



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/107

Judgment No.: UNDT/2010/055

Date: 31 March 2010

Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

ABBASI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Raja Muhammad Farooq

Counsel for respondent:
Tamara Shockley, UNICEF

Introduction

1. The applicant, a former staff member with 22 years of service with the United Nations Children's Fund (UNICEF), alleges that she should have been selected for one of three vacant posts of operations officer in the Pakistan office of UNICEF. She considers that she was not given full and fair consideration by UNICEF and that she was discriminated against because of her sex.

2. The application is resisted by UNICEF which states that the selection process to fill these posts complied with its policy and procedures. According to UNICEF, the applicant was unsuccessful because she was not the most suitable candidate for appointment to each of these vacant posts. The respondent denies any discrimination against her.

3. The parties' representatives indicated at the case management discussion that a decision could be made on the basis of the documents. However, it was my view that in a case of alleged sex discrimination it was generally undesirable to make a decision on the substantive merits of the case merely by considering the documents. Interview panel members and one or more members of an appointment committee, or its equivalent, may be called to give evidence about the procedures followed and the actual decision-making process and discussion. Whether the final decision is made by a committee or an individual, the reasons for the decision should be properly documented. However, out of deference to the representatives, I decided that when the process of discovery was completed I would review the question as to whether an oral hearing was necessary. Both representatives agreed that if a hearing was ordered suitable arrangements could be made to hear the case via a video-link. Having examined the parties' submissions, I ordered an oral hearing.

4. At the conclusion of the case management discussion the representatives agreed that if I considered it appropriate to do so I would make recommendations for the purpose of assisting UNICEF in relation to such cases in the future.

5. By an order dated 9 September 2009, following a case management discussion, it was agreed that the respective contentions of the parties were as follows.

The case for the applicant

6. It was the applicant's case that she was unsuccessful in her application for an appointment as operations officer in December 2008 for one of three advertised vacancies based in Peshawar, Lahore and Quetta, Pakistan. She was treated less favourably than male candidates and this constituted discrimination on grounds of sex. On being informed that she had been unsuccessful she requested a copy of the minutes of the Appointment and Placement Committee (APC). (APCs are advisory bodies established to make recommendations through the Head of Office concerning appointments, promotions and contractual status.) The APC minutes were initially refused to her on the grounds of confidentiality. It was her belief that the minutes had been offered to others whom she did not identify.

7. She took exception to the fact that at no time was she given a written offer for the vacancy in Quetta. Instead, the human resources officer involved in the selection process telephoned her unexpectedly at an inconvenient time. This was to her detriment and contrary to normal procedures. She was expected to give an immediate answer but was unable to do so (see paragraph 10).

8. The applicant seeks an appointment as operations officer at a suitable duty station. Further, she wants compensation for loss of earnings and associated benefits together with compensation for anxiety, stress and hurt feelings.

The case for the respondent

9. It was the respondent's case that at all material times the applicant was treated fairly and properly in accordance with UNICEF's policies and procedures. The respondent denied the allegations of sex discrimination or discrimination on any

prohibited ground. The panel was prepared to recommend her for the vacancy in Quetta and she had declined the opportunity. In the circumstances she is not entitled to any remedy and the case should be dismissed.

10. It emerged later in the course of these proceedings that the applicant was not in fact offered the position in Quetta, as she believed, but was being asked if she consented to her name being put forward for that vacancy.

Disclosure of documents

11. An issue arose regarding the applicant's request that the respondent should produce documents relating to other candidates interviewed for the operations officer posts. The applicant argued that without those documents she would be severely disadvantaged. The respondent initially objected to the disclosure of documents of the kind identified on the grounds that they were confidential. After some discussion I convinced both sides that in a case like that advanced by the applicant, particularly in relation to her allegation that she was less favourably treated than male candidates for those posts, it was necessary to give her access to the application forms and other material used or produced for the purposes of making the selection decisions.

12. In cases of discrimination the information and material available either to support or to refute the claim will very rarely be in the possession of the staff member. It will be in the possession of the employing organisation. Discrimination will often involve an allegation that, although the complainant is as well qualified as the person selected, or indeed better qualified, she or he was not chosen. Such an allegation will necessarily involve a careful comparison to be made of qualifications and experience and performance at the job interview. This information will be in the possession of the employer.

13. Given the difficulties of proving discrimination the staff member is entitled to have the opportunity of looking at such material which is in the possession of the

employer and which material will be necessary to enable the Tribunal to consider the allegations and to arrive at a reasoned and just decision.

Discovery of documents

14. The principles applicable in deciding on the disclosure of material which may otherwise be protected by confidentiality within the workplace, including the UN, are as follows:

- i. There is no public policy principle that places an absolute bar on the disclosure of material so long as the documents sought to be disclosed are relevant and necessary for a fair disposal of proceedings and have probative value in relation to issues in the case.
- ii. The guiding principle for the judge is whether the disclosure sought is necessary for a fair disposal of the proceedings and to do justice to the parties.
- iii. If these conditions are satisfied the judge may order disclosure and in doing so will have regard to any legitimate concerns about the need to maintain confidentiality.
- iv. The parties may need to be reminded that disclosure of the material is for the purposes of the particular proceedings only.
- v. In granting disclosure, where issues of confidentiality of the identity of the individuals are concerned, names may be deleted and an agreed set of symbols either by number or letters may be used. The redacted documents should be disclosed to the party seeking access to them and it will often be necessary for the judge to have available a complete unredacted set of relevant documents which would be used in the event of an issue arising in the course of proceedings.

- vi. Sometimes it may be necessary for the Tribunal to order disclosure of statistical material which may assist in deciding whether there is a pattern of conduct which may require an explanation.
 - vii. Where grievance and disciplinary proceedings are in issue it may be relevant and necessary to order disclosure of documents, including statistical data, where appropriate, to assist the parties and the Tribunal.
 - viii. Where a request for discovery is oppressive and not necessary for disposing fairly of the proceedings it may be refused.
 - ix. In cases involving issues of extreme sensitivity or security the Tribunal may order disclosure, initially to the judge, who will, after examining the material, decide on the terms, if any, of the disclosure. This could include redacting parts of the documents or restricting disclosure to the legal representatives only.
 - x. The respondent should not seek to hide behind the argument of confidentiality given the difficulties of proving, or disproving, the allegations and given the safeguards inherent in these principles.
 - xi. The respondent and its representatives should take note of the fact that they have a duty to cooperate with the Tribunal in ensuring that justice is done and is manifestly seen to be done.
15. These principles are consistent with General Assembly resolution 63/253, dated 17 March 2009, on the report of the Fifth Committee (A/63/642) regarding the new system of administration of justice.
16. In applying these principles to the facts in this case the following order was made on 9 September 2009:

The respondent is to provide to the applicant, within 14 days of the date of this Order:

- 7.1 a detailed schedule, identifying by a numerical or alphabetical system, a list of all candidates who were short-listed for interview indicating their gender and the scores they obtained in the test(s);
- 7.2 similar information as above in a separate schedule for the nine candidates who were recommended for appointment indicating the relevant duty station;
- 7.3 the relevant extract from UNICEF's [Human Resources Policy and Procedure Manual] or other procedural/policy document on how such recruitment exercises are to be conducted, including paragraph 4.4.5 of UNICEF's Manual;
- 7.4 details of training given to panel members in relation to recruitment, selection, and appointment generally and specifically in relation to these appointments, if any;
- 7.5 the notes taken by each panel member in relation to each of the candidates who were interviewed, identifying those who were recommended for appointment indicating if male or female;
- 7.6 notes recording the panel's deliberations;
- 7.7 the report with recommendations made by the panel;
- 7.8 a complete set of the APC minutes; and
- 7.9 an unredacted set of all redacted documents to be made available to the Judge in the event that it may become necessary to resolve any dispute that may arise.

Legal principles

17. Article 101.3 of the Charter of the United Nations provides as follows:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

This provision is repeated in paragraph 4.2 of the Staff Regulations (ST/SGB/2008/4).

18. The staff regulations further state as follows:

4.3 In accordance with the principles of the Charter, selection of staff members shall be made without distinction as to race, sex or

religion. So far as practicable, selection shall be made on a competitive basis.

4.4 Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations. . . .

19. Staff members are to be appointed on merit. Selection decisions must be made in accordance with the Charter of the United Nations and any relevant provision governing staff selection within UNICEF. However, what precisely is meant by “the highest standards of efficiency, competence and integrity” and how this is to be translated into practical reality is not defined. Nevertheless, reading these principles as a whole and in their proper context it is plain that they are not meant to be recited as a mantra to insulate decision-makers from the obligation to justify and explain their decisions. Above all there is a duty to be transparent in the selection process and at all times the principles of equity and natural justice must be followed. In a selection or promotion decision those involved in recruitment on behalf of UNICEF must have regard to its policy on gender parity.

Principles applicable in cases of discrimination

20. Allegations of discrimination are easy to make, but they are difficult to prove or to disprove. Therefore, it is both necessary and important to identify and define principles which recognize these difficulties and take into account the particular characteristics of the phenomenon of discrimination in the workplace. Some of these principles are as follows:

- i. Mere belief, or suspicion, unsupported by information or rational argument, is not a sufficient basis for embarking on a searching enquiry into whether there was or was not an act or acts of discrimination.

- ii. In the vast majority of cases the staff member will have more than a mere suspicion and will be able to put forward some material in support of the allegation.
- iii. It would be extremely rare to find affirmative evidence of discrimination. Accordingly the Tribunal should be prepared to draw such inferences as are legitimate from the available evidence including the documents and oral testimony together with an assessment, where necessary and appropriate, of the credibility of witnesses on each side.
- iv. Discrimination is not always intentional or conscious. There are occasions when the person carrying out the act of discrimination may do so unintentionally or unconsciously. The Tribunal will need to be astute in its assessment, particularly of oral testimony, taking into account the fact that it may be necessary to look behind the actual words used by a witness. Words and phrases may be incorrectly or inappropriately used. On the other hand individuals who are seeking to mislead the Tribunal will have an interest in projecting themselves and their decisions in the most favourable light so as to steer the Tribunal away from entertaining any doubt or suspicion that they may have discriminated against the staff member.
- v. The Tribunal will be aware of the phenomenon of selective perception and recollection. It will often be necessary to test evidence by probing questions in the performance of the Tribunal's inquisitorial function pursuant to the need to clarify the evidence and to ensure an equality of arms.
- vi. It is important to recognise the risk inherent in a literal acceptance of the words used by a witness who is not using his first language.
- vii. Those who are accused of discriminatory conduct or of condoning such discrimination on the part of others feel a sense of moral outrage. They

might not even recognise in their own conduct, or that of others, the possibility of discrimination. Their sense of indignation and outrage may inhibit or mask their ability to recognise events or behaviours as a reasonable, impartial and informed observer might.

- viii. It may be difficult to distinguish between a genuine lapse of memory and a deliberate attempt to mislead. Accordingly whenever possible corroboration should be sought in either documentary form or the testimony of other witnesses, preferably those who have no direct or indirect interest in the outcome of the case.
- ix. It is unnecessary and generally unhelpful for the Tribunal to seek out evidence of a discriminatory attitude. An attitude of prejudice is not an essential prerequisite to discriminatory conduct. Sometimes discriminatory treatment is meted out to an individual for a reason that is wholly unconnected with the discriminator's personal attitude. For example a manager may discriminate against a person on the basis of a perceived negative response by a senior manager and not as a result of any personal bias or prejudice against the individual. Accordingly valuable time and effort will be saved by discouraging evidence designed to establish the existence or otherwise of prejudice on the part of a particular decision-maker. The exception, of course, which is rare, is where there is clear evidence of prejudice which is more likely than not to predispose an individual to behave in a discriminatory way.
- x. It is unhelpful for the Tribunal to agonise over questions relating to attitude, motive, intention, or beliefs of the person or persons whose actions or decisions are being challenged. The Tribunal must focus on the objectively verifiable behaviours to see whether those behaviours are consistent with the possibility of having been carried out in pursuance of unlawful discriminatory considerations which may be conscious or unconscious.

- xi. It is only the decision-maker who can explain why and for what reason a particular decision was taken. Accordingly, where the applicant has discharged the burden of producing sufficient evidence and establishing sufficient facts from which it could be inferred that discrimination could have taken place the onus should generally pass to the decision-maker to prove that there was a non-discriminatory reason for the decision.
- xii. It is helpful to apply the “But For” test. But for the staff member’s sex, race, disability, ethnicity, religion etc would she or he have been similarly treated?
- xiii. Decisions are taken as a result of a complex interaction of factors. It is not necessary for the discriminatory element to be the sole factor underpinning the decision. If it was a significant factor that would be sufficient to support a finding of unlawful discrimination.
- xiv. At the conclusion of the evidence it would be helpful to approach the totality of the documentary and oral testimony in the following stages:
 - a. Is there any affirmative evidence pointing to discrimination having taken place?
 - b. If so, what is the quality of the evidence? Could it support an inference or a finding of unlawful discrimination?
 - c. If there is no such affirmative evidence, has the applicant established sufficient facts from which it could be inferred that discrimination could have taken place?
 - d. If so, the burden should shift on the respondent to show that there was an innocent and non-discriminatory explanation and that no unlawful discrimination had taken place.

- e. If the respondent is unable to provide a cogent non-discriminatory explanation or justification the claim will succeed.

Findings of fact

21. The applicant joined UNICEF in August 1987 as a secretary at the GS-5 level, initially on a fixed-term appointment. This was subsequently converted, in June 1996, to a permanent position with a change in title to administrative clerk. In September 2000 she was promoted to the GS-6 level, and, in September 2001, to the GS-7 level, with a change in title to senior administrative assistant.

22. In July 2007 she was selected for the post of operations officer in Abbottabad. She commenced duties in this post on 13 December 2007 after a break in service. This was a temporary appointment.

23. In August 2008 UNICEF advertised three vacant positions of operations officer in Peshawar, Lahore and Quetta. These posts were advertised both internally and externally.

24. A total of 1,970 applications were received, including 833 candidates for Peshawar, 769 for Lahore and 368 for Quetta. It would appear on the basis of the breakdown of applications that Quetta was the least popular of the three locations. This is not surprising in view of the serious security problems there. Of the 1970 applications, 21 candidates, including the applicant, were short-listed.

25. The procedure for selecting the candidates involved a requirement to pass a written test with a score of at least 50 per cent or higher followed by an interview. The APC would recommend a number of candidates for each vacancy for a final selection to be made by the Selection Advisory Panel (SAP) and the UNICEF Chief Field Officer (CFO) for the office in question. (SAPs are formed to review short-listed candidates and make recommendations to the APC for further review and

recommendation.) The CFO had a decisive role and it would appear had the final say in whom to appoint to his office.

26. The test was conducted on 18 November 2008. The applicant scored 32 per cent on the test and scored zero in the question that tested “Finance”. However, it was decided that in accordance with UNICEF’s policy on gender parity the applicant should be interviewed as being the only female candidate. Furthermore, she was given preference as an internal candidate in accordance with paragraph 4.4.5 of UNICEF’s Human Resources Policy and Procedure Manual, which states: “Preference will be given to qualified internal candidates who apply to specific vacancies”.

27. Thirteen individuals were selected to be interviewed and of these only one scored a lower mark in the test than the applicant.

28. UNICEF regarded the posts of operations officers as being one of the most important posts for the management of the financial and administrative functions of a duty station. The respondent explained that the operations officer was responsible for monitoring and certifying the financial operational transactions on behalf of the Organisation, adding that UNICEF in turn was accountable to donor governments to ensure that all financial transactions were in compliance with the appropriate procedures and accountability for expenditure.

29. The respondent stated that UNICEF Pakistan was a difficult duty station and that it was important to ensure that the right person was appointed as operations officer. It was also accepted that there were security considerations in relation to all three duty stations and particularly Quetta.

30. In accordance with UNICEF’s policy preference was to be given to internal candidate’s whose post had been abolished. The successful candidate for Peshawar was in such a position.

31. The gender parity policy recognised the gross under-representation of female staff members and placed a duty on those responsible for selection to include female candidates for consideration for appointment. They should be provided with an equal opportunity for consideration. However, appointments were to be made on merit and in accordance with the principles and requirements derived from the UN Charter (article 101.3) and the UN staff regulations and rules (in particular regulation 4.2) which state that the paramount consideration in the appointment of staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Whatever this may mean in a particular case is not entirely clear. However, given UNICEF's policy on gender parity there can be no doubt that those responsible at all stages of the selection process have a duty to give effect both to the spirit and intent of the policy.

32. On the written tests the applicant was twelfth in the rank order of the thirteen candidates who were interviewed. There were four components to the assessment of candidates: the written test, the interview, qualifications and experience. The scores for the applicant, the candidate appointed to Peshawar (P) and the candidate appointed to Lahore (L) were as indicated below.

Candidate	Written test (30)	Interview (45)	Qualification (10)	Experience (15)	Total (100) (with written test)	Total (without written test)
Applicant	10	36	10	12	68	58
Candidate P	21	32.5	10	12	75.5	54.5
Candidate L	13	39	10	12	74	61

33. The applicant scored the third highest when test results and interview performance were added together. When the test scores were excluded she was the second highest. Therefore, given UNICEF's policy on gender parity, she was potentially eligible for appointment to Peshawar, to which she was one of those recommended by the APC, or to Lahore to which she was not recommended.

34. Following the interview, the panel was required to make recommendations by putting forward a list of names for further consideration in accordance with the procedures. The human resources officer was asked to ascertain from the applicant whether she would be interested to have her name included in the list of candidates for the vacancy in Quetta. He telephoned the applicant. She declined the opportunity. Accordingly her name was not included for the Quetta vacancy.

35. The post in Peshawar was offered to an internal male candidate on an abolished post. He scored the highest mark when both the written test and assessment at interview were included but was the third highest when the written test was excluded. His first preference was for the post in Lahore. He was not appointed to Lahore because it would appear that the CFO had a strong preference for candidate L. Candidate P was not eligible for Quetta because of UNICEF's policy to move people to new duty stations.

36. The post in Lahore was offered to a male external candidate who scored the second highest mark when both test results and interview performance were added together. However, when test results were excluded he scored the top mark.

37. The respondent was asked to explain why an external candidate was offered the post in Lahore when the applicant scored the second highest at the interview, had previous experience as an operations officer and merited serious consideration in accordance with the gender parity policy. The human resources officer explained that the gender parity policy entitled the panel to give preference to the female candidate "all things being equal". In other words the candidate's gender could tip the scales in favour of a female candidate where the panel was faced with two candidates of equal merit. The Chief of the Office preferred the male candidate since he was familiar with the applicant's work and, according to the human resources officer, this was not a situation where all things were equal. However, given the analysis in paragraphs 33 and 34 it is not wholly correct for the respondent to take the view that this was not a case which required the gender parity policy to be brought into play in the final stages of the selection process.

38. As far as the initial failure to disclose the minutes of the APC meeting on the grounds of confidentiality are concerned, the human resources officer explained that in his absence there was a new person in the office who took the view that the minutes were confidential and therefore could not have been disclosed to the applicant. On his return to the office he noted the applicant's written request and complaint about the nondisclosure of the minutes. He immediately remedied the situation by sending her a copy of the relevant extract which showed that her name was included on the list of candidates for the vacancy in Peshawar.

Assessment

39. The question, given the scores summarized in paragraphs 32 and 33, is why the applicant was not recommended for consideration and subsequently offered one of the vacancies in Peshawar or Lahore.

40. After the November 2008 selection process, the SAP recommended the applicant for Quetta only. Given her interview performance this decision is surprising and has not been satisfactorily explained. On 12 December 2008 the APC, having considered the SAP recommendation, decided to include the applicant among the four "possible candidates" for the Peshawar post only. The APC did not recommend her for the Lahore or Quetta posts. She did not wish to be considered for the post in Quetta. However, there is no satisfactory explanation for failing to recommend her for Lahore. The fact that the CFO preferred another candidate is not a sufficient explanation when candidates whose interview performance was lower than the applicants were included. No rational and cogent explanation has been provided for such decisions. On 24 February 2009 the Senior HR Manager, having considered the SAP and APC recommendations, recommended the appointment of two other candidates (not the applicant) to Peshawar and Lahore, and that the Quetta post be re-advertised. The recommendation was endorsed by the UNICEF Representative in Pakistan. The fact that both the Senior HR Manager and subsequently the UNICEF Representative in Pakistan accepted the recommendations

so uncritically notwithstanding the applicant's interview performance, and the policy on gender parity, must be a matter of concern for UNICEF.

41. The respondent stated that the principal reason for calling the applicant to an interview, notwithstanding her poor test result, was the fact that she was a female and it was UNICEF's policy on gender parity for positive steps to be taken to provide opportunities for female candidates to be considered for appointment in order to address gender imbalance in the workforce. Accordingly they decided that it was important to give the applicant the opportunity of an interview since the final decision would be taken not on the basis simply of test scores but a combination of the test scores, interview performance and overall panel assessment and the views of the Chief of the Office.

42. I considered that it was necessary to test the respondent's evidence in relation to the intent behind including the applicant's name on the list of those who were interviewed. I asked the human resources officer whether the applicant had a realistic chance of being appointed given his evidence as to the importance of the test scores, particularly in relation to the finance questions where the applicant scored zero. He denied any suggestion that the interview was a sham exercise and stated that the applicant was given an opportunity to convince the panel that she should have been appointed thereby implicitly accepting the primacy of interview performance over test scores. It should be noted at this point that one of the competencies assessed at the interview was "Results based track record" which included "finance management". The applicant and candidates L and P scored 12 out of a total of 15 marks. Upon further questioning the human resources officer stated, "She had a chance but not a big chance". Whilst I note his evidence on this point it is clear to me on an examination of all the documents and the oral testimony that so long as the respondent insisted on including the scores from the written test the applicant did not have a realistic chance of being appointed to Peshawar or Lahore. This raises the question as to whether there is a disjunction between the written policy and the actual practice adopted by those involved in selection decisions. It seems to me that once

the respondent set to one side the applicant's test result to give her, as the lone female candidate, a fair opportunity to persuade the panel that she should be appointed, it is inappropriate to import that test score back into the equation to minimize her otherwise creditable interview performance. It is clear from the forgoing analysis and paragraph 33 that when the test scores are excluded she was the second highest performer at interview compared to the successful candidates P and L. In these circumstances, and given that she was included in the list of possible appointees for Peshawar, why was this vacancy not offered to her? She was the second most eligible candidate of the three. Given the policy on gender parity it does not assist the respondent to claim that she was asked if she would be interested in Quetta which was a known security risk and the least popular posting. It turned out that no appointment was made for Quetta. The Tribunal was informed that the CFO had the final word on whom to appoint to his office. Cogent reasons of substance were not provided by the respondent to explain and to justify the selection of candidates P and L for Peshawar and Lahore instead of the applicant.

43. UNICEF has a comprehensive policy on gender parity and nothing in this judgment should be taken as implying an attack on the policy or on the importance of adopting positive and affirmative action measures designed to address historical imbalances in the employment profile. It was equally important to ensure that those invited for interview had a realistic chance of being appointed. It is clear in this case that there was a failure to carry out a detailed analysis of the totality of the evidence and to fully appreciate how the policy on gender parity should be applied. It would appear on the evidence that those involved at different stages of the selection process have failed fully to assimilate, understand and give effect to the underlying rationale and objective of the policy. The best of policies are not worth the paper they are written on if they are not translated into effective action where it matters.

44. The applicant has previous experience as an operations officer and no evidence was produced that her performance was not up to the required standard. On the contrary her service was rated as "distinguished". She was treated as an internal

candidate and awarded full marks for her qualifications. At interview she ranked second. Taking these facts into account I conclude that the applicant has established sufficient facts from which it could be inferred that the reason why she was not offered an appointment in Peshawar or Lahore was on the grounds of sex. Accordingly it is for the respondent to prove, by providing an innocent and non-discriminatory explanation, that there was no direct or indirect sex discrimination. For the reasons stated above the respondent has failed to provide a satisfactory explanation for the treatment that was accorded to her. They have not made out a cogent case that the recommendations and final decisions relating to the appointments to Peshawar and Lahore were made solely on merit. The scores from the written test ought to have been excluded for UNICEF to comply with their professed policy and commitment to provide the applicant with an equal opportunity to compete for the post. Having invited her to interview, notwithstanding her poor test score, they are estopped, consistent with the gender policy, from reintroducing the test results in making the recommendations and final decisions. They have failed to demonstrate that they took full account of the letter and spirit of the policy on gender parity. Accordingly the respondent has not discharged the burden of proving an innocent and non-discriminatory reason for not recommending and subsequently appointing the applicant as operations officer in Peshawar or Lahore.

Recommendation

45. The respondent would be well advised in the future to take the following steps pursuant to the Organisation's duty to appoint on merit and in accordance with the policy on gender parity.

- i. Where tests are used in the recruitment process they should be properly validated to ensure that they are testing the relevant competencies for the post in question. The tests should be truly job-related.
- ii. Care should be taken to ensure that where a female candidate is invited to interview she should have a realistic prospect of convincing the

selection panel on merit setting aside those factors which, but for the policy on gender parity, would have operated to exclude her from the interview. To do otherwise would be merely to pay lip service to the policy on gender parity.

- iii. Where a genuine attempt is made to accord to a female candidate the opportunity of satisfying a panel as to her suitability it should not be sufficient to leave the final recommendation on appointment to the Chief of the Office. Whilst the reason for giving the Chief the final say is understandable it incurs the risk of bias influencing the final decision. The Chief should provide adequate reasons for not preferring an otherwise appointable female candidate and these reasons should be fully recorded. It would not be sufficient as an explanation for the Chief to say that he was familiar with the female candidate's work.
- iv. Where positive action is taken to include a female candidate notwithstanding, say, a poor test score, it would be wrong in principle, where that candidate scores well at the interview, to hold against her the very criterion which was set aside. It is important that provision be made, as happened in this case, for the interview to provide a further opportunity to test the relevant competencies.

Conclusion

46. The applicant has established sufficient facts from which it could be inferred that sex discrimination had taken place. It is therefore for the respondent to prove by providing a cogent and innocent non-discriminatory explanation that there was no sex discrimination. The objectively verifiable evidence is inconsistent with the respondent's defence that the final decision to appoint the two male candidates was in accordance with the requirement that appointments should be made on the basis of merit. In considering candidates for Peshawar and Lahore they have, inexplicably, disregarded the applicant's excellent interview performance. They placed undue

importance on the stated preference of the CFO which preference has not been satisfactorily explained. Accordingly the respondent has not discharged the burden of proving that there was an innocent non-discriminatory reason for their selection decisions.

47. The applicant had her legitimate career aspirations thwarted and suffered economic loss. She is entitled to be compensated for loss of the opportunity of being appointed and consequent damage to her career development. Further, the applicant was, and still is, distressed by the experience. Such distress was aggravated by the fact that in the course of proceedings the respondent attempted to cast doubt on her academic qualifications as a justification for the decision stating that her degree was not from a recognised university. This particular point was played down at the hearing for two reasons: first, the applicant scored the maximum marks for qualifications and, second, the policy regarding the recognition of qualifications came into effect after the interview. In any event the applicant mounted a challenge to the assertion that her degree was not from a recognized university. In view of the Tribunal's findings it is not necessary to address that point. However, the distress caused to the applicant warrants compensation.

Judgment

48. The complaint that the applicant was discriminated against on grounds of sex succeeds.

49. The respondent is ordered to pay to the applicant compensation for distress in the sum of USD30,000. Interest on this sum will accrue at the rate of eight per cent per annum as from 45 days from the date of receipt of this judgment until payment is effected.

50. For loss of the opportunity of being appointed and for consequential loss of career development and associated benefits the respondent is ordered to pay the applicant the equivalent of twelve months' net base salary at the rate applicable for

the post of operations officer at the salary she would have received had she been appointed. Interest on this sum will accrue at the rate of eight per cent per annum as from 45 days from the date of receipt of this judgment until payment is effected.

(Signed)

Judge Goolam Meeran

Dated this 31st day of March 2010

Entered in the Register on this 31st day of March 2010

(Signed)

Hafida Lahiouel, Registrar, New York