



Case No.: UNDT/NY/2009/107

Judgment No.: UNDT/2010/055

Date: 31 March 2010





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

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

#### Disclosure of documents

11. An issue arose regarding the applicant's request that the respondent should produce documents relating to other candidates interviewed for the operations officer posts. The applicant argued that without those documents she would be severely disadvantaged. The respondent initially objected to the disclosure of documents of the kind identified on the grounds that they were confidential. After some discussion I convinced both sides that in a case like that advanced by the applicant, particularly in relation to her allegation that she was less favourably treated than male candidates for those posts, it was necessary to give her access to the applicn the grounw -8e3 Tw34 Tw9.431 0 Td [g



- vi. Sometimes it may be necessary for the Tribunal to order disclosure of statistical material which may assist in deciding whether there is a pattern of conduct which may require an explanation.
- vii. Where grievance and disciplinary proceedings are in issue it may be relevant and necessary to order disclosure of documents, including statistical data, where appropriate, to assist the parties and the Tribunal.
- viii. Where a request for discovery is oppressive and not necessary for disposing fairly of the proceedings it may be refused.
- ix. In cases involving issues of extreme sensitivity or security the Tribunal may order disclosure, initially to the judge, who will, after examining the material, decide on the terms, if any, of the disclosure. This could include redacting parts of the documents or restricting disclosure to the legal representatives only.
- x. The respondent should not seek to hide behind the argument of confidentiality given the difficulties of proving, or disproving, the allegations and given the safeguards inherent in these principles.
- xi. The respondent and its representatives should take note of the fact that they have a duty to cooperate with the Tribunal in ensuring that justice is



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

4.4 Subject to the provisions of Article 101, paragraph 3, of the



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

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

- xi. It is only the decision-maker who can explain why and for what reason a particular decision was taken. Accordingly, where the applicant has discharged the burden of producing sufficient evidence and establishing sufficient facts from which it could be inferred that discrimination could have taken place the onus should generally pass to the decision-maker to prove that there was a non-discriminatory reason for the decision.
- xii. It is helpful to apply the *But For* test. But for the staff member's sex, race, disability, ethnicity, religion etc would she or he have been similarly treated?
- xiii. Decisions are taken as a result of a complex interaction of factors. It is not necessary for the discriminatory element to be the sole factor underpinning the decision. If it was a significant factor that would be sufficient to support a finding of unlawful discrimination.
- xiv. At the conclusion of the evidence it would be helpful to approach the totality of the documentary and oral testimony in the following stages:
  - a. Is there any affirmative evidence pointing to discrimination having taken place?
  - b.

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

#### Findings of fact

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

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

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

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

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



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

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

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

33.

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

35. The post in Peshawar was offered to an internal male candidate on an





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

41. The respondent stated that the principal reason for calling the applicant to an interview, notwithstanding her poor test result, was the fact that she was a female and it was UNICEF's policy on gender parity for positive steps to be taken to provide opportunities for female candidates to be considered for appointment in order to address gender imbalance in the workforce. Accordingly they decided that it was important to give the applican

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

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

candidate and awarded full marks for her qualifications. At interview she ranked second. Taking these facts into account I conclude that the applicant has established sufficient facts from which it could be inferred that the reason why she was not offered an appointment in Peshawar or Lahore was on the grounds of sex. Accordingly it is for the respondent to prove, by providing an innocent and non-discriminatory explanation, that there was no direct or indirect sex discrimination. For the reasons stated above the respondent has failed to provide a satisfactory explanation for the treatment that was accorded to her. They have not made out a cogent case that the recommendations and final decisions relating to the appointments to Peshawar and Lahore were made solely on merit. The scores from the written test ought to have been excluded for UNICEF to

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

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

## Conclusion

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

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

*(Signed)*

Judge Goolam Meeran

Dated this 31<sup>st</sup> day of March 2010

Entered in the Register on this 31<sup>st</sup> day of March 2010

*(Signed)*

Hafida Lahiouel, Registrar, New York