



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/038

Judgment No.: UNDT/2021/056

Date: 19 May 2021

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

MUC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Federica Midiri, UNDP

Introduction

1. On 18 August 2020, the Applicant, a staff member with the United Nations Development Programme (“UNDP”), filed an application contesting her exclusion from a selection process for the Investigations Advisor post at the P-5 level (“the post”) in the UNDP Office of Audit and Investigation (“OAI”) and UNDP’s failure to inform her of her exclusion.
2. For the reasons stated below, the application is rejected.

Facts

3. Since May 2014, the Applicant serves as Investigations Specialist at the P-4 level in the Policy, Quality Assurance and Special Investigations Unit (“PQSI”) of OAI.
4. In October 2016, the Applicant married her colleague who occupies the post of Investigations Manager at the P-5 level in the Investigations Section, OAI.
5. On 9 November 2016, following the Applicant’s marriage, the Director of OAI prepared a note-to-file to record the Director of OAI’s discussion with the Office of Human Resources (“OHR”) concerning “OAI’s arrangement to address potential conflict of interest issues in connection with the marriage of [the Applicant and her spouse], staff member[s] of Investigations Section”. In this note, the Director of OAI noted that to manage the potential conflict of interest issues, the following arrangements were established:
 - a. Separate reporting lines were to be maintained (i.e. the Applicant reports to her P-5 manager and the Applicant’s spouse reports to the Deputy Director (Investigations) of OAI); and

- b. In the event the Applicant was requested to investigate cases and thus had to report to her spouse as operations manager, another staff member would be requested to act as the officer-in-charge for her spouse.

6. In addition, it was stated in the note that “[i]f issues regarding perceived conflict of interests, or other professional issues perceived to be related to their marriage, [are] brought to the attention of OAI management, the arrangements will be reassessed”.

7. In April 2020, OAI management learned that the then Investigations Advisor at the P-5 level, the Head of PQSI, would be leaving UNDP as of 1 May 2020. On 2 April 2020, the Deputy Director (Investigations) of OAI asked the Applicant to act as the officer-in-charge (“OIC”) of PQSI from 1 May 2020, and the Applicant agreed.

8. On 20 April 2020, the Director of OAI wrote an email to the Director of the UNDP Ethics Office to seek advice regarding the potential conflict of interest that could arise from the Applicant’s acting as OIC of PQSI. The Director of the Ethics Office responded on the same day that in his opinion, “the conflict already exists as the staff member works in the same organizational unit (Investigations) as her spouse” and the problem might “actually be exacerbated” if the Applicant became OIC of PQSI.

9. On 22 April 2020, the Deputy Director (Investigations) advised the Director of OAI that the Applicant’s spouse would be on annual leave from 1 May to 10 June 2020, which, in his opinion, mitigated the situation.

10. On 28 April 2020, the Director of OAI shared the draft note-to-file regarding the Applicant’s placement as OIC of PQSI with OHR. The Director noted that the Head of PQSI would be leaving and that the Applicant was the only person who could act as OIC until the completion of a recruitment process for the post left vacant by the Head of PQSI. He further stated that this arrangement would not create a conflict of interest and would not violate the UNDP Policy on Family Relationships as the Applicant and her spouse would not be in a reporting relationship as both would report to the Deputy Director (Investigations).

11. On 1 May 2020, the Director of OHR responded that he could not endorse the Applicant's placement as OIC of PQSI in light of the Director of the Ethics Office's advice of 20 April 2020.

12. On the same day (1 May 2020), the Director of OAI wrote an email to the Deputy Director (Investigations) stating that he disagreed with the advice from the Director of OHR and asked for a meeting with the Director of OHR for further discussion.

13. On 7 May 2020, the vacancy announcement for the post was published and the Applicant applied on 18 May 2020.

14. On 14 May 2020, following a meeting with the Director of OAI, the Director of OHR endorsed the Applicant's placement as OIC of PQSI until 30 June 2020 in order to facilitate the work of the office in the immediate term. However, the Director of OHR emphasized "the importance of avoiding any potential conflict of interest, and even the appearance of such, given the mandate of [OAI]" and stated that he would not approve "any long term OIC arrangement or substantive appointment in line with the advice already provided by [the Director of the Ethics Office] and in line with the Family Relationship policy".

15. On 5 June 2020, the OAI Operations Manager emailed OHR for advice on the potential conflict of interest arising from the Applicant's application for the post.

16. On 9 June 2020, the Senior Human Resources Business Advisor of OHR ("the HR Advisor") responded. Recalling the Director of OHR's earlier advice in the email of 14 May 2020 that he would not approve "any long term OIC arrangement or substantive appointment in line with the advice already provided by [the Director of the Ethics Office]", she stated that the Director of OHR's advice would still stand.

17. On 10 June 2020, the OAI Operations Manager informed the HR Advisor that "OAI has followed the corporate decision that [the Applicant's] candidacy is not eligible for further consideration for this recruitment" and asked whether OAI should

inform the Applicant of the office's decision at the long-listing stage or wait until the end of the recruitment process as per usual practice.

18. On the same day (10 June 2020), the Deputy Director (Investigations) of OAI responded that he disagreed with the decision to disqualify the Applicant. In his opinion, if the Applicant were to be selected for the post, “[the Applicant and her spouse] would be at the same level, thus negating any influence either could have over the other's decisions”. He further advised the Director of OAI that if it was decided to disqualify the Applicant, she should be formally advised so.

19. On 11 June 2020, the HR Advisor advised OAI that OHR would recommend that the “usual process” be followed. She stated that as for “normal recruitments”, HR would only inform candidates who were interviewed of the outcome of the selection process. However, since the Applicant was an internal candidate, she could be informed once recruitment was complete. On the same day, the Deputy Director (Investigations) emailed the Director of OAI to express his disagreement with the OHR's advice not to inform the Applicant until the completion of the recruitment process and advised him that the Applicant should be formally notified immediately.

20. On 22 June 2020, the Director of OAI held further discussions with the Director of OHR in writing. The Director of OHR advised not to inform the Applicant of the decision until the recruitment process was completed and confirmed that the Applicant should not be further invited to the written test.

21. On 24 June 2020, the Director of OAI informed the Deputy Director (Investigations) of OAI that after the consultation with the Director of OHR, the Applicant would not be notified of her non-selection until the recruitment process was completed. The Deputy Director (Investigations) responded that he disagreed with the decision and believed that it was “nonsensical and unethical” not to inform the Applicant of the decision. The Director of OAI responded that he would also have preferred to inform the Applicant immediately.

22. On 25 June 2020, the Director of OAI informed the OAI Operations Manager that “[t]he conclusion from the consultations with OHR is that [the Applicant’s] application cannot be taken forward due to the UNDP policy on family relationship, and that she will be notified after the recruitment process has been concluded”.

23. On 7 July 2020, candidates were invited to take the written test for the post. On the same day, the Applicant requested information on the status of the recruitment, noting that she had learned that other candidates had been invited to the written test for the post.

24. On 8 July 2020, the Director of OAI consulted with OHR regarding the Applicant’s inquiry on the status of the recruitment. OHR responded that in this case “it would be best for [him] to respond to [the Applicant] and inform her that [the Director] consulted with Ethics Office” and OAI decided not to move forward with her candidacy due to the Ethics Office’s advice.

25. On 9 July 2020, the Director of OAI replied to the Applicant informing her that, following consultation with the Ethics Office and the Director of OHR, he had decided not to move forward with her application for the post. The Director of OAI further advised the Applicant that while the standard UNDP policy was to inform candidates after the recruitment process was completed, OHR advised him that it would be appropriate to inform the Applicant at this stage as a response to her inquiry.

26. On 13 July 2020, the Applicant submitted a request for management evaluation of the decision to exclude her candidacy from consideration for the post and the decision not to inform her of her exclusion.

27. On 10 August 2020, the Applicant was notified that, following the management evaluation, the contested decision was upheld.

Consideration

28. The Applicant contests the following two decisions: (1) decision to exclude her from a selection process for the post due to conflict of interest and (2) the failure to inform her of her exclusion.

Decision to exclude the Applicant from the selection process due to conflict of interest

29. Staff regulation 1.2(m) provides that “[a] conflict of interest occurs when, by act or omission, a staff member’s personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member’s status as an international civil servant” and “[w]hen an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization”.

30. Staff rule 4.7 provides specific rules concerning appointment and family relationships as follows:

Family relationships

(a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.

(b) The spouse of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.

(c) A staff member who bears to another staff member any of the relationships specified in paragraphs (a) and (b) above:

(i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;

(ii) Shall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

(d) The marriage of one staff member to another shall not affect the contractual status of either spouse, but their entitlements and other benefits shall be modified as provided in the relevant Staff Regulations and Rules. ...

31. The UNDP Policy on Family Relationships reads, in its relevant part, as follows:

Obligation of the Hiring Unit

...

13. All Hiring Units are encouraged to exercise careful judgment when hiring candidates who bear family relationships other than the six prohibited with a person already employed by UNDP or when hiring a candidate who bears a family relationship with a person employed by another UN organization, which would create the perception or actual conflict of interest.

...

Spouses

17. Spouse: Pursuant to Staff Rule 4.7 (b) and (c) and recognizing the importance of supporting dual careers, the spouse or recognized partner of a staff member may be appointed to a position with the prior review of the Compliance Review Board or Compliance Review Panel and the endorsement by the hiring manager, who each will ensure that he/she:

- a) Is fully qualified for the position for which he/she is being considered
- b) Has been selected in accordance with the UNDP recruitment and selection policy requirements, including a full, transparent and open competitive selection process
- c) Is not given undue preference by virtue of his/her marriage or domestic partnership and
- d) Is not assigned to serve in a position in the same line of authority, in the same organizational unit, or in a manner that might influence or could be influenced by the spouse

32. As the Appeals Tribunal stated in *Sanwidi* 2010-UNAT-084, at para. 40, the judicial review of an administrative decision involves a determination of the validity of the contested decision on grounds of legality, reasonableness and procedural fairness:

...the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

33. In light of the above, the question is whether the Administration lawfully exercised its discretion in deciding that the Applicant was ineligible for the post due to conflict of interest.

34. As staff regulation 1.2(m) provides, “[a] conflict of interest occurs when, by act or omission, a staff member’s personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member’s status as an international civil servant”. When “an actual or possible conflict of interest” arises, the Organization has an obligation to mitigate and resolve any such conflict in the interests of the Organization and rather than of the staff member(s) concerned.

35. The Organization recognizes that when staff members have close family relationships with one another, a conflict of interest evidently arises. This is why, in addition to staff regulation 1.2(m) that addresses conflict of interest in general, specific rules exist to deal with conflict of interest resulted from family relationships.

36. While staff rule 4.7 prohibits the appointment of the father, mother, son, daughter, brother or sister of a staff member, staff rule 4.7(c) allows the appointment of a spouse of a staff member. However, this rule provides two situations involving spouses that are prohibited: a spouse of a staff member “[s]hall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to

whom he or she is related” and “[s]hall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related”.

37. While these two situations are specifically prohibited, this does not mean that conflict of interest cannot arise in other circumstances due to spousal relationships. In addition to staff rule 4.7, staff regulation 1.2(m) applies when a conflict of interest arises due to family relationships in general. When such a conflict arises, the Organization can and must exercise its discretion to mitigate and resolve an actual or possible conflict of interest in favour of the interests of the Organization.

38. In addition to the Staff Regulations and Rules, the UNDP Policy on Family Relationships provides that all Hiring Units are “encouraged to exercise careful judgment” when hiring candidates who bear family relationships to a staff member. In addition, in the event a Hiring Unit decides to hire a spouse of a staff member, it should be ensured, among other things, that a spouse of a staff member shall not be “assigned to serve in a position in the same line of authority, in the same organizational unit, or in a manner that might influence or could be influenced by the spouse”.

39. Similar to staff rule 4.7(c), this does not mean that the Organization cannot exercise its discretion to manage a conflict of interest in other situations in considering a spouse of a staff member for a position in the Organization. These specific conditions are prohibited by the UNDP Policy on Family Relationships but UNDP can still exercise its discretion to resolve an actual or potential conflict of interest arising from spousal relationships in other situations.

40. The Applicant argues that staff rule 4.7 and UNDP Policy on Family Relationships only apply to initial appointment but do not apply to promotion cases and therefore she is not bound by these rules. This claim is without merit.

41. As the Tribunal explained above, staff regulation 1.2(m) is a general rule applying to all staff in order to manage any conflict of interest and staff rule 4.7(c) is a

specific rule dealing with conflict of interest arising from family relationships. It would be entirely illogical to interpret that staff rule 4.7(c) applies to initial appointment only when staff regulation 1.2(m), which is a higher norm in hierarchy and addresses a conflict of interest in general, applies to all staff at any time during their employment. As the Appeals Tribunal held, “[t]he interpretation of a rule is made within the context of the hierarchy in which the rule appears” and “a Staff Rule may not conflict with the Staff Regulation under which it is made” (see *Ozturk* 2018-UNAT-892, para. 30). Therefore, the Applicant’s argument is rejected.

42. The Applicant further argues that staff rule 4.7(d), which provides that the marriage will not affect the contractual status of either spouse, precludes the Administration from applying rules on family relationships because otherwise it would affect her contractual status, contrary to staff rule 4.7(d).

43. Staff rule 4.7(d) provides that entitlements and other benefits of staff members married to other staff members shall be modified while the marriage will not affect the contractual status of either spouse otherwise. This means that even if the entitlements and other benefits of staff members married to other staff members are modified to avoid “double dipping”, their contractual status (i.e. temporary, fixed-term, continuing, etc.) does not change. Considering that staff rule 4.7(d) and staff rule 4.7(c) are at the same level of the hierarchy and that staff rule 4.7 is lower in the hierarchy than staff regulation 1.2(m), the Applicant’s interpretation, which would place staff rule 4.7(d) above other equal or higher norms of the hierarchy, will be simply absurd.

44. Having concluded that staff regulation 1.2(m), staff rule 4.7(c) and UNDP Policy on Family Relationships apply in this case, the Tribunal will review whether the decision was lawfully made in light of the applicable legal framework.

45. In this case, the Director of OAI, after consultation with the Ethics Office and OHR, decided to find the Applicant ineligible for the post due to conflict of interest caused by her marriage to the Investigations Manager.

46. The Director of the Ethics Office advised that conflict of interest already existed as the Applicant and her spouse worked in the same organizational unit (Investigations) and it would actually be exacerbated if the Applicant was placed in the post as OIC. The Director of OHR agreed with the Ethics Office and stated that considering “the importance of avoiding any potential conflict of interest, and even the appearance of such, given the mandate of [OAI]”, he would not approve “any long term OIC arrangement or substantive appointment in line with the advice already provided by [the Director of the Ethics Office] and in line with the Family Relationship policy”.

47. While the record shows that the Deputy Director (Investigations) of OAI disagreed and the Director of OAI also initially disagreed with the advice from the Ethics Office and OHR, the Director of OAI ultimately decided to follow the advice from the Ethics Office and OHR, finding the Applicant ineligible for the post.

48. According to the job description of the Investigations Advisor post, “OAI’s Investigations Section has established a [PQSI unit], which is headed by the Investigations Advisor. It further provides that “PQSI takes the lead on policy development for the Investigations Section, including updating or creating new Standard Operating Procedures (SOPs) and procedural and best practice guidelines relating to investigations; providing quality assurance reviews and legal assessment to ensure sufficiency and quality of evidence for all investigation reports and other relevant documents, as required, transmitted by Investigations Section to Legal Office and/or other stakeholders; and conducting sensitive and/or complex investigations as requested by the Deputy Director (Investigations)”. The Investigations Advisor reports to the Deputy Director (Investigations), and the Investigations Manager also reports to the same.

49. The Tribunal considers that it is evident that the job responsibilities of the Investigations Advisor and the Investigations Manager, who both report to the Deputy Director (Investigations), are closely related. As the Head of PQSI, the Investigations Advisor leads policy development for the Investigations Section and is in charge of

reviewing and providing recommendations on all investigation reports, which are drafted by investigators who are under the supervision of the Investigations Manager.

50. Considering the above, the Tribunal finds that the Organization reasonably determined that the appointment of the Applicant to the post of the Investigations Advisor would create an actual or possible conflict of interest due to her marriage to the Investigations Manager.

51. The Applicant argues that her spouse and she do not belong to the same organization unit because they are in the same ‘section’, but not in the same ‘unit’ and therefore they are not “in the same organizational unit”. The Tribunal finds that this argument is without merit.

52. The “organizational unit” could be called a team, a unit, a section, a division, an office, or any other different name. Whether the two posts belong to the “same organizational unit” is governed by the functions of the posts, not by the specific name of the “organizational unit” the posts belong. The determining factor is not the name given to the unit but whether the appointment of a spouse of a staff member creates an actual or possible conflict of interest in fact.

53. In other words, regardless of whether the two posts belong to the “same organizational unit”, if the appointment of the Applicant to the post creates an actual or possible conflict of interest due to the working relationships between the post she applies for and the post of her spouse, the Organization can exercise its discretion in hiring decisions in accordance with staff regulation 1.2(m) and para. 13 of the UNDP Policy on Family Relationships which encourages hiring units to “exercise careful judgment” when hiring candidates who bear family relationships to a staff member.

54. The Applicant further argues that such exercise of discretion can only be made at the end of the recruitment process by the Compliance Review Body and the hiring manager in accordance with para. 17 of the UNDP Policy on Family Relationships and the contested decision is unlawful for having violated para. 17.

55. However, para. 13 of the UNDP Policy does not impose such a limitation. It simply encourages hiring units to exercise careful judgment and does not specify when such judgment can be exercised. Paragraph 17 requires a prior review by the Compliance Review Body and the hiring manager in order to appoint a spouse of a staff member. The contested decision was not to appoint the Applicant to the post but to exclude her from the selection process. Therefore, the contested decision did not require a prior review by the Compliance Review Body and the hiring manager.

56. The Applicant further argues that the Administration's decision is irrational and arbitrary because UNDP allowed her to act as OIC numerous times in the past four years without adopting any additional measures. However, placing a staff member as OIC on an "as-needed" basis is quite different from appointing the staff member to the post permanently and thus the Tribunal finds this claim without merit.

57. Further, even if the Administration's prior decisions may seem to contradict the contested decision, that does not bar the Administration from correcting its previous erroneous decisions. As the Appeals Tribunal held, "[t]he Administration has a duty to correct its own errors" and to deny the Administration's "discretion to correct erroneous decisions ... on a quasi-estoppel basis would be contrary to both the interests of staff members and the Organization" (*Kellie 2018-UNAT-875*, para. 30).

58. The Applicant further argues that the contested decision is disproportionate as the Administration failed to explore alternative measures to address any potential issue had she been selected for the post. However, there is no such obligation on the Administration. To the contrary, the Administration has an obligation to resolve the conflict of interest "in favour of the interests of the Organization" under staff regulation 1.2(m).

59. The Applicant also claims that she was misled in the past four years since she had performed as OIC numerous times and she was never informed that she had no chance of promotion at OAI. She also argues that the contested decision amounts to

constructive dismissal as it leaves her with no choice but to look for another position elsewhere.

60. The Applicant seems to believe that, by occupying certain functions, a staff member accrues a right to be selected against a particular post. However, the Tribunal further recalls that staff members of the United Nations do not have a legitimate expectation of promotion or selection to a particular post. All the Applicant is entitled to, as a staff member of the Organization, is for her applications for posts in the Organization to receive full and fair consideration.

61. Moreover, staff rule 3.10(a) provides that all staff members are “expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts”. Therefore, acting as OIC does not create any legitimate promise or expectation regarding the Investigations Advisor post, the higher level post.

62. Regarding the Applicant’s claim that the contested decision amounts to constructive dismissal, the Appeals Tribunal held in *Koda* 2011-UNAT-130 that “in a case of alleged constructive termination, the actions of the employer must be such that a reasonable person would believe that the employer was ‘marching them to the door’” (para. 36). As stated above, the Applicant has no right to promotion to a particular post and therefore the non-selection for the post can in no way be construed as constructive dismissal.

63. Based on the above, the Tribunal finds that the contested decision to find the Applicant ineligible for the post was lawful.

The failure to inform the Applicant of her exclusion

64. The Applicant argues that the decision not to inform her of her exclusion was in breach of the UNDP Recruitment and Selection Framework Policy and of the Organization’s duty of care.

65. In particular, the Applicant argues that the Policy provides that “all phases of recruitment processes will be transparent to staff and candidates to the fullest extent possible” and yet the Administration was not transparent by not informing her that her candidacy had been excluded. She only learned of the contested decision after she inquired about the process.

66. She further argues that while para. 73 of the Policy provides that it is “expected that no information be shared with the candidates until the final approval for the selection has been signed”, this particular situation called for transparency as she was a long-serving internal candidate who was performing the duties of the post as OIC. The Applicant avers that this decision also violated the Organization’s duty of care.

67. The Tribunal rejects this argument. As the Applicant acknowledges, there is no requirement that the decision to exclude a candidate from the selection process should be communicated immediately. To the contrary, the relevant policy provides that it is “expected that no information be shared with the candidates until the final approval for the selection has been signed”. According to this general policy, the Administration initially decided not to inform the Applicant of the contested decision and yet, upon her inquiry, notified her of the contested decision on an exceptional basis.

68. Accordingly, the Tribunal does not find that the decision not to inform the Applicant of her exclusion immediately was unlawful.

69. As a final note, the Tribunal notes that on 30 April 2021, the Respondent requested to file comments in response to the Applicant’s submission of 23 April 2021. In light of the above, the Tribunal finds that the Respondent’s comments are unnecessary and thereby rejects his request.

Conclusion

70. In light of the foregoing, the application is rejected.

(Signed)

Judge Joelle Adda

Dated this 19th day of May 2021

Entered in the Register on this 19th day of May 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York