



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

Judgment No. 2018-UNAT-836



**Loeber
(Appellant)**

v.

Secretary-General of the United Nations

Counsel for Mr. Loeber: Edward Patrick Flaherty

Counsel for Secretary-General: Rupa Mitra

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/074, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 12 September 2017, in the case of Loeber v. Secretary-General of the United Nations . Mr. John Henry Frank Loeber filed the appeal on 11 November 2017, and the Secretary-General filed an answer on 12 January 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... [Mr. Loeber] was selected for the post of Chief of Section (Procurement of Goods), PMCS, [within the Office of the United Nations High Commissioner for Refugees (UNHCR)] effective 2 March 2014, under a two-year fixed-term appointment (“FTA”) due to expire on 1 March 2016.

... Between May and June 2014, the Head, PMCS, started implementing a
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... In a memorandum dated also 18 June 2015 and entitled Follow up to the Fritz Institute Review of the Supply Chain , the Director, DESS, submitted the structuring proposal to the Secretary of the Budget Committee. It was received by the Budget Committee on 19 June 2015. During a meeting with staff of both services held on 19 June 2015, the Heads of PMCS and SMLS presented the restructuring proposal, and responded to questions raised by staff, including [Mr. Loeber].

... In an email of 29 June 2015 to the Deputy High Commissioner and others, [Mr. Loeber] expressed his concerns and criticism about the submission to the Budget Committee with respect to the new/modified posts at SMLS/PMCS. He noted, particularly, that the new posts proposed as Section Chief HQ Procurement and Field Procurement were not grounded in the Fritz report , which was however used “to implement subliminal changes desired by PMCS leadership”.

... At its 10 July 2015 session, the Budget Committee approved the proposed PMCS restructuring, including the discontinuation of the position encumbered by [Mr. Loeber], effective 1 March 2016. [Mr. Loeber] was informed of that decision by the Head, PMCS, in a letter dated 24 July 2015, which [Mr. Loeber] signed on 27 July 2015.

... On 28 August 2015, [Mr. Loeber] filed a request for management evaluation with the Deputy High Commissioner of the decision to abolish his post; in his request, he also asked to be provided with a copy of the Budget Committee Decision of 10 July 2015. [Mr. Loeber]

... By email of 2 December 2015 from a Senior Resource Management Associate, Resource Management Unit, Office of the Director, DESS, [Mr. Loeber] was invited for an interview for the post of Head, SMLS, on 9 December 2015.

... By follow up email of 3 December 2015, [Mr. Loeber] was informed of the composition of the Interview Panel (“the Panel”), which consisted of:

- a. The Director, DESS ([Mr. Loeber’s] second reporting officer, and the Hiring Manager for the position);
- b. The Head, Procurement Service ([Mr. Loeber’s] first reporting officer);
- c. The Head, SMLS; and
- d. Mr. L., Office of the Director, Division of Human Resources Management (“DHRM”).

personal level, by telephone or email. Further, on the occasion of an event in Geneva in the afternoon of 3 September 2015, [the Director, DESS] met [[Mr. Loeber]] greeting with apparent disdain. Under these circumstances, conducting an objective interview appears impossible”;

... He expressed his view that based on the above, and the issues he had raised in his request for management evaluation, the three Panel members had a direct conflict of interest in the D-1 post recruitment process.

... The Senior Resource Management Associate, Resource Management Unit, Office of the Director, DESS, responded to [Mr. Loeber], in the following terms:

I take note of your comments. On the procedural side, we ensured the presence of DHRM in the senior level interviews and of [Mr. L.] D1, Director's

... The selected candidate was a female candidate.

... [Mr. Loeber] was separated from the Organization on 2 March 2016.

... After his separation from the Organization, [Mr. Loeber] indicated the Head, PMCS, as a referee for, at least, two other positions for which he applied at [United Nations Stabilisation Mission in Haiti “MINUSTAH”] and [The United Nations Relief and Works Agency for Palestine Refugees in the Near East “UNRWA”]. The Head, PMCS, had also positively recommended [Mr. Loeber] to Ms. G., who was looking for a procurement officer to fill a post at the Food and Agriculture Organization of the United Nations (“FAO”), while he was still in the employment of the UNHCR.

... On 4 March 2016, [Mr. Loeber] was informed about his non-selection for the contested post. He requested management evaluation of his non-selection on 24 April 2016, but did not receive a response to his request. He subsequently filed [an] application [before the UNDT].

3. On 12 September 2017, the UNDT issued its Judgment and rejected Mr. Loeber’s application in its entirety. The UNDT found that Mr. Loeber’s candidature received full and fair consideration. In particular, the UNDT found that the professional disagreements between Mr. Loeber and his supervisors and the performance issues taken together with Mr. Loeber’s strong comments made in his request for management evaluation about the Head, PMCS, would have rendered it reasonable and sound management for the Head, PMCS to recuse himself from the interview panel. The UNDT found, however, that because Mr. Loeber refused to be interviewed, it was impossible for the UNDT to assess whether the presence of the Head, PMCS on the panel prejudiced Mr. Loeber and 9r6-1. tha

Submissions

Mr. Loeber's Appeal

4. Mr. Loeber submits that the UNDT erred in fact and law and requests the Appeals Tribunal to vacate the UNDT Judgment, rescind the selection decision, and order a new recruitment exercise with a different panel composition. Mr. Loeber also requests the following:

a) monetary compensation in the amount of 50 per cent of the difference between two years' gross salary at the D-1 position and seven months' gross salary for the period of March to September 2016 during which Mr. Loeber held the P-5 position within UNHCR as Chief of PMCS;

b) 17 months' gross salary for the period of October 2016 to February 2018 at

reporting line and reassignment of his tasks to the P-4 staff member were not taken to improve the workflow and motivation of the team, but rather to motivate only the P-4 staff member, as the Head, PMCS and Director, DESS admitted at the hearing. Mr. Loeber likewise argues that the UNDT failed to note that the Director, DESS was informed of the progressive withdrawal of his tasks, had initiated the restructuring process which led to his post abolition, and was aware of his opposition to the restructuring. The Head, SMLS was also aware of Mr. Loeber's criticism of overpriced warehouse charges, which the Head, SMLS had overseen and consequently, the Head, SMLS supported the discontinuation of his post and could not have been impartial. The UNDT further erred in finding that the restructuring process was no evidence of bias on the part of the Head PMCS, because it was a genuine process within the discretionary power of the Organization. To the contrary, the restructuring process was irregular and unlawful. Based on the foregoing, the UNDT erred in concluding that the Head PMCS, Director, DESS, and Head, SMLS did not have bias against him.

6. Mr. Loeber also argues that the UNDT erred in paragraph 31 of the impugned Judgment by incorrectly implying that his chance of success was not dependent upon the assessment by the interview panel as the DHRM shortlist matrix indicated that he was not a suitable candidate because he lacked full time field assignments. This was not required in the job description and the Head, PMCS confirmed at the hearing that he was qualified for the post.

7. Mr. Loeber argues that the UNDT erred in law. The UNDT found that his comments against the Head, PMCS in the management evaluation request, called into question the latter's impartiality and it would have been sound judgment for the Head, PMCS to recuse himself. Mr. Loeber argues that the Head, PMCS was clearly biased and this rendered the interview panel irregular *ab initio* which in turn rendered the selection process irregular, whether he participated in the interview or not. The UNDT also erred in finding that the Head, PMCS was not biased because he served as a referee on his application subsequent to his separation. The issue is not what the Head, PMCS said or did over a year after the interview date but whether the Head, PMCS had bias at the time of the interview. Moreover, the Head, PMCS had no choice in the matter as he was required to list him as a reference as he was his latest supervisor. The UNDT erred in concluding he was selected to the post in MINUSTAH due to the Head, PMCS's recommendation. This is erroneous as he was selected because he was already on a peacekeeping roster. Lastly, the UNDT erred in law in concluding that it was correct not to replace the panel members, finding that the invitation to Mr. Loeber to contact legal affairs was sufficient.

The Appeals Tribunal's jurisprudence, in *Aliko*², however, indicates that the selection process conducted by an interview panel may be rescinded when the staff member has not received full and fair consideration or when the members of the panel exhibited bias.

The Secretary-General's Answer

8. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety as the UNDT correctly concluded that Mr. Loeber's candidature received full and fair consideration. The presumption of irregularity is satisfied thereby shifting the burden of proof to Mr. Loeber, who must show through clear and convincing evidence that he was not given full and fair consideration. Mr. Loeber failed to produce any evidence to this effect as the Panel indicated in the shortlist matrix that it assessed his experience against the position's requirements and found him not suitable because he did not demonstrate experience in the supply and logistics aspects of managing supply chains. The interview was a compulsory procedural step in the recruitment process and he unilaterally decided not to participate. Based on the foregoing, the UNDT correctly found that Mr. Loeber was given full and fair consideration.

9. The Secretary-General further argues that Mr. Loeber has not established any errors of fact to warrant a reversal of the impugned Judgment. Mr. Loeber does not identify a defect in the UNDT's finding that the change of reporting lines amounted to a professional disagreement, but merely disagrees with the UNDT's analysis that such did not lead to a conclusion of perceived bias. Mr. Loeber likewise does no more than disagree with the relative weight the UNDT placed on the facts relied upon in its conclusions about the Head, SMLS and Director, DESS. Mr. Loeber also fails to identify a reversible error in the UNDT Judgment noting that the shortlisting matrix indicated that he lacked field related experience and was not considered suitable. The UNDT in addressing the merits was not required to assess whether he was in fact suitable for the position. The UNDT Judgment did not turn on this issue, but, on whether he was afforded full and fair consideration. Similarly, Mr. Loeber does not identify a defect in the UNDT's finding that the restructuring process was not unlawful. The UNDT issued a separate judgment on this issue, which Mr. Loeber appealed.

² *Aliko v. Secretary General of the United Nations*, Judgment No. 2015-UNAT-540.

12. The present case does not deal with the abolishment of Mr. Loeber's post or his subsequent separation from service. Although these issues form the necessary background of the present case, they are the subject of another case, addressed in UNDT Judgment No. UNDT/2017/073. There is no doubt that the Administration has broad discretion in restructuring exercises, even if that includes abolition of posts, provided that it is not intended to deliberately exclude a particular person or motivated by extraneous reasons. In the present case, there is no evidence whatsoever that the restructuring exercise was not genuine.

13. Therefore, *incidenter tantum* and for the exclusive purposes of the present case, the presumption of regularity of administrative acts applies and we hold that the post was correctly abolished.

14. In non-selection matters, our jurisprudence has established that:⁴

17. Indeed, the Administration cannot be bound or paralyzed by any accusations or allegations against its bodies or authorities. Once any suspicion arises, the relevant rules apply and an investigation may be carried out. However, evidence must be produced to support allegations of possible misconduct. In the absence of such evidence, the allegations will be disregarded for the intended purposes. In the case at hand, despite the seriousness of the accusations, the complaint was put on hold at the request of the negotiating parties.

18. Furthermore, there is no challenge to the UNDT's finding that the Head, PMCS had not been informed about the harassment complaint, in light of its confidentiality; therefore, the Head, PMCS could not have admitted to any conflict of interest due to the content of the complaint.⁵ As to the content of the request before the Management Evaluation Unit (MEU), the Head, PMCS, explained during the hearing before the UNDT that he had been asked to give his view on the accusations of dishonesty and lying, which he rebutted with documentary evidence.

19. Moreover, he also justified that, from the five D-1 level staff positions serving at UNHCR at the time of the interview, only two had expertise in supply or logistics, which was a requirement to be a panel member: himself and the Head, SMLS, against whom Mr. Loeber objected. The Appeals Tribunal also takes note that, despite the existence of professional disagreements, particularly about the reorganization, the exchange between Mr. Loeber and his direct supervisor was courteous and professional, as revealed by the e-mails in the case file.

20. Regarding the Head, DESS, she was the direct supervisor of the post Mr. Loeber was applying for and, therefore, her presence was expected on the panel. As she informed in her evidence, the composition of the Panel had taken into account the purpose of the post and the close professional relations the person to be selected would need to have with the panel members. And, contrary to Mr. Loeber's contention, there had been a previous explanation as to why the members of the Panel would continue in their role, since the Organization replied to his objection also stating that they had built some protection for him during the interview, including the presence of a D-1 staff member from the Director's Office, DHRM, in order to ensure objectivity of the assessment.

⁵ Impugned Judgment, paras. 61 and 62.

21. One further detail is to be considered: there appears to be a contradiction between what Mr. Loeber stated before the UNDT as one of the reasons as to why he had not applied for the P-5 level posts (not having been encouraged to apply by his immediate supervisor) and the fact that he did apply for the D-1 level post, despite the absence of encouragement.

22. This Tribunal recalls its Judgment in Chhikara, wherein this Tribunal held that the staff member had not received full and fair consideration due to procedural irregularities, some occurring at the interview assessment.⁶ However, Chhikara is distinguishable from the present case. Here, Mr. Loeber did not participate in the interview process and the UNDT found that Mr. Loeber was given full and fair consideration for the post in question, as the UNDT found no irregularity or bias of the Panel.

Judgment

33. The appeal is dismissed and Judgment No. UNDT/2017/074 is hereby affirmed.

Original and Authoritative Version: English

Dated this 22nd day of March 2018 in Amman, Jordan.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Murphy

(Signed)

Judge Lussick

Entered in the Register on this 23rd day of May 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar