, the panel recommended all of the five candidates whom they interviewed. The Hiring Manager requested his administrative assistant to enter the results into *Inspira*, the Organization's online recruitment system. However, the ratings used by the panel to assess the candidates were different from those in *Inspira*. Whereas the panel rated the candidates, overall and with reference to individual competencies, as either "minimally

[1] The UNDT consolidated three separate applications by staff members challenging the same selection decision.

(basically) meets", "meets", or "fully meets", *Inspira* only allows for the ratings of "Unsatisfactory", "Partially meets", "Satisfactory - successfully meets" or "Outstanding – exceeds" to be entered in its system.

5. According to the *Inspira* Manual, a candidate who receives any rating less than "Satisfactory" is disqualified from further consideration and cannot be recommended for a post. As a result, when the results of the panel's evaluation report were entered into *Inspira*, it was necessary to accord only the highest two *Inspira* ratings to the recommended candidates to avoid the disqualification of any of them.

6. On 17 July 2013, the Hiring Manager sent a list of the five recommended candidates to the Central Review Board (CRB), which met on 31 July 2013. After comparing the *Inspira*-generated Comparative Analysis Report with the panel's detailed comments concerning their assessment of some of the candidates' competencies, the CRB detected some discrepancies and sought clarifications from the Hiring Manager.

7. On 5 August 2013, the two panel members involved in preparing and finalising the evaluation report provided the CRB with their comments. The Hiring Manager also requested the administrative assistant to update *Inspira* to reflect the adjustments made to the panel's ratings of the staff members in light of the CRB's observations.

8. On 14 August 2013, the CRB confirmed that the applicable procedures had been followed, endorsed the list of candidates and sent its conclusions to the Hiring Manager.

9. On 20 August 2013, the Hiring Manager sent a memorandum to the UNOG Human Resources Management Service for onward transmission to the Director-General of UNOG (recommendation memorandum). The memorandum contained the names of the five endorsed candidates and recommended one particular candidate for the Director-General of UNOG to select and set out reasons supporting his recommendation of that particular candidate.

10. On 28 August 2013, the Director-General of UNOG selected the candidate recommended by the Hiring Manager for the position and, on 2 September 2013, the remaining candidates, which included the three staff members, were informed by e-mail that they had not been selected for the vacancy but had been placed on a roster for similar positions.

11. On 17 October 2013, the three staff members requested management evaluation of the selection decision.

12. On 18 November 2013, the Management Evaluation Unit (MEU) responded and informed them that the selection decision was upheld.

13. On 13 December and 20 December 2013, Messrs. Zhao and Zhuang, and then Ms. Xie, respectively filed individual applications with the UNDT contesting the selection decision.

14. On 26 February 2014, the UNDT held a hearing. The following day, 27 February 2014, the UNDT issued Order No. 38 (GVA/2014) ordering the Secretary-General, inter alia, to submit:

> All documents, if any, accompanying the memorandum titled "Recommendation for the filling of vacant post No. 500421" dated 20 August 2013 from Mr. Zhengren Li, in his capacity as Officer-in-Charge, Interpretation Service, Division of Conferences Management, to the Human Resources Management Service [...] intended to enable the Director-General, [UNOG], to make the final selection decision.

15. On 28 March 2014, the UNDT issued its Judgment, finding in favour of the staff members. The UNDT found that the selection process was marred by several irregularities, in particular:

a) the Hiring Manager's conversion of the panel's rating scale to the *Inspira* rating scale resulted in a distortion of the panel's ratings that were accorded to the candidates;

b) having converted the panel's ratings to the *Inspira* rating scale, the Hiring Manager failed to consult all of the panel members for their approval of the converted scale;

c) the panel's instructions to the interviewees, namely that they could answer questions in either English or French and that their choice of language would not affect their assessment was misleading as the individual assessments showed that the use of both languages to answer the panel's questions was positively regarded in relation to the competency of "Communication";

d) as the Secretary-General failed to prove that the Hiring Manager, at the time of submitting the recommendation memorandum to the UNOG Director-General, supported his recommendation for the selection of the chosen candidate by a

documented record, Section 9.3 of Administrative Instruction ST/AI/2010/3 (Staff selection system) had been breached; and

e) as the Hiring Manager also failed to indicate in the recommendation memorandum how the qualifications and experience of the recommended candidate were clearly superior to Ms. Xie, as a female candidate, Section 1.8(d) of Administrative Instruction ST/AI/1999/9 (Special Measures for the Achievement of Gender Equality) had been breached.

16. Accordingly, the UNDT ordered that the selection decision be rescinded. Alternatively, if the Secretary-General elected not to rescind the decision, the UNDT ordered payment for compensation for material damages in the amount of USD 3,000 to Mr. Zhuang and USD 4,000 to Ms. Xie, but not to Mr. Zhao. It further ordered the payment of moral damages in the amount of USD 4,000 to each of the three staff members.

Submissions

The Secretary-General's Appeal

17. The Secretary-General contends that the UNDT erred on a question of fact when it found that the conversion of the panel's ratings into "*Inspira* ratings" was distorted and had a material impact on the outcome of the selection process to the detriment of the staff members. The conversion process was not an exercise in the linguistic translation of text to equate the two rating scales. The Hiring Manager's responsibility was to accurately reflect the panel's deliberations within the framework of the *Inspira* system and the UNDT recognized that "the selected candidate was undeniably the most highly rated by the panel". Accordingly, the panel's intention to give a candidate its highest rating, i.e., "Fully meets", could only most faithfully be reflected by entering in *Inspira* the highest *Inspira* rating, being "Outstanding".

18. The UNDT also erred in fact when it found that inconsistencies in the manner in which the panel ratings were converted into *Inspira* ratings constituted a "serious violation" of the selection process, when there was no impact on the outcome. Even if the Hiring Manager had left unchanged the three ratings it had downgraded to the *Inspira* rating of "Satisfactory" after the CRB's enquiries, there would have been no difference in the outcome of the selection decision for any of the three staff members, that is, none of them would have received a higher overall rating than the selected candidate.

19. The UNDT erred when it concluded that the Hiring Manager was required to obtain approval of all of the Panel members before finalizing the *Inspira* ratings. There is no requirement for a hiring manager to prepare an evaluation only after obtaining the express agreement of each panel member to the evaluation, and to every revision, however inconsequential, that might need to be made to the evaluation. The ultimate *Inspira* ratings accurately reflected the unambiguous agreement amongst the panel members to give the selected candidate the highest ratings. While the UNDT relied on *Fayek*[2] to reach this finding, that case is distinguishable on its facts as the slanting of that candidate's ratings resulted from bias and "overt favouritism", which the UNDT expressly found did not arise in the present matter.

20. The UNDT erred in law and in fact in finding that the panel's instruction regarding language choice materially affected the outcome of the selection process to the detriment of the staff members. Even if each of the staff members had responded using both languages, they still would not have received a higher *overall* rating than they were accorded, that is, the *Inspira* rating of "Satisfactory" and the final outcome would not have been affected.

21. The UNDT erred when it found that Section 9.3 of ST/AI/2010/3 was breached, insofar as the UNOG Director-General received the necessary documentation accompanying the recommendation for selection, as required. In response to the UNDT's Order No. 38 (GVA/2014), the Secretary-General confirmed and listed the documents on which the Director-General of UNOG had based his final selection and ensured that all those documents were before the UNDT. Had the UNDT expressly requested the Secretary-General to prove that the documentation accompanying the recommendation memorandum had, in fact, been transmitted to the Director-General of UNOG, the Secretary-General would have called a senior human resources official from UNOG to testify that, as a matter of practice, selection recommendations are sent with supporting documentation in original hard copies, rather than by e-mail, and therefore, there is no electronic record demonstrating the transmission of the documents by e-mail.

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22. The UNDT also erred on a question of law by disregarding the presumption of regularity. Given the staff members brought no evidence to the contrary, the UNDT erroneously reversed the burden of proof in finding that the recommendation memorandum was *not*

23. The UNDT erred when it found that ST/AI/1999/9 requires that a separate memorandum addressing the gender issue be sent to the head of department. In the context of the new staff selection system, the reference to "the appointment and promotion bodies" must be understood as referring to the CRB. In any event, the requirement that a written analysis concerning the gender issue be submitted is only applicable when a female candidate is *not* recommended to the appointment and promotion bodies; as Ms. Xie was among the candidates

32. As to the Secretary-General's onus to prove what documentation accompanied the recommendation memorandum, at the oral hearing on 26 February 2014, the UNDT expressly ordered that the Secretary-General produce evidence that the final version of the Comparative Analysis Report was in fact attached to the recommendation memorandum. It is thus not open to the Secretary-General to contend that he did not understand that he was required to provide evidence of the *actual* submission of any documented records, if they did in fact accompany the recommendation memorandum, under Order No. 38 (GVA/2014). The UNDT correctly shifted the burden of proof to the Administration to show what documentation was annexed to the recommendation memorandum.

33. The UNDT's order of rescission and alternative award of material and moral damages was correct and in line with the Appeals Tribunal's jurisprudence. As concerns the conversion errors, it is erroneous for the Secretary-General to submit that Mr. Zhuang had no right to an award as he had no chance of being selected. The Secretary-General was also silent as to the rest of the irregularities identified by the UNDT which went beyond the ratings adjustments, to span the entire selection process from beginning to end, and warranted damages. Moreover, the Administration's argument depends upon the notion that the Director-General must choose the candidate who is either most highly-ranked by the assessment panel or proposed by the Hiring Manager, whereas Sections 2.3 and 9.3 of Administrative Instruction ST/AI/2010/3 show that the Director-General is free to select any candidate that was recommended to and cleared by the CRB. As such, reliance upon *Vangelova*,[4] which concerned a UNHCR recruitment process governed by a different ranking system, is misplaced. Compared to Ms. Vangelova, Mr. Zhang was one of five recommended candidates and in a fair and procedurally correct selection process he stood a very good chance of being promoted.

34. Mr. Zhuang requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

Mr. Zhao and Ms. Xie's Answer[5]

35. The Secretary-General does not demonstrate reversible error by the Dispute Tribunal whose consideration of the matter was thorough.

[4] *Vangelova v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-172.
[5] With the exception of the additional submission concerning the provision of a separate written analysis concerning gender in selection decisions, Mr. Zhao and Ms. Xie's submissions are otherwise identical.

36. The Secretary-General's arguments concerning the problematic ratings' conversion are confused and do not accurately represent the UNDT's reasoning. The UNDT's conclusion, which refrained from determining how the ratings should be converted, correctly held that the converted ratings should have been approved by

Administration mistakenly assumes that the candidate with the highest ratings must be chosen, while ST/AI/2010/3 provides that any candidate recommended to, and cleared by, the CRB may be ultimately selected. Thus, the Administration is wrong to submit that notwithstanding the irregularities, the result would have been the same.

41. While the UNDT ordered rescission but not material damages for Mr. Zhao, Mr. Zhao does not cross-appeal this point. Nonetheless, the Administration's argument that the irregularities would not have affected the ultimate outcome for Mr. Zhao or Ms. Xie is premised on faulty reasoning: firstly, given the assessment ratings were altogether unreliable, it is impossible to conclude with certainty that the selected candidate would surely have been successful; furthermore, given that the Director-General could have selected any of the five recommended candidates, it is impossible to say that either Mr. Zhao or Ms. Xie would not have been chosen. Indeed, the UNDT noted that Ms. Xie "had a strong chance of being selected".

42. Ms. Xie further submits that the UNDT did not err when it found that the obligation under Section 1.8(d) of ST/AI/1999/9 to transmit an appropriate written analysis with the recommendation memorandum was not fulfilled. Insofar as the Secretary-General contends that the Administration complied with Section 1.8(d) through the submission of the recommendation memorandum, the memorandum failed in any way to show how the selected candidate was "*ionƀ( )rior"o sheDe thgeer Seequality*

Merits

45. There is no need for the Appeals Tribunal to discuss in this Judgment all of the myriad claims raised by the parties. We have reviewed the claims which have been raised by the Secretary-General in this appeal and find no fault with the reasoning of the UNDT. We therefore uphold the conclusions of the UNDT on those issues. We will, however, deliberate upon the provisions and interpretation of ST/AI/2010/3.

46. The Appeals Tribunal has stated in matters related to selection procedures that:[6]

> [I]t is not the function of the Dispute Tribunal, or indeed of this Tribunal, to take on the substantive role with which the interview panel was charged, even in situations where elements of that procedure have been impugned. The jurisdiction vested in the Dispute Tribunal is to review alleged procedural deficiencies, and if same are established then, by the application of the statutory remedy it deems appropriate in all the circumstances, rectify such irregularity or deficiency as may have been found.

Did the UNDT err in reversing the burden of proof?

47. The Secretary-General challenges the UNDT's finding at paragraph 73 of its Judgment. The challenge is that the Administration failed to prove "despite an express request to that effect from the [Dispute] Tribunal" that all the relevant documentation that was required to accompany the recommendation memorandum as required by Section 9.3 of ST/AI/2010/3, in fact, reached the Director-General of UNOG. The Secretary-General submits that in so finding the UNDT erroneously ignored the presumption of regularity of official acts and reversed the burden of

qualifications and experience of the recommended candidate were "clearly" superior to those of Ms. Xie, as a female candidate.

52. Section 1.8 of Administrative Instruction ST/AI/1999/9 provides, inter alia:

> (a) Vacancies in the Professional category and above shall be filled, when there are one or more women candidates, by one of those candidates provided that:
>
> (i) Her qualifications meet the requirements for the vacant post;
>
> (ii) Her qualifications are substantially equal or superior to those of competing male candidates;
>
> [...]
>
> (d) When the qualifications of one or more women candidates match the requirements for the vacant post and the department or office recommends a male candidate, the department or office shall submit to the appointment and promotion bodies a written analysis, with appropriate supporting documentation, indicating how the qualifications and experience of the recommended candidate, when compared to the core requirements of the post, are clearly superior to those of the female candidates who were not recommended[.]

53. Section 1.8(d) is clear and unambiguous. The use of the word "shall" makes the requirement to provide a written analysis mandatory, thus to do anything to the contrary renders a selection process flawed.

54. The Secretary-General contends that the obligation to submit a written analysis pursuant to Section 1.8(d) is only applicable when a female candidate is not recommended to the appointment and promotion bodies, which he claims in the context of the selection system, must be intended to refer to the CRB. He argues that since Ms. Xie was among the candidates recommended to the CRB, Section 1.8(d) was not applicable to the present case.

55. That analysis is flawed. The context of Se

nonsensical to require hiring managers to have to so justify their non-recommendation of all women who are not successful at an earlier stage of the recruitment process.

56. Accordingly, we reject the Secretary-General's argument that a specific written analysis comparing the qualifications and experience of the recommended candidate and Ms. Xie was not required at the time the Hiring Manager submitted the recommendation memorandum to the Director-General of UNOG.

57. The Secretary-General also argues that the Comparative Analysis Report, which he maintains accompanied the recommendation memorandum, contained sufficient information indicating how the recommended candidate's qualifications and experience were clearly superior to those of Ms. Xie. While the name of the document – the Comparative Analysis Report – could be said to support the Secretary-General's argument, a review of the contents of that document indicates otherwise. The report is no more than a compilation of the panel's individual evaluations of the staff members who were interviewed. It does not fulfill the requirement of Section 1.8(d) insofar as there is no specific analysis as to how the qualifications and experience of the recommended candidate were clearly superior vis-à-vis Ms. Xie's own qualifications and experience. We therefore reject the Secretary-General's argument that Section 1.8(d) of ST/AI/1999/9 was complied with by virtue of the Comparative Analysis Report.

Judgment

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

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)	*(Signed)*	*(Signed)*
Judge Thomas-Felix, Presiding	Judge Chapman	Judge Faherty

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar