

UNITED NATIONS D

## **Introduction**

1. The Applicant is a former Programme Assistant at the United Nations Children's Fund (UNICEF), Pretoria, Republic of South Africa office. In her Application dated 18 July 2013, she is contesting a 6 March 2013 decision which she claims unlawfully excluded her from a recruitment exercise.

2. The Respondent filed a Reply to the Application on 19 August 2013.

3. The Tribunal held a case management discussion on 4 November 2014 and, vide Order No. 249 (NBI/2014), decided that an oral hearing is not required in determining this case and that it would rely on the Parties' pleadings and written submissions.

## **Facts**

4. The Applicant began working for UNICEF's Pretoria office in South Africa on 4 February 2008 as a GS6 Programme Assistant on Social Policy and Economics.

5. UNICEF decided in 2012 to reclassify all Programme Assistant posts in the Pretoria office from GS6 to GS7. Expectedly, the reclassification exercise affected the Applicant's post which was then abolished with effect from 31 March 2013.

6. In anticipation of the decision to reclassify, UNICEF's Deputy Executive Director had, in a memorandum dated 22 September 2011, informed UNICEF's Regional Directors that the institutional budget for 2012-2013 had been approved and that staff members who were affected by the abolition of their posts would receive a formal notification letter informing them of the Executive Board's decision and of the consequences on their contractual status. The memorandum spelt out in detail the corporate support to be extended to the staff sitting on abolished posts. The memorandum stipulated 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 (see Staff Rule 9.6 (e)). Non-selection of a staff member on an 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

The Approving Authority committed a procedural error by referring the selection matter back to the Selection Panel rather than to ~~the~~ Central Review Body (LCRB).

12. The courses of action available to the Approving Authority upon receiving the list of recommended candidates are governed by the provisions of section 5.5 of

The Approving Authority exceeded her authority by reviewing the substance of the Selection Panel's recommendation.

15. Although section 1.7 of the UNICEF Executive Directive on Staff Selection (CF/EXD/2013-004) offers some discretion to the Approving Authority to change the selection process, it does not include the discretion to challenge the assessment of the Panel.

16. Under section 8.2 of the same legislation, it is clearly provided that the Approving Authority is the final decision maker who decides which of the recommended candidates to select. However, in the case of the selection process which is the subject matter of this Application, this discretion to have the final say was superseded by the clear directives in the Deputy Executive Director's memorandum of 22 September 2011.

17. Section 4.5 of CF/EXD/2013-005 stresses that the CRB cannot replace or override the assessment of the Selection Panel. The reasoning behind this is that only the Panel is properly placed to make the assessment after considering the results of the written test and interviewing the candidates.

18. It must be recalled that the Panel did not reverse its finding as to the Applicant's suitability when the LCRB raised concerns about the Panel initially giving certain conditions to be placed on the Applicant's appointment.

19. The only way to explain the Panel's withdrawal of its recommendation of the Applicant after reaffirming it to the LCRB is that the Country Representative queried its decision.

20. In the case of *Verschuur*<sup>1</sup> the Appeals Tribunal affirmed that the head of department, who performs similar roles as the Approving Authority in recruitment exercises, should not interfere in the functions of the other bodies involved in the recruitment process.

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<sup>1</sup> 2011-UNAT-149.



27. There was no justification for the Panel to reverse its assessment of the Applicant and to find her unsuitable for the post since no new information was provided to the said Panel when they assessed the Applicant for the third time.

28. By achieving the shortening of the list of approved candidates, the Approving Authority was able to bypass the directives in the Deputy Executive Director's memorandum of 22 September 2011. If the Applicant was not taken off the recommended list, she would have been hired despite being ranked second amongst the recommended candidates.

It was also argued for the Applicant in the alternative that if the Approving Authority had correctly identified a procedural flaw in the recruitment exercise, the proper thing to do would be to begin the exercise again.

29. The UNICEF staff selection process flowchart (Annex 9 to the Application) setting out the roles of the different bodies in a recruitment exercise clearly demonstrates that the Approving Authority has two options. One of these is to approve the recommendation of the Panel. The other is to reject the recommendation of the Panel and to approve the recommendation of the second ranked candidate. No.

*The Respondent's case*

33. The summary of the Respondent's case is that the recruitment process was properly followed.



40. On the issue of remedies, the Respondent made the following submissions:
- a. Article 10.5 of the Statute of the Tribunal limits the total amount of compensation the Tribunal may award to the equivalent of two years' net base salary unless it would concern an exceptional case. The current case is not exceptional because the Applicant's separation from service was the result of the abolition of her post and not the result of her non-selection for a different post, which was at all times a probable event as selection was subject to competition, in particular as the Applicant competed for a post at a higher level than her own. It is not in contention that the Applicant's non-selection was not the result of malicious or other ulterior intent.
  - b. In the event that the Tribunal rules in the Applicant's favor on the merits, the Respondent agrees that, on her principal argument, the Applicant would be entitled to compensation for the loss of opportunity caused by the unlawful act and that, were it not for the unlawful act, the Applicant had a 100% chance of selection for the pertinent post. However, whereas the Applicant had an obligation to mitigate her loss of opportunity, the Respondent submits that the award on loss of opportunity must take into account the effort that the Applicant made to find a suitable, alternate source of income. In addition, if the Applicant was able to find a suitable, alternate source of income in the period that she would have been under contract with UNICEF – two years, the income earned is to be deducted from the award on loss of opportunity.
  - c. There is no basis for compensation for loss of opportunity.
  - d. The breach of the Applicant's entitlements (procedural and/or substantive) was not fundamental and/or that the Applicant did not produce evidence of moral harm, in particular in the absence of a medical or psychological report.

e. In the event that the Tribunal would find in the Applicant's favor on the merits and rule that the breach of her entitlements was fundamental and/or that she produced sufficient evidence of moral harm, the Respondent submits that moral damages be limited as: (i) the breach and/or moral harm was not the result of malicious intent and the Applicant's feeling that UNICEF hurt and/or betrayed her cannot, therefore, be taken into account; (ii) the Selection Panel's ultimate finding that the Applicant was not suitable for selection was an honest and appropriate assessment; and (iii) the Applicant's separation from service was the result of the abolition of her post and not of her non-selection for a different post, which was at all times a probable event as selection was subject to competition; her selection would have occasioned a continuation of the Applicant's service with UNICEF.

## **Considerations**

### The Selection Process

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44. The Panel noted further that the Applicant's performance and rating with regard to the competency of 'Working with people' was consistent with the rating she received in the same competency in her 2011-2012 performance evaluation rating.

45.

50. The Panel stated that it was following that global directive in recommending that the Applicant be appointed. It then duly forwarded its recommendation to the LCRB.

#### The LCRB

51. The proper mandate of the LCRB<sup>3</sup> is to review and assist UNICEF in ensuring that its selection process has been complied with. This includes ensuring that relevant provisions of the United Nations Staff Regulations and Rules, applicable UNICEF policies and the evaluation criteria as stipulated in the vacancy announcement were all complied with.

52. It is not the role of the LCRB to review the substance of the Selection Panel's recommendation. It ca

56. On the same day, the LCRB made a finding that the selection process had complied with the applicable UNICEF procedures and policies including the applicable UNICEF Staff Selection Policy and was based on the evaluation criteria stipulated in the Vacancy Announcement.

57. The LCRB then endorsed the recommendation of the Applicant and added that she be offered a two-year contract and that UNICEF procedures in mentoring and performance evaluation should be followed to ensure that she developed the correct proficiency. It sent its recommendation of the Applicant to the Approving Authority.

#### The Approving Authority

58. The Approving Authority in this case was the UNICEF Country Representative. The Approving Authority is the person who makes the final selection decision and may authorize changes to the selection process in accordance with the UNICEF Staff Selection Policy.

59. Upon receiving the report and recommendation of the LCRB



69. Also relevant and applicable was a memorandum dated 22 September 2011 from the Deputy Executive Director of UNICEF titled “Corporate Support to Staff on Abolished Posts.”

70. The brief summary of the UNICEF selection process can be found in section 2.3 of CF/EXD/2009-008 and that provision simply states:

Selection Panels shall assess the candidates’ relative suitability for the post, and recommend one or more suitable candidates. Central Review

to the Approving Authority and inform him/her that applicable procedures were followed.

74. If on the other hand, its questions and doubts are not resolved after obtaining additional information, the LCRB shall inform the Approving Authority that the applicable procedures were not followed while transmitting the Panel's recommendation.

75. Under section 7.3<sup>6</sup>, when the LCRB finds that the applicable procedures were not followed, it shall state its reasons and recommend to the Approving Authority to return the case to the Selection Panel for re-evaluation or cancel the selection process and re-advertise the post.

76. The third and final level is that of the Approving Authority. Section 7.4 of CF/EXD/2009-008 provides that in all cases, the recommendations of the LCRB shall be given due consideration by the Approving Authority.

77. The Approving Authority may approve the recommendation of the LCRB as provided for in section 8.2 of CF/EXD/2009-008 and section 5.5 of CF/EXD/2009-009 and go on to make a selection decision.

78. Section 8.2 provides that the Approving Authority shall normally select the highest-ranking candidate from the Selection Panel's list of recommended candidates or another person from the same list and shall document the reasons why he or she deviated from the ranking order.

79. Under section 5.5, instead of approving the LCRB's recommendation, the



80. In the instant case however, the Deputy Executive Director's memorandum of 22 September 2011 was also applicable and would actually supersede and nullify the provisions of section 8.2 since it directed that recommended staff members on abolished posts be preferred in making selection decisions even if they were not the highest-ranking candidates. The non-selection of the staff member who meets the minimum requirements for the post must be justified in writing.

81. The Respondent submitted at paragraph 23 of his Reply that the Approving Authority upon reviewing the recruitment recommendation acted pursuant to sections 7.4 and 8.1 of CF/EXD/2009-008 and section 5.5 of CF/EXD/2009-009 and did not approve the recommendation. He continued t

85. The facts also show that the LCRB endorsed the recommendation after it had resolved certain questions and doubts that had arisen from the Panel's recommendation. It is not contested that the Approving Authority did not approve the recommendations of the Selection Panel and the LCRB for the selection of the Applicant.

86. The facts further show that the said Approving Authority did not return the case to the LCRB for further review or disagree with the said LCRB and make a selection decision as provided for by section 5.5 of CF/EXD/2009-009.

87. Instead, the Approving Authority avoided the LCRB and directly queried the Selection Panel as to why it had recommended the Applicant for selection in spite of its finding that she was rated as "Developing Proficiency" in two areas of competency.

88. There is no contest that this action on the part of the Approving Authority constituted a substantial procedural breach or irregularity. She had clearly deviated and departed from the clear requirements of UNICEF's Staff Selection Policies and resorted to her own arbitrary methods.

Did the Approving Authority exceed her powers in any way and did she exert undue influence on the members of the Selection Panel ~~substantially~~ affect the outcome of the selection process?

89. It was argued on behalf of the Respondent that the Approving Authority who was also UNICEF's Country Representative not only had the authority to review the substance of the Selection Panel's recommendation but had the obligation to do so in order to ensure compliance with the executive directive.

90. He submitted that in acting as she did, the Approving Authority was actually complying with her role as the final decision maker who was responsible for ensuring that the selection principles were fully complied with and that the recommended candidates were suitable.





102. Ordinarily, the correct legal position in UNICEF's recruitment process was that where the Approving Authority did not agree with the LCRB's recommendation of candidates, only two courses of action were open to her: (i) to return the case to the LCRB for further review or (ii) to make a selection decision against the LCRB's recommendation and inform the said LCRB of her decision, stating her reasons for doing so.

103. However, even that position had been altered and superseded by another policy embodied in a memorandum dated 22 September 2011 and authored by UNICEF's Deputy Executive Director. The recommendations of the Selection Panel and the LCRB that the Applicant be selected rather than another recommended candidate were made in the light of the said memorandum<sup>9</sup>.

104. The said memorandum titled 'Corporate Support to Staff on Abolished Posts'

107. Additionally, while disagreeing with the recommendation that the Applicant be selected, the Approving Authority was obviously reluctant to justify her non-selection decision in writing and to explain why she did not select the Applicant in spite of the Selection Panel's and the LCRB's findings that she had met the minimum requirements for the post. The Approving Authority also needed to explain how the Applicant's core and functional competencies as assessed in the selection process did not match those required for the post.

108. The Tribunal is not in any doubt that the Approving Authority found the obligation of making a justification in mi-7(y)19( )-230(he)3(r)-7( )-230(n)19(o)-20(n)] TJ ET Q q B

entire selection process through undue influence contrary to the principles of independence and fairness and the legal intentment of relevant UNICEF legislation.

### **Conclusion**

112. The Tribunal's findings are summarized below:

- a. The Approving Authority in this case did not act in accordance with any UNICEF Executive Directive on recruitment.
- b. The Approving Authority avoided the LCRB and went directly to query the Selection Panel as to why it had recommended the Applicant for





Case No. UNDT/NBI/2013/041

Judgment No.