



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

DIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Tamara Shockley, UNICEF

Introduction

1. The Applicant joined the United Nations Children's Fund Country Office in Senegal (UNICEF Senegal CO) on 6 January 2003 at the GS-5 level on a temporary assignment. On 12 March 2007, he was appointed to the post of Finance Assistant at the GS-5 level.

2. On 22 September 2012, he filed the current Application before the United Nations Dispute Tribunal (UNDT) challenging the decision, taken on 29 September 2011, to separate him from service following an abolition of posts through the Program and Budget Review (PBR), together with the decision, notified to him on 10 April 2012, of his non-selection for a finance assistant GS-5 post to which he had applied.

Facts

3. On 19 November 2009, the then Representative of UNICEF Senegal CO sent a memorandum to the Applicant about a significant error he had committed in exercising his functions as Finance Assistant in the handling of bids for tables and chairs for the Education Programme (contract value of USD50,000-60,000). According to the memorandum, he opened closed bids provided by vendors relating to said contract without the procurement committee being present and let a colleague influence him into changing the dates of the documents. According to the memorandum, his actions compromised the integrity of the procurement process and violated the standards of conduct of the international civil service and the financial rules. Nevertheless, no subsequent action was taken.

4. The Applicant's post was abolished through the PBR in March 2011. The functions of the post were reviewed by the Job Classification Panel leading to a substantial change in the job description. The new position of finance assistant was classified at the GS-5 level.

5. On 6 July 2011 and again on 29 September 2011, the Applicant was formally informed of the abolition of his post effective 31 December 2011, as per standard procedure. Thus, though the post was abolished in March 2011, formal notification of same was sent in July and September and the effective date of termination was in December 2011. He applied for the newly created GS-5 Finance Assistant post within UNICEF Senegal CO, which was advertised in October 2011.

6. On 20 December 2011, the UNICEF Senegal CO Representative and the Human Resources Specialist met with the Applicant to explain to him that his candidacy had been removed from the short list for the newly created Finance Assistant post for reasons of performance and the ethical issues mentioned in the 19 November 2009 memorandum.

7. On 29 December 2011, the Applicant received a letter of separation indicating his entitlements and the conditions of his separation. In return for payment of an additional termination indemnity, the Applicant signed a waiver stating “I agree not to contest the action of separation from UNICEF”.

8. On 5 January 2012, the written test for the GS-5 post was administered to the 9 candidates identified by the Manager of the post.

9. On 17 January 2012, the Applicant submitted a request for management evaluation to the Deputy Executive Director (DED) challenging the UNICEF Senegal CO decision to withdraw his name from the shortlist for the GS-5 post.

10. On 9 February 2012, the four candidates who had been successful in the written test were interviewed by a panel.

11. On 2 March 2012, the DED instructed the UNICEF Senegal CO to reopen the case and put forward the Applicant’s candidature to the recruitment panel considering the GS-5 Finance Assistant post within that office.

12. On 5 March 2012, the Applicant took the same test as the other candidates, graded in the same manner by the same persons, namely the Finance Officer who was the manager of the post and the Chief of Operations. The Applicant scored a mark of 14, making him the fourth ranked candidate out of five.

13. On 14 March 2012, the Applicant was interviewed by the same panel that interviewed the other four candidates. He was asked the same questions as the previously interviewed candidates.

14. On 30 March 2012, the panel finalized the Candidate Comparison Matrix for the post of Finance Assistant and found the Applicant not suitable. It recommended another candidate for the post.

15. On 10 April 2012, the Applicant was informed of his non-selection. On 14 April 2012, he requested clarifications and was informed on 16 April 2012 that he was ranked fourth out of the 5 candidates admitted to the interview.

16. On 10 May 2012, the Applicant filed a request for management evaluation to the DED of the decision not to select him stating that: (i) abolishing his post was not justified; (ii) the decision is flawed due to the fact that his candidature was at the end of the process, he was administered the test alone, his test was corrected separately from the others, he was interviewed on a separate date depriving him of anonymity and thus exposing him to the bias of the interview panel; and (iii) UNICEF should have identified a suitable post for him.

17. On 21 June 2012, the DED responded as follows:

[...] your request for management evaluation as far as it concerns the decision to abolish the post you encumbered in 2011 is time barred. [...] After careful and thorough consideration of all the relevant documentation gathered, no improper motives or extraneous factors have been identified in the decision not to select you for the post of Finance Assistant (GS-5), UNICEF, Senegal Country Office. The nature of the contested decision and the process followed leaves no doubt as to the legitimacy of the hiring

unit's decision to select the candidate it considered best to serve the interests of the Organization.

18. On 22 September 2012, the Applicant filed the current Application before this Tribunal challenging the decision, taken on 29 September 2011, to separate him from service together with the decision, notified to him on 10 April 2012, not to select him for a Finance Assistant GS-5 post to which he had applied. Further, the Applicant avers that the recruitment process was flawed due to a lack of impartiality.

19. On 30 October 2012, the Respondent replied.

20. On 17 December 2012, the Applicant filed his comments on the Respondent's reply.

Applicant's submissions

21. The Applicant contests the decision to abolish the post he encumbered, namely Finance Assistant GS-5. He was formally informed of the abolition of his post effective 31 December 2011 although his fixed term contract would have ended on 31 March 2012. He avers that there was no serious justification to reduce the budget. All the more so as the newly created posts for the 2012-2016 organization chart would cost more compared to the former one.

22. Further, according to the Applicant, UNICEF did not comply with its obligation regarding termination of appointment due to abolition of posts as per administrative instruction CF/AI/2010-001 (Separation from service), dated 10 March 2010. Paragraph 9.5 reads:

During the period of notice, a staff member is expected to apply for all available posts for which he or she believes he or she has the required competencies. HR managers will assist staff in identifying and applying for available and potentially suitable posts [...]. They will include the name of a staff member on lists of applicants and/or shortlists, even if the staff member did not submit an application. Every effort will be made to keep the staff member informed of the posts for which he or she is being reviewed.

23. The Applicant submits that he should have been given preference due to his status as a staff member on an abolished post. Therefore, the decision not to select him for the newly created Finance Assistant GS-5 post was improper. Further, the post for which he was not selected was the same as the one he had previously encumbered.

24. Lastly, the recruitment process was tainted by improper motives, including harassment and lack of impartiality from the Finance Officer and the Chief of Operations, who were aware of his identity when they marked his test. In this respect, the Applicant submits that in December 2011, the Finance Officer and the Chief of Operations recommended the withdrawal of his name from the short list alleging the ethical issues mentioned in the 19 November 2009 memorandum. On 5 March 2012 he was the only candidate who took the test that had been taken earlier on 5 January 2012 by the other candidates. On 14 March 2012, he was interviewed by the same panel who interviewed the other candidates on 9 February 2012. Therefore, the selection process was not as anonymous as it should have been.

Respondent's submissions

25. The Respondent rejected the claims of impropriety made by the Applicant regarding the abolition of the post he encumbered for it was part of a legitimate, well-documented and widely justified restructuring exercise. UNICEF operates solely on voluntary contributions hence the abolition of posts was due to the economic crisis, which was affecting the donors.

26. Further, this claim is not receivable by the Tribunal as it is time-barred. The Applicant received notice of the contested decision on 6 July 2011 and again on 29 September 2011. Consequently, in accordance with staff rule 11.2(c) he had 60 days to request management evaluation, which was until 5 September 2011 or 30 November 2011. The Applicant only filed his request for management evaluation on 10 May 2012, which was well after either of the deadlines earlier stipulated.

Therefore, in the absence of a timely management evaluation the claim is not receivable.

27. The Respondent submitted that no violation of CF/AI/2010-001 has occurred and the issue of possible damages need not be addressed. The Applicant conceded that he was timely informed of the restructuring plans and their impact on the staffing of his office as per section 9.3 of CF/AI/2010-001. He also conceded that he was timely served with a written notice of termination as per section 9.4. Further, as per section 9.5, the Applicant applied to all available posts for which he believed he had the required competencies. Therefore there was no other vacancy to which his name could have been added by the Human Resources Manager.

28. The Respondent conceded that there is one issue where section 9.5 of CF/AI/2010-001 was originally not followed, namely the obligation to shortlist the Applicant, as an interested staff member, for all available and potentially suitable posts. The UNICEF Senegal CO, following guidance from the Regional Human Resources bureau on the weight to be given to a 2009 performance issue, decided not to shortlist the Applicant for the newly created GS-5 finance assistant post, which he had applied for.

29. The Applicant requested management evaluation of the decision not to short list him for said post and, in keeping with section 9.5, the DED reversed the contested decision. As instructed, the UNICEF Senegal CO reopened the case and invited the Applicant to participate in the recruitment exercise, presenting him with the same test and interview the other candidates had taken. In doing so, the obligations described in section 9.5 were fully complied with by the Administration.

30. In light of a foreseen increase in the abolition of posts due to the economic crisis affecting UNICEF donors, on 22 September 2011, the DED issued a memorandum on “Corporate support to Staff on Abolished Posts” to the Regional Directors and UNICEF Representatives stating that:

UNICEF has an obligation to make every possible effort to place staff members who are on abolished posts on other available posts for which they are suitable”, “[if] a staff member on an abolished post is one of the recommended candidates, he/she would be given preference even if he/she is not the first recommended candidate unless strong reasons relating to the relative competence and integrity dictate otherwise.

31. Thus, should a staff member on an abolished post be found suitable for a post, though not the best of all the suitable candidates, preference must be given to that staff member. The DED’s memorandum did not however create an obligation to place all staff members on abolished posts nor did it eliminate the competitive recruitment process established by Executive Directive CF/EXD/2009-008 (Staff Selection Policy). Preference over other candidates shall be given if, and only if, the staff on an abolished post has been found suitable for the post concerned.

32. The Applicant’s status as a staff member on an abolished post was fully and duly considered. His condition as staff on an abolished post was well known by the hiring unit and was clearly brought to the attention of the Selection Panel. Section 9.8 of CF/AI/2010-001 reads “A post is ‘suitable’ if the staff member on an abolished post has the core and functional competencies required for the post, as assessed in the respective staff selection process (see CF/AI/2009-008 on Staff selection)”. The Selection Panel justified in writing why the Applicant was not recommended for the post and how his core and functional competencies did not match those required for the post, making him an unsuitable candidate. There is no obligation for UNICEF to place staff on abolished posts without a competitive process.

33. The Applicant had been accusing the Operations Officer and the Finance Officer, the two persons reviewing his test, of harassment and abuse of authority since at least 2010. However, no complaint had been filed by the Applicant, nor has any evidence been produced to support such accusations. During management evaluation, no evidence was found to *prima facie* substantiate any of the allegations; therefore no formal investigation was opened.

34. The Applicant also claimed that the selection process was tainted by lack of “neutrality” because his test was not anonymous, as were those of the other candidates. The Respondent concedes that, contrary to what occurred with the other shortlisted candidates, the two persons reviewing the Applicant’s test were aware of whose test they were scoring. Nonetheless, this fact had no negative effect on the scoring and, given that the Applicant was the only candidate added for consideration due to a management evaluation he had requested, it was simply inevitable. There is no evidence to suggest any ill-will or prejudice on the part of the two persons who corrected the Applicant’s test or that he was negatively affected.

35. In fact, the grade attributed to the Applicant was only 1.63 points below that achieved by the selected candidate. The candidate who received the highest score in the written test was not recommended by the Selection Panel as the best candidate. In the absence of proven bias, prejudice or damage, there is no reason to second guess the grade given by the two reviewers. The record shows that the Applicant’s candidature was given full and fair consideration by the Selection Panel. The Applicant was given the same written test as the other candidates. The same persons reviewed the tests of all candidates. The same panel interviewed all the candidates and posed the same questions. The selection process was reviewed and approved by a competent review body (Central Review Body) and finally endorsed by the Representative.

36. Lastly, the Respondent rejects the Applicant’s claim stating that the post for which he was not selected was the same as the one he had previously encumbered. In order to approve the change of a job description there must be a difference of more than 50% of the functions. In the current case, the UNICEF Senegal CO prepared the proposal and this was approved by the Job Classification Panel at the Regional Office, precisely because there were substantial differences between the previous post (which was abolished) and the newly created one. Consequently, although the name and level remained the same, the requirements and expectations of the job differed

substantially. Therefore, it is inaccurate to claim that the experience the Applicant had in his previous post necessarily made him suitable for the newly created post.

Issues

37. (i) Whether the Application in regard to the abolition of his post and his separation from service is receivable; (ii) whether UNICEF complied with CF/AI/2010-001 in regard to the recruitment for the post of GS5 Finance Assistant and (iii) whether on the assumption that CF/AI/2010-001 was complied with, the due process rights of the Applicant were respected during the recruitment process.

Considerations

Abolition of post and separation from service

38. A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment must do so by requesting management evaluation within 60 calendar days from the date on which he/she received notification of the decision (staff rule 11.2 (a) and (c)). The Tribunal notes that the Applicant received the final contested decision to abolish his post on 29 September 2011. Accordingly, he should have filed his request for management evaluation by 30 November 2011, at the latest. The Applicant only filed his request for management evaluation on 10 May 2012 which is well after the deadline. The DED rightfully decided that the Applicant's request on the decision to abolish the post he encumbered in 2011 was time-barred.

39. The Tribunal has no power to deal with the issue of deadlines for management evaluation¹ except in so far as the Tribunal considers that the Management Evaluation Unit has made an incorrect assessment of the factors relevant to the issue of deadlines².

¹ *Ajdini* UNAT/2011/108

² *Manco* UNDT/2012/104

40. The Tribunal therefore holds that the Application in so far as it relates to the abolition of the Applicant's post and his separation from service is not receivable³ *ratione temporis*.

Non-selection for the post of GS-5 Finance Assistant

41. Here, the Tribunal will look at whether UNICEF complied with CF/AI/2010-001 in regard to the recruitment for the post of GS-5 Finance Assistant.

42. The Applicant submitted a request for management evaluation on 17 January 2012 challenging his non-selection for the position of GS-5 Finance Assistant. On 2 March 2012, the DED issued a report noting that the recruitment process had not been finalized; therefore it instructed the UNICEF Senegal CO to reopen the case and put forward the Applicant's candidature to the Recruitment Panel considering the GS-5 Finance Assistant post within that office.

43. Basing its comments on CF/AI/2010-001 and the Memorandum on "Corporate support to Staff on abolished posts", dated 22 September 2011, the DED's report stated the following:

However, the Memorandum is also very clear on how determinations as to suitability of staff members on abolished posts are reached. This decision is reached in two stages. First, "[i]n line with current UNICEF policy, Human Resources Managers will be adding the names of staff members on abolished posts to the shortlist of potentially suitable posts where these staff members meet the minimum requirements of those posts, identifying them as staff on abolished posts.

Then, upon consideration of the recruitment panel, either the staff member on an abolished post is selected or he or she is not, but then "Non-selection of a staff member on abolished post should be justified in writing, explaining why the staff member who meets the minimum requirements for the post is not preferred and how his or her core and functional competencies as assessed in the staff selection process did not match those required for the post".

³ *Rosana* 2012-UNAT-273

In your case, the responsible HR unit considered that you were found unsuitable for the post. It was considered that the official record showed that you had not always demonstrated the integrity required of a Finance Assistant and hence, you were not even considered as “potentially suitable”. Your candidature was not examined by the panel established to recommend appointment to the post in question.

(...) The memorandum of November 2009 is part of the official record. The facts described therein were not considered serious enough to warrant a disciplinary investigation or to justify the non-extension of your contract. This does not, however, prevent the Administration from taking them into account when examining your suitability for a newly-created post.

Nevertheless, we agree that, as no disciplinary case was pursued against you as a result of said incident and as your contract was extended shortly after the reprimand, the Administration did not consider this incident as sufficiently grave to consider you unsuitable for continued employment with UNICEF. Hence, it cannot now invoke it as sufficient to justify not even allowing the Panel to consider your candidature for a vacant position.

(...) The Panel, in its role, will have to examine your candidature along with that of all the other candidates, taking into account results of any interviews, tests and your previous record of performance with UNICEF, including your Performance Evaluation reports as well as the Memorandum of November 2009.

44. Following the DED’s report, the Applicant was considered for the position and took the required test on 5 March 2012 and was interviewed on 14 March 2012. Therefore, the Tribunal considers that UNICEF complied with Administrative Instruction CF/AI/2010-001 and the Memorandum on “Corporate support to Staff on abolished posts”, dated 22 September 2011.

Was the recruitment process flawed?

45. The Tribunal is tasked here with determining whether the due process rights of the Applicant were respected during the recruitment process.

46. Those who took the decision not to shortlist the Applicant for the vacancy took that decision on the ground that he had committed an error of judgment in the handling of bids in 2009 and had thus compromised the integrity of the procurement

process and violated the standards of conduct of the international civil service and the financial rules. This allegation was never the subject of any investigation and the Applicant was never sanctioned in any manner for this alleged error of judgment.

47. Following the decision of the DED that it was wrong not to shortlist the Applicant, he was shortlisted, sat for a written test and was interviewed. The very persons who had already passed a value judgment on his suitability to be on the shortlist were the very ones who marked his written test and interviewed him. The Tribunal is not reviewing the marking of the written test or the ratings the Applicant obtained at the interview. The Tribunal is only tasked with finding out whether, given the circumstances, the process was flawed in any manner. The Tribunal will here refer to what the United Nations Appeals Tribunal (UNAT) stated in *Rolland* 2011-UNAT-122:

We also hold that there is always a presumption that official acts have been regularly performed. This is called the presumption of regularity, but it is a rebuttable presumption. If the management is able to even minimally show that the appellant's candidature was given a full and fair consideration, then the presumption of law is satisfied.

48. Though there is a presumption that the selection process may have been regular, that presumption is not an absolute one but is rebuttable. In *Simmons* UNDT/2013/050, Meeran J held:

Allegations of bias and prejudice are easy to make and usually extremely difficult to prove because of the absence of affirmative evidence. Accordingly the Tribunal must be prepared to draw inferences from the primary facts. If the facts established do not reasonably point to the possibility of bias or prejudice that will normally be the end of the matter.

49. There is no direct evidence that the decision makers in the present case were actually biased. However, the review of the Tribunal does not stop here because there are two aspects to consider when bias or impartiality is an issue. It is well settled that the two tests to determine whether bias or impartiality exists are subjective or objective. The European Court of Human Rights has held that:

The existence of impartiality for the purpose of Article 6-1 [European Convention on Human Rights] must be determined according to a subjective test, that is on the basis of the personal conviction of the judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect⁴.

50. On the objective test The European Court held:

What is decisive are not the subjective apprehensions of the suspect, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified⁵.

51. The same approach should be adopted when the decision of an administrative body in regard to appointments or promotions is being reviewed. Under the subjective test there is no evidence that the decision makers were or would have held a personal bias against the Applicant. The personal impartiality of the decision makers must be presumed until there is proof to the contrary and in the present case there is no such proof⁶.

52. On the objective test the Tribunal's task is to look at the primary facts and determine whether from those facts it can be inferred whether "the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased"⁷. What then are the primary facts? By not shortlisting the Applicant initially due to the 2009 memorandum it is obvious that the decision makers had already formed an adverse view of the Applicant. When the Administration was compelled to consider his application, the same persons who had disqualified him initially ended up interviewing and evaluating his performance and found him unsuitable for the vacancy. Can it be said that in such circumstances

⁴ *Saraiva v Portugal*, Judgment by European Court of Human Rights of 22 April 1994, Series A, No. 286-B, p.38, paragraph 33.

⁵ *Nortier v The Netherlands*, Judgment by European Court of Human Rights of 23 August 1993, paragraph 33.

⁶ *Hauschildt v Denmark*, Judgment by European Court of Human Rights, 24 May 1989, Series A No. 154, p.21, paragraph 47.

⁷ *Magill v. Porter* [2002] 2 AC 357 House of Lords referred to by Shaw J. in *Finniss* UNDT/2012/200

doubts would not be raised as to the impartiality of the decision makers? The answer to this question is clearly no.

53. The decision makers should have borne in mind the nature and scope of their mandate as members of a panel processing a recruitment exercise. Shaw J made that very clear in the case of *Finniss* UNDT/2012/200 by observing:

The Tribunal notes that an interview panel in a selection exercise is not a tribunal and has no final powers of decision making. It takes one step in a process but it is an important step. It is the only opportunity candidates have to provide information and create an impression apart from their Personal History Profile (PHP) records. The interview panel has the power to recommend and to provide a reasoned analysis of the suitability of candidates for the post relied on by the ultimate decision maker. To avoid the tainting of the final decision it is incumbent on the interview panel to be and to be seen to be impartial, objective and free from bias.

54. It is not the view of this Tribunal that in proceeding in that manner the examiners would have been subjectively biased but objectively a reasonable observer would be bound to draw the irresistible inference that the possibility of bias existed. It would have been more commensurate with fairness that people other than those who initially disqualified the Applicant from being shortlisted should have examined and interviewed him. Unfortunately that was not the case. That was the view expressed by UNAT in *Finniss* 2014-UNAT-397, referring to a decision by the Administrative Tribunal of the International Labour Organization (ILOAT)⁸, where it was stressed by ILOAT that:

It is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to his jurisdiction must withdraw in cases in which his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the person affected by the decision to suspect its author of prejudice.

⁸ *Varnet v. UNESCO*, Judgment No. 179, 8 November 1971.

Persons taking part in an advisory capacity in the proceedings of decision-making bodies are equally subject to the above-mentioned rule. It applies also to members of bodies required to make recommendations to decision-making bodies. Although they do not themselves make decisions, both these types of bodies may sometimes exert a crucial influence on the decision to be taken.

Decision

55. The Tribunal concludes that the Application in regard to the abolition of the post and separation from service is not receivable. This claim is therefore dismissed in its entirety.

56. The Applicant has satisfactorily established that there was a flaw in the recruitment process and that this flaw breached his right to due process.

Compensation

57. Article 10.5 of the UNDT statute materially provides that in cases of appointment the Tribunal may as part of its judgment order rescission of the contested administrative decision and/or compensation that shall not normally exceed the equivalent of two year's net base salary of the Applicant.

58. Due to the passage of time, rescission of the selection decision is not a feasible option. However, in light of the fact that the Applicant was a staff member on an abolished post, if he had been one of the recommended candidates, he would have been given preference for selection for the new Finance Assistant position in accordance with the 22 September 2011 memorandum on "Corporate support to Staff on Abolished Posts". Unfortunately, he lost this important advantage since he was not one of the recommended candidates.

59. Accordingly, the Tribunal awards him three months net base salary as at the time of the selection decision.

60. The above amount shall be paid within 60 days of the date that this Judgment becomes executable. Interest will accrue on the above amount from the date of this Judgment at the current US Prime rate until payment. If the above amount is not paid within the 60 days period an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Vinod Boolell

Dated this day of 18th June 2014

Entered in the Register on this day of 18th June 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi