



**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

PALIT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Alister Cumming, UNICEF  
Mathias Schuster, UNICEF

## **Introduction**

1. On 18 December 2018, the Applicant, a former Private Sector Fundraising Officer with the India Country Office in New Delhi of the United Nations Children's Fund (“UNICEF”), filed an incomplete application to contest his separation from service upon abolishment of post and his non-selection to the post of Fundraising Officer. The Applicant completed his application on 8 February 2019.

2. On 11 March 2019, the Respondent filed his reply contending that the application is not receivable *ratione temporis* with respect to the decision not to renew the Applicant’s fixed-term appointment due to abolishment of post. The Respondent further submits that a challenge to the non-selection decision is without merit.

## **Facts and procedural history**

3. In 2011, the Applicant joined the UNICEF India Country Office on a fixed-term appointment as a Private Sector Fundraising Officer at the National Officer level (NO-A).

4. By email of 31 October 2017, the Representative of the UNICEF India Country Office, *inter alia* informed the Applicant that the approval of the UNICEF India Country Programme 2018-2022 would result in the abolition, upgrading or downgrading of a number of posts, including the one that the Applicant encumbered.

5. More specifically, a letter dated 5 October 2017, attached to the above email, notified the Applicant that his post would be abolished and that he would be separated from service upon expiration of his fixed-term appointment on 30 June 2018 if he was not selected to another post before this date.

6. As per the parties' submissions, in November 2017 a newly created post of Fundraising Officer at the NO-B level was advertised and, on 25 November 2017, five shortlisted candidates, including the Applicant, took the written test. The Applicant was the only candidate who passed the test.

7. In January 2018, the post of Fundraising Officer at the NO-B level was re-advertised. The Applicant re-applied for the post and was shortlisted for the written test. This time, no candidate passed the test.

8. On 30 January 2018, the Applicant was informed that he would be placed on a performance improvement plan ("PIP") related to his communication skills.

9. On 13 March 2018, the Applicant filed a first request for management evaluation ("first MER") contesting *inter alia* the "targeted" abolishment of his post. He argued that he was punished for his informal reporting of recruitment irregularities in 2016.

10. In the same month (March 2018), the Applicant also filed a complaint with the Office of Internal Audit and Investigations ("OIAI"), UNICEF, regarding harassment, targeted recruitment and abolishment of post, and various other conducts by his supervisors.

11. By letter dated 26 April 2018, the Deputy Executive Director, Management, UNICEF, responded to the Applicant's first MER. In this letter, the Deputy Executive Director:

- a. Upheld the decision not to renew the Applicant's fixed-term appointment due to abolishment of the post he encumbered; and
- b. Informed the Applicant that his allegations of recruitment irregularities had been forwarded to OIAI.

12. On 15 May 2018, the Applicant filed with the Ethics Office, UNICEF, a complaint of and a request for protection against retaliation.

13. On 6 June 2018, the Applicant was informed of his non-selection to the re-advertised post of Fundraising Officer at the NO-B level.

14. On 29 June 2018, the Applicant received a response from the Ethics Office, UNICEF, who informed the Applicant of its finding that no *prima facie* case of retaliation had been established.

15. On 30 June 2018, the Applicant was separated from service upon the expiration of his fixed-term appointment.

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

17. On 5 August 2018, the Applicant filed a second request for management evaluation (“second MER”) contesting his 6 June 2018 non-selection to the re-advertised post of Fundraising Officer at the NO-B level.

18. On 19 September 2018, the Administration responded to the Applicant’s second MER informing him that following a review of his case, it was found that the selection process in question was inconsistent with UNICEF policies.

19. The Administration explained that the India Country Office had decided to re-advertise the post on the grounds that there was an insufficient number of qualifying applicants who had passed the test, as the Applicant was the only candidate who had passed it. However, the Administration found that as the Applicant passed the written test he should have been interviewed and, therefore, the Administration instructed the India Country Office to interview the Applicant for the post on a “non-competitive basis”.

20. The Administration further instructed that the Applicant be appointed to the post if he was found suitable and, if so, that he 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.

21. On 26 September 2018, the India Country Office invited the Applicant to an interview for the post of Fundraising Officer at the NO-B level. He was asked to confirm his participation to the interview on 3 October 2018. The Applicant responded that he was willing to participate in the interview but considering the pending investigation of his complaints by OIAI, he requested that the interview be rescheduled to a later date.

22. On 27 September 2018, the Applicant replied to the response to his second MER. The Applicant suggested that since his primary complaints of harassment and abuse of authority as a result of his “whistleblowing act” were still under review by OIAI and the Ethics Office, an interview should be held at a mutually agreeable later date.

23. On 1 October 2018, the Administration responded to the Applicant that an instruction that the India Country Office conduct an interview on a non-competitive basis was based solely on a management evaluation of the procedural and legal aspects of the selection process. It also noted that OIAI and the Ethics Office were separately considering his claims and that they would each inform him of the respective outcome in due course. Therefore, the Administration informed the Applicant that an interview on a non-competitive basis would proceed as scheduled.

24. On 15 and 18 October 2018, the India Country Office responded that after consulting with Headquarters, it had been advised to proceed with the interview in accordance with UNICEF policies and procedures and again invited the Applicant to an interview on 26 October 2018.

25. On 22 October 2018, the Applicant responded that he was “not in a position to undertake the interview”.

26. On 23 October 2018, the India Country Office acknowledged receipt of the Applicant’s message declining the interview invitation.

27. On 1 November 2018, the Applicant responded that he was not declining the interview but only asking for a rescheduling while the OIAI investigation was underway.

28. On 12 November 2018, the India Country Office responded that in view of the urgent need to fill the post, the interview could not be delayed until the completion of the OIAI investigation. The Country Office further informed the Applicant that should he not accept the interview invitation, it would proceed with the recruitment process without him.

29. On 14 November 2018, the India Country Office again followed up with the Applicant regarding the interview invitation.

30. On 16 November 2018, the Applicant expressed his “apprehensions and lack of faith in the process” and pointed out that the India Country Office had not “outlined any protective measures that will be taken to ensure [his] faith in these recruitment efforts”. He concluded that he had “no means or intent to stop you from going ahead with the process” but he will exercise every option to seek justice.

31. On 18 December 2018, the Applicant filed the present application, which was completed on 8 February 2019.

32. On 11 March 2019, the Respondent filed his reply.

33. On 15 September 2020, pursuant to Order No. 87 (GVA/2020) dated 19 August 2020, the Applicant filed a submission in response to the Respondent’s reply.

**Parties' submissions**

34. The Applicant's principal contentions are:

a. The basis of the current application is the second management evaluation outcome, and his mentioning of the first management evaluation outcome does not render his application irreceivable;

b. A series of actions taken by the India Country Office, including abolishment of his post, his placement on PIP, his non-selection and his separation, were the result of retaliation against him for his whistleblowing act;

c. The India Country Office's actions were in violation of guidelines on support to be given to staff on abolished posts, under which Human Resources managers should assist staff members in identifying and applying for potential, suitable posts;

d. His supervisors violated performance management policy by using the performance management system to threaten him and deprive him of development opportunities and hurt his candidature for the newly created post of Fundraising Officer at the NO-B level; and

e. His candidatures were not given full and fair consideration as the selection processes were biased. The fact that a fair and transparent process with protective measures was not guaranteed to him, even after the management evaluation response, validates his apprehensions and lack of faith in the process.

35. The Respondent principal contentions are:

a. The application is not receivable *ratione temporis* with respect to the decision not to renew the Applicant's fixed-term appointment due to abolishment of post, as the application was filed after the 90-day deadline counted as from the

time the Applicant received the response to his first management evaluation request;

b. The only receivable matter is the Applicant's non-selection for the post;

c. The Applicant's claims regarding support to staff on abolished posts and performance management issues are not subject to review in this case as the Applicant failed to request management evaluation of these matters and, thus, he is precluded from raising them now;

d. The non-selection decision was reviewed during the management evaluation process and subsequently corrected in accordance with the applicable UNICEF regulatory framework and, yet, the Applicant declined to participate in the interview; and

e. There is no obligation to provide any "protective measures" to the Applicant.

## **Consideration**

### *Receivability*

36. The first issue the Tribunal has to address is the receivability of the contested decision to separate the Applicant due to the abolition of the post he encumbered, namely that of Private Sector Fundraising Officer at the National Officer level (NO-A).

37. By email of 31 October 2017, the Applicant was informed that his post, along with several other posts, was to be abolished due to restructuring. A letter dated 5 October 2017, attached to this email, unequivocally notified the Applicant of the abolition of the post he encumbered and the conditions under which his separation from service would take place.



38. As per the applicable provisions, the 60-day deadline to request management evaluation of the 31 October 2017 decision expired on Monday, 1 January 2018. The Applicant filed his first MER on 13 March 2018 and indicated therein that the basis for it was the 31 October 2017 email. Consequently, the Applicant's request for management evaluation was out of time. On this ground, the application concerning the Applicant's separation from service due to post abolition is not receivable *ratione materiae*.

39. Even if the Tribunal were to assume that, for any undocumented reason, the Applicant's first MER is to be deemed as timely, the record shows that the Applicant received a reply on 26 April 2018. Under art. 8 of the UNDT Statute, an application is receivable if it is filed within 90 days of receipt of the management evaluation response. In the case at hand, this deadline expired on 25 July 2018 and the Applicant filed his application on 17 December 2018.

40. It is well established case law that it is a staff member's responsibility to ensure that he or she is aware of the applicable procedure(s) and timelines, and ignorance of the law cannot be invoked in support of *inter alia* missed deadlines. Also, the Tribunal took due note that in March 2018 the Applicant filed a complaint with OIAI and that, on 15 May 2018, he requested protection against retaliation with the Ethics Office. However, these procedures neither suspend nor waive the deadlines to file an application before the Tribunal.

41. Finally, the Tribunal does not have the power to waive statutory deadlines (see *Costa* 2010-UNAT-036, *Terragnolo* 2015-UNAT-566, *Gehr* 2016-UNAT-613) and it is clear from the evidence on file that the application concerning the Applicant's separation from service due to post abolition is time-barred and, consequently, not receivable *ratione temporis*.

42. The Tribunal will now turn to the analysis of the alleged unlawfulness of the decision not to select the Applicant for the re-advertised post of Fundraising Officer at the NO-B level.

*Non selection for the re-advertised post of Fundraising Officer*

43. The Applicant contests the decision not to select him for the above position on the following grounds:

- a. His non-selection and separation resulted from retaliation against him for his whistleblowing acts;
- b. The India Country Office's actions were in violation of guidelines on support to be given to staff on abolished posts, under which Human Resources managers should assist staff members in identifying and applying for potential, suitable posts;
- c. His supervisors violated performance management policy by using the performance management system to threaten him and deprive him of development opportunities and hurt his candidature for the post in question; and
- d. His candidature was not given full and fair consideration as the selection processes were biased. The fact that a fair and transparent process with protective measures was not guaranteed to him even after the management evaluation response validates his apprehensions and lack of faith in the process.

44. The burden to prove unlawfulness in relation to his non-selection lays with the Applicant as per the consistent internal case law establishing a presumption of regularity of official acts (see *Rolland* 2011-UNAT-122):

26. There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given full and fair consideration, then the presumption of law stands satisfied. Thereafter, the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.

45. This principle was later reaffirmed in *inter alia* *Simmons* 2014-UNAT-425, *Landgraf* 2014-UNAT-471 and *Niedermayr* 2015-UNAT-603.

46. Therefore, it is incumbent on the Applicant to argue and demonstrate that his non-selection was tainted by improper motives, bias or even as retaliation against him.

47. According to the evidence on file, following the first advertisement of the position at stake, five shortlisted candidates, including the Applicant, took a written test on 25 November 2017. The Applicant was the only candidate who passed it.

48. Nonetheless, in January 2018, the post of Fundraising Officer at the NO-B level was re-advertised. The Applicant re-applied for the post and was shortlisted for the written test. This time, no candidate passed the test.

49. Following a management evaluation request from the Applicant in relation to said recruitment process, the Administration explained that the India Country Office decided to re-advertise the post on the ground that there was an insufficient number of qualifying applicants who had passed the test as the Applicant was the only candidate who had passed it. However, the Administration found that the Applicant should have been interviewed and, therefore, it instructed the India Country Office to interview him for the post on a non-competitive basis.

50. The Administration further instructed that the Applicant be appointed to the post if he was found suitable and that he would 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.

51. The Tribunal recalls that the purpose of a management evaluation request is precisely to afford the Organization the possibility to correct its own procedures if a flaw in those procedures is identified (see, in this regard, *Kalashnik* 2016-UNAT-661).

52. The Tribunal is satisfied that the Administration took steps to correct the selection procedure, which resulted in instructing the India Country Office to invite the Applicant to an interview.

53. As a consequence, on 26 September 2018, according to the management evaluation, the India Country Office invited the Applicant to an interview for the post of Fundraising Officer at the NO-B level.

54. However, it is also proven that, despite three attempts made by the Administration to interview the Applicant, he consistently refused to attend it. In this connection, the Tribunal refers to the chronology of events outlined in paras. 23 to 30 above.

55. The Tribunal recalls that, by the time the India Country Office called the Applicant for an interview, he was already aware that the Ethics office had not found a *prima facie* case of retaliation. Indeed, it was on 29 June 2018 that the Applicant received a response from the Ethics Office.

56. Moreover, at the time the Applicant refused to attend the interview, OIAI's investigation was still underway.

57. The Tribunal highlights in this regard that the fact that an investigation was taking place at the time does not lead to the immediate conclusion that harassment and bias had actually occurred thus tainting the recruitment process. Consequently, the Tribunal finds that the Applicant has not met his burden of proof.

58. Also, the Tribunal recalls *Loeber* 2018-UNAT-836, where the Appeals Tribunal stated (emphasis added):

29. A special aspect of this case must be highlighted. Mr. Loeber chose voluntarily not to participate in the interview. Mr. Loeber claims that he was not required to do so, as the composition of the Panel was irregular, compromising its impartiality. He did not agree with the justification provided by the Administration, as in his view his concerns were not properly considered. As he stated during the UNDT hearing, for him, either there should have been a change in the composition of the Panel or an alternative Panel should have been created to interview him.

30. Mr. Loeber chose not to participate in the interview due to his belief that the Panel was biased against him. However, he has failed to present sufficient evidence of such bias. **Furthermore, in failing to participate in the necessary recruitment procedures, he is estopped from contesting this aspect and without standing to contest the selection outcome.**

59. The Tribunal finds that the same reasoning can be transposed to the current case. The Applicant's refusal to attend the interview results from his own volition and prevents the Tribunal from assessing if the decision not to select him for the readvertised position in the India Country Office, was, in fact, tainted by any improper motive.

60. Therefore, the Applicant's allegations about his non-selection are without merit.

### **Conclusion**

61. In view of the foregoing, the application is dismissed.

*(Signed)*

Judge Teresa Bravo

Dated this 14<sup>th</sup> day of October 2020

Entered in the Register on this 14<sup>th</sup> day of October 2020

*(Signed)*

René M. Vargas M., Registrar, Geneva