



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2021-UNAT-1175

**Bhaskar Palit
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge John Raymond Murphy Judge Dimitrios Raikos
Case Nos.:	2020-1499
Date:	29 October 2021
Registrar:	Weicheng Lin

Counsel for Appellant:	Zishaan Iskaandari
Counsel for Respondent:	Maryam Kamali

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. Bhaskar Palit (the Appellant), a former staff member of the United Nations Children's Fund (UNICEF) contests his separation from service upon the abolishment of post and his non-selection to the post of Fundraising Officer. In Judgment No. UNDT/2020/178 issued on 14 October 2020 (the impugned Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed his application. The Appellant appeals and says the Dispute Tribunal failed to exercise jurisdiction and erred.
2. For the reasons below, we dismiss the appeal.

Facts and Procedure

3. The Appellant joined UNICEF on a fixed-term appointment (FTA) in the India Country Office as a Private Sector Fundraising Officer at the National Officer level (NO-A).
4. On 31 October 2017, the Representative of the UNICEF India Country Office informed the Appellant that numerous posts would be abolished, including the post on which he served, as a result of the UNICEF India Country Programme 2018-2022. By letter dated 5 October 2018, he was specifically notified his post would be abolished and that he would be separated from service upon the expiration of his FTA on 30 June 2018 if he was not selected to another post before that date.
5. In November 2017, a newly created post of Fundraising Officer at the NO-B level was advertised. On 25 November 2017, the Appellant was one of five short-listed candidates that took a written test. He was the *only* candidate to pass that test.
6. In January 2018, the post of Fundraising Officer NO-B was re-advertised. The Appellant re-applied. He was short-listed for the written test, however, he, along with the other candidates, did not pass the test.

7. On 30 January 2018, the Appellant was informed that he was being placed on a performance improvement plan (PIP) related to his communication skills.

First Management Evaluation: Abolition of post

8. On 13 March 2018, the Appellant requested management evaluation of the decision to abolish his post arguing that the abolishment was retaliatory and targeted and that he was being punished for “informal reporting or recruitment irregularities in 2016”.¹

9. Also in March 2018, the Appellant filed a complaint with the Office of Internal Audit and Investigations (OIAI), UNICEF, reporting harassment, targeted recruitment, abolition of his post, against his supervisors.

10. By letter dated 26 April 2018, the Deputy Executive Director furnished a response to Appellant’s first request for management evaluation, upholding the decision not to renew the Appellant due to the abolition of his post and informed him that the allegation of recruitment irregularities had been forwarded to the OIAI.

11. On 15 May 2018, the Appellant filed a complaint with the Ethics Office, UNICEF and requested protection against retaliation. On 29 June 2018, the Ethics Office found no *prima facie* case of retaliation had been established.

12. On 6 June 2018, the Appellant was informed he was not selected to the re-advertised post of Fundraising Officer NO-B.

13. On 30 June 2018, the Appellant was separated from service upon expiration of his FTA.

14. In July 2018, the post of Fundraising Officer NO-B level was re-advertised for a *third time*.²

Second Management Evaluation: Non-Selection

15. On 5 August 2018, the Appellant filed a second request for management evaluation with the Management Evaluation Unit contesting his 6 June 2018 non-selection to the re-advertised post of Fundraising Officer NO-B level.

¹ *Palit v. Secretary-General of the United Nations*, UNDT Judgment No. UNDT/2020/178, para. 9.

² Impugned Judgment, para. 16.

16. On 19 September 2018, the Management Evaluation Unit responded informing him that it found that the “selection process in question was inconsistent with UNICEF policies.”³

17. The Management Evaluation Unit further explained that the India Country Office had re-advertised the post on the grounds that there was an insufficient number of qualifying candidates who passed the test (as only the Appellant had passed it). The Management Evaluation Unit found further that since the Appellant had passed the exam he should have been interviewed. Thus, on this basis, the Management Evaluation Unit instructed the India Country Office to interview the Appellant for the post on a “non-competitive basis”.

18. The Management Evaluation Unit further instructed that the Appellant be appointed to the post if found suitable and be retroactively reinstated at the NO-B level and compensated for the salary difference between his former post and the new post from 1 January to 30 June 2018.

The Interview

19. On 26 September 2018 the India Country Office invited the Appellant to an interview on 3 October 2018 for the post of Fundraising Officer at the NO-B level. The Appellant responded that he was willing to participate but requested it be rescheduled to a later date noting the pending investigation into his complaints with OIAI against his supervisors.

20. On 1 October 2018, the Management Evaluation Unit responded noting that their instruction to the India Country Office to interview him on a non-competitive basis was based solely on the management evaluation of the procedural and legal aspects of the selection process and that the Ethics Office and OIAI were separately considering his claims. Therefore, the Management Evaluation Unit would proceed with an interview providing a new date of 26 October 2018.

21. On 22 October 2018, the Appellant informed the India Country Office that he “was not in a position to undertake the interview”.⁴ On 1 November 2018, he clarified that he was not declining the interview but requesting a rescheduling pending the OIAI investigation outcome.

³ *Ibid.*, para. 18.

⁴ *Ibid.*, para. 25.

22. The India Country Office, on 12 November and again on 14 November 2018, responded to the Appellant indicating they had an urgent need to fill the post and could not wait to conduct his interview until the completion of the OIAI investigation and would proceed with recruitment without him.

23. On 16 November 2018, the Appellant replied that he had a lack of faith in the process and that the India Country Office had not “outlined any protective measures.”⁵

The UNDT Judgment

24. The UNDT found that the Appellant’s challenge of his separation from service due to post abolition was not receivable *ratione materiae* as he did not timely file a request for management review within the 60-day deadline. He was notified of the abolition of his post by e-mail dated 31 October 2017, which attached a letter dated 5 October 2017. Sixty days from the 31 October 2017 e-mail rendered his deadline 1 January 2018. However, he filed his first request for management evaluation on 13 March 2018.⁶

25. In addition, the UNDT found his application regarding abolition of post to be not receivable *ratione temporis* as it was filed before the UNDT out of time. Even if the UNDT assumed the first management evaluation had been requested timely, the Appellant received a response on 26 April 2018. Ninety days from the response meant his application before the UNDT was due on 25 July 2018. His application, however, to the UNDT was filed on 17 December 2018.⁷

26. Regarding the Appellant’s challenge of his non-selection to the re-advertised post, the UNDT held that his allegations were without merit on the basis that he voluntarily refused to interview which prevented the Tribunal from assessing if the decision was in fact tainted by any improper motive. The Administration on instruction of the Management Evaluation Unit attempted to correct itself through the management evaluation process and despite three attempts to interview the Appellant, he consistently refused to attend. The fact an investigation was pending does not lead to the conclusion that harassment and bias had occurred thus tainting the recruitment process.⁸

⁵ *Ibid.*, para. 30.

⁶ *Ibid.*, para. 38.

⁷ *Ibid.*, para. 39.

⁸ *Ibid.*, para. 59.

Submissions

Appellant's Appeal

27. The Appellant argues that the UNDT erred on questions of facts resulting in a manifestly unreasonable decision. He argues he had “limited opportunity and means to present his case” and that the impugned judgment is “perverse not only legally but factually.”

28. The Appellant submits that his grievance is *not* about the abolishment of post (due to bias or harassment) but regarding the non-selection to a suitable post after such abolishment and the acts to discredit his candidature for suitable posts/vacancies. He clarifies that his argument is that his non-selection and the discrediting of his candidature for suitable posts was a result of discrimination, bias, and harassment as well as retaliation for having reported misconduct against management related to irregular recruitment practices in favour of family members.

29. He was subject to a PIP by the same supervisor against whom he alleged harassment and abuse of power and discrimination. His complaints are still under investigation. The UNDT failed to appreciate the deliberate malice behind initiating a PIP and its timing which was designed to harass and retaliate. The UNDT failed to view this as retaliation, bias, and harassment. It was not an act in isolation but must be seen as a battery of incidents against him resulting in his non-selection to any suitable post in the wake of his post being abolished.

30. In addition, the UNDT did not consider that UNICEF failed in its obligation to assist in identifying and giving him preferential consideration for posts through lateral assignment (even for lower posts) as per UNICEF's recruitment and selection policy governed by CF/AI/2016-005 and CF/AI/2010-001, Amend. 2 and per UNAT's jurisprudence in *Timothy*.⁹ He was not considered for lateral re-assignment, and this is a violation of the Staff Rules and the noted policy. He was also refused performance discussions and denied learning and development opportunities and stretch assignments.

31. The UNDT erred in failing to consider the biased and discriminatory treatment of the Appellant when management abolished the selection process in which the Appellant was the

⁹ *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847.

only candidate qualified through the written test. The offer for the interview was an attempt to “cover up the loopholes” and not a *bona fide* redress of the Appellant’s grievance.

32. The Respondent claimed that Appellant refused to participate in the interview, however, he was keen to participate. He was never informed, however, that the panel was reconstituted as it never actually happened. The Appellant strongly believes that management was “lying” about reconstituting the interview panel.

33. Further, the Appellant submits that he was denied fair consideration and instead was discriminated against as the individual selected for the position failed to clear the NOB Fundraising Officer test in December 2017. Despite the Appellant being the only one to pass the test among 30 candidates, he was not even short-listed for the third round of the advertised assessment. The selected candidate was not shortlisted during that initial recruitment exercise but went on to be selected thereafter.

34. The UNDT erred in law in relying upon the *Loeber*¹⁰ case to draw a parallel. The UNDT applied reasoning in *Loeber*, however, unlike in *Loeber*, the Appellant was no longer a staff member when the offer was made and thus had no staff rights like in *Loeber*. Mr. Loeber’s claim of a biased interview panel was outrightly rejected and not proved whereas in the Appellant’s case his reluctance to interview with the panel was acknowledged by the Administration and the panel was allegedly reconstituted. The first time that management took this position was in response to his application before the UNDT. Thus, the *Loeber* case should not be applicable to the Appellant.

Secretary-General’s Answer

35. The Secretary-General or Respondent requests the Appeals Tribunal uphold the UNDT’s findings that there was no evidence of improper motive for the Appellant’s non-selection to the position of Fundraising Officer and to dismiss the appeal in its entirety.

36. The Respondent argues that the UNDT correctly found that the Appellant had not proven improper motives for his non-selection decision of the position of Fundraising Officer. The UNDT correctly found the Appellant had not discharged his burden to prove, on a balance

¹⁰ *Loeber v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-836, at para. 58 of the impugned Judgment.

of probabilities, the unlawfulness of his non-selection because of alleged bias (see *Macharia*¹¹). The Appellant has not provided any concrete evidence in support of his assertions of bias and improper motive.

37. The UNDT correctly held that UNICEF had taken appropriate steps to correct the selection procedure for the Fundraising Officer position that included inviting the Appellant to retake the interview on a non-competitive basis.

38. The Appellant argues that he felt the selection process remained biased and that he did not know the interview panel had been reconstituted and, had he known, he would have participated in the interview. However, the evidence shows that the Appellant's reason at the time for not attending the interview was that he wanted it postponed until the OIAI investigation had been concluded. The UNDT correctly noted that the fact an investigation was ongoing did not automatically lead to a conclusion that harassment and bias had occurred in the recruitment process. In addition, the UNDT therefore correctly determined that Mr. Palit failed to rebut the presumption of regularity.

39. Furthermore, the Appellant was aware of the Ethics Office's determination that there was no *prima facie* case of retaliation when he refused the interview. He has failed to identify any evidence of specific instances of bias towards him but rather makes general allegations that the management had a grudge against him.

40. In addition, the Appellant's arguments that UNICEF failed to make good faith efforts to assist him in identifying a new position are not relevant to the non-selection decision as it relates to the abolition of his post, which UNDT held was not receivable.

41. Lastly, the Appellant fails to satisfy the requirements of Article 2(1) of the UNAT Statute as he is re-arguing his case and repeating his arguments already considered by the UNDT.

Considerations

Request for Oral Hearing:

42. The Appellant requests that the impugned Judgment be set aside, that the Appeals Tribunal reinstate him to a suitable post with whistleblower protection, compensation

¹¹ *Macharia v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-128, para. 16.

for loss of income beginning 1 July 2018 to the date of such reinstatement including interest with proportionate growth in pension. In addition, he requests compensation of one year salary for the “irreparable mental agony, medical harm, career loss, trauma, and continuous harassment ...”. Alternatively, he requests compensation of minimum five years’ salary with interest and pension for the violations of harm and requests an award of legal costs. He also requests an award for legal expenses. As a preliminary matter, the Appellant also requests an oral hearing before the Appeals Tribunal.

43. We deny the Appellant’s request for an oral hearing. Under Article 8(3) of the Appeals Tribunal Statute (the Statute) and Article 18(1) of the Appeals Tribunal Rules of Procedure (Rules), the Appeals Tribunal may grant an oral hearing if it would “assist in the expeditious and fair disposal of the case”.

44. The Appellant requests an oral hearing because he faced “much difficulty of being misunderstood” and he wants an opportunity to “enable sound understanding and explanation” to the Tribunal. However, an appeal before the Appeals Tribunal is not a rehearing of the matter but an opportunity for parties to appeal on narrow bases, such as errors of law, fact, and jurisdiction of the UNDT, not to further explain evidence. We find that an oral hearing would not assist in expeditiously and fairly resolving the issues on appeal.

Merits of the Appeal

45. The Appellant submits that the Dispute Tribunal failed to exercise jurisdiction vested in it and erred on a question of law and question of fact in its Judgment. However, the Appellant fails to specifically identify how the UNDT failed to exercise its jurisdiction or what errors of law or fact were committed. Rather, the Appellant makes a series of generalised assertions such as that the interview offer was a “hoax” or the Administration has a “grudge” or “malicious” intent against the Appellant. These assertions are largely made without underlying evidence or support.

46. As provided for by Article 2(1) of the Statute, the role of the Appeals Tribunal is to determine if the UNDT has made errors of fact, law or procedure or exceeded or failed to exercise its jurisdiction or competence. The Appellant has the burden of showing the UNDT Judgment is defective in the manner required by Article 2(1). The Appellant has failed to discharge this burden but instead makes submissions on his disagreement with the UNDT

Judgment. However, it is not sufficient in an appeal for an appellant simply to set out how they disagree with the UNDT outcome or attempt to have the matter retried.¹²

47. We are mindful that the Appellant is self-represented and may be encumbered by a lack of fluency in the English language or legal principles. But despite the lack of clear identification of the grounds for appeal as required by Article 2(1) by the Appellant, we also can find no basis for vacating the UNDT Judgment.

48. The Appellant requests the Appeals Tribunals intervention into the matter “as a whole” but provides no submissions on the UNDT’s finding that his challenge of his separation from service due to abolition was not receivable *ratione materiae*. He fails to address his failure to file a timely request for management review within the 60-day deadline. He fails to address the UNDT’s finding of lack of receivability of his application *ratione temporis* as it was filed before the UNDT beyond the 90-day deadline. The Appellant does not specifically contest these findings in his appeal. Therefore, we find the receivability issue is not an issue before us and even if it were, there is nothing provided by the Appellant that suggests the UNDT erred in their findings on receivability.

49. As for the challenge to the Appellant’s non-selection to the position of Fundraising Officer, we find the UNDT did not err in dismissing this challenge.

50. It is well established that that the Secretary-General has a broad discretion in decisions regarding promotions and appointments.¹³ However, this discretion is not unfettered and is subject to judicial review. When reviewing the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The burden of proving improper motives, such as abuse of authority, discrimination, retaliation, or harassment rests with the person making the allegation.¹⁴

51. Regarding judicial review of a staff selection decision, the review is not for the purpose of substituting the Tribunal’s selection decision for that of the Administration. Rather, the Dispute Tribunal’s role in reviewing an administrative decision regarding an appointment is

¹² See *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051, para. 29; *Krioutchkov v. Secretary General of the United Nations*, Judgment No. 2016-UNAT-691, para. 19.

¹³ See Article 101(1) of the Charter of the United Nations; Staff Regulation 1.2(c).

¹⁴ *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-506, para. 49.

to examine: “(1) whether the procedure laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration”. The purpose of the review is “to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner.”¹⁵

52. In this instance, the UNDT correctly held that the burden was on the Appellant to argue and demonstrate that his non-selection was tainted by improper motives, bias, or abuse of authority. The UNDT did not err by finding that the Appellant had not discharged this burden.

53. There is no dispute that there was an irregularity in the initial recruitment process for the post in question, namely the Appellant should have been given an interview after passing the written test of November 2017. The Management Evaluation Unit held that this irregularity must be remedied by the Appellant being granted an interview on a non-competitive basis, which was what had occurred.

54. The Appeals Tribunal has previously confirmed that “(m)anagement evaluation is a vital component of our system for the administration of justice. As we have commented, ‘the purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary ...’.”¹⁶

55. The UNDT was satisfied that, in this present case, the Administration took steps to correct the selection procedure by instructing the India Country Office to invite the Appellant to a non-competitive interview. Despite repeated attempts, the Appellant consistently refused to attend the interview on the basis that the selection process remained biased, and he wished the OIAI investigation to be concluded.

¹⁵ *Abbasi v. Secretary-General of the United Nations*, Judgment No. 2011, para. 23 and *Ljungdell v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-265, as quoted in *Lemonnier v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-762, para. 51.

¹⁶ See *Kalashnik v. Secretary-General of the United Nations* Judgment No. 2016-UNAT-661, para. 26, citing *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-381, para. 37 and *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 42.

56. The UNDT correctly concluded that the fact the investigation was taking place did not lead to the immediate conclusion that harassment and bias had occurred in tainting the recruitment process. What was known at the time of the interview invitation was that the Ethics Office had not found a *prima facie* case of retaliation.¹⁷

57. The Appellant was given an opportunity to participate in the corrected selection process but declined. Without participating in the corrected process, it is premature to make allegations of bias and improper motive. The Administration made attempts to safeguard the new selection process by reconstituting the interview panel. The Appellant now says he would have participated if he had known of this reconstitution. However, at the time of declining the interview, his primary stated reason for declining the interview was the ongoing OIAI investigation.

58. As in *Loeber*, the Appellant here chose not to participate in the interview due to his claim of bias and improper motive but failed to present sufficient evidence to support the claim. In failing to participate in the necessary recruitment procedures without reasonable excuse, the Appellant is estopped from contesting the procedures and the selection outcome. The Appellant says that *Loeber* is distinguishable because the Appellant was not a staff member when the interview offer was made and because the Appellant's grievance has been acknowledged. However, these facts are not relevant to the finding that absent sufficient evidence of bias or improper motive, an appellant is estopped from contesting the process and the selection outcome after baldly refusing to participate in that process. The facts identified by the Appellant do not distinguish the present case from *Loeber*.

59. The Appellant also submits the Administration failed to meet its obligation to make a "good faith effort" to assist him in identifying a new position after the abolition of his post. However, he was invited to interview for the post of Fundraising Officer but declined. In any event, this argument is not relevant to the non-selection decision. Similarly, the Appellant says the Administration failed to meet its obligation to provide him with support as part of the "employee wellbeing policy". This seems to be a new argument not before the UNDT. There is also no evidence to support this argument and it is irrelevant to the non-selection decision.

¹⁷ Impugned Judgment, para. 55.

60. Given UNDT did not make any errors of law or fact in the Judgment, we are precluded from awarding the remedies requested by the Appellant, including an award for costs. As this Tribunal has stated before, “compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member’s rights or administrative wrongdoing in need of repair”.¹⁸

61. Accordingly, the appeal fails.

¹⁸ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 34, citing *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33, in turn citing *Wishah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-537, para. 40 and citations therein). See also *Abdeljalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-960, para. 50.

Judgment

62. We dismiss the appeal and affirm the UNDT Judgment.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Murphy
Cape Town, South Africa

(Signed)

Judge Raikos
Athens, Greece

Entered in the Register on 4th day of January 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar