



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DUBE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Robbie Leighton, OSLA

Counsel for the Respondent:

Stephan Grieb, UNICEF

Tamara Shockley, UNICEF

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 process did not match those required for the post. Please ensure that your hiring managers are fully aware of these policy provisions as outlined in Section 9 of CF/AI 2010-001 on Separation from service.

7. On 27 December 2012, the Applicant applied for the newly constituted post of Programme Assistant on Social Policy and Economics at the GS7 level. She was then shortlisted and invited to sit a written examination.

8. Three candidates including the Applicant passed the written examination. Thereafter, the Applicant was invited to participate in a competency-based interview by a Selection Panel which took place on 12 February 2013 and lasted about 30 minutes.

9. The Applicant was then informed by Human Resources on 6 March 2013 that she had not been selected for the post and this was confirmed in writing on the same day.

10. The following day, 7 March 2013, she requested management evaluation of the decision not to select her for the GS7 post and on 27 April 2013 the Management Evaluation Unit (MEU) upheld the decision not to select her for the post.

The Applicant's case

11. The Applicant's case is that the decision not to select her was unlawful. In this regard, three arguments were canvassed on behalf of the Applicant. They are reproduced below.

The Approving Authority committed a procedural error by referring the selection matter back to the Selection Panel rather than to the Local 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 UNICEF Executive Directive on Central Review Bodies (CF/EX/2013-005). It provides as follows:

5.5 The Approving Authority may:

- (a) Approve the CRB's recommendations;
- (b) Return the case to the CRB for further review, giving his/her reasons;
or
- (c) Choose not to agree with the CRB's recommendation, make his/her decision and inform the CRB of his/her decision, and the reasons thereof.

13. The above provision is an exhaustive list and does not include referring the matter back to the Selection Panel. In referring the matter back to the Panel, the Approving Authority, who was also the UNICEF Country Representative, went outside her proper role. In doing so, she had usurped the functions of the LCRB whose duty it was to ensure that the proper procedures were followed. She had also usurped the functions of the Panel whose duty it was to make an objective assessment of the Applicant's suitability.

14. The result of the Approving Authority challenging the said Panel was that instead of a consideration of the procedure, which should have been done by the LCRB; the Selection Panel undertook a wholesale reassessment of the Applicant's suitability for the post.

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*,¹ 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.

¹ 2011-UNAT-149.

There is no rule stating that a candidate must be rated Proficient or Highly Proficient in order to be found suitable for a post.

21. In the Deputy Executive Director's memorandum of 22 September 2011, it was made clear at paragraph 5 that all that the Applicant had to demonstrate in order to be recruited for the post was that she met "the minimum requirements of the post".

22. The Approving Authority's challenge of the Panel's assessment of the Applicant as suitable for the post and the Panel's subsequent reversal of its assessment stems from a view that in order to be suitable for a post, a candidate must be assessed as "Proficient" or "Highly Proficient" in all elements of the competency based interview.

23. Such a position has no basis in law. No rules governing recruitment processes in UNICEF demonstrate such a requirement. In performance appraisals for instance, it is possible that a staff member who is given a rating of "Developing Proficiency" or "Not Proficient" in one or more competencies can be rated overall as "Proficient" or "Highly Proficient".

24. In spite of being rated as "Developing Proficiency" for "Working with people" in her last two Performance Evaluation Reports (PER) for 2011 and 2012, the Applicant was still rated overall as "Proficient" in 2012 and "Highly Proficient" in 2011. It follows that an assessment of "Developing Proficiency" in one or more competencies is not inconsistent with an overall assessment as suitable for the post.

25. The Panel could take a holistic view of all the information available to them and reach the conclusion that the Applicant was suitable for the post. This is what they did on the first two occasions when they assessed the Applicant only to change their assessment when the Country Representative queried them.

26. Since the Panel did not apply a pass or fail criteria to their assessment of the relevant competencies, only a finding of "Not Proficient" would mean that a candidate lacked a particular competency as alleged.

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 recommended candidates while the second option is to refer the matter back to the Human Resources Unit for the post to be re-advertised.

30. If the assessment was found to have been procedurally flawed, the only way to rectify this error and maintain the integrity of the recruitment process was to begin the process again. This would have afforded the Applicant a further opportunity to be assessed as suitable for the post.

Remedies sought

31. The Applicant prayed that she be awarded compensation in the amount of 100% of the salary she would have earned if recruited on the post for two years.

32. She also seeks compensation for the procedural irregularity in the recruitment process and moral damages for the enormous stress she suffered due to being unlawfully excluded from the recruitment exercise and loss of employment.

The Respondent's case

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

34. It was the Respondent's case that the Approving Authority not only had the authority to review the substance of the Selection Panel's recommendation but in fact had the obligation to do so in order to ensure compliance with the Executive Directive.

35. He pointed out that the Applicant's case was argued based on certain provisions of CF/EXD/2013-004 and CF/EXD/2013-005 which entered into force after the conclusion of the recruitment process that gave rise to this case and are therefore not relevant here.

36. He noted that the relevant law can be found in the two Executive Directives, CF/EXD/2009-008 (Staff Selection Policy) and CF/EXD/2009-009 (Central Review Bodies). The Respondent submitted that the provisions of these two legislations were followed and that the impugned selection process was not flawed in any way.

37. The Approving Authority was faced with a conflicting recommendation in which the Panel found the Applicant suitable for the post but in its narrative was saying the opposite while recommending that the Applicant be given conditional employment.

38. In the said circumstances, the Approving Authority was right to refuse to approve the recommendation and to ask the Panel to clarify. A different course of action by the Approving Authority would have amounted to a dereliction of her duty as head of office and final decision maker.

39. From an examination of the provisions of sections 1.7, 2.3, 2.4, 3.4 and 8 of CF/EXD/2009-008, it can be gleaned that the Approving Authority had the authority to review the substance of the Panel's recommendation.

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

41. The Selection Panel is responsible for assessing the shortlisted candidates and for deciding on the list of recommended candidates. The Panel is established by the Division Director or Head of Office².

42. The Panel assessed four core competencies. These were: (a) Communication; (b) Working with people; (c) Drive for results; and (d) Following instructions and procedures. Additionally, a technical question was asked.

43. The Applicant was ranked 'highly proficient' for technical expertise, she was ranked 'proficient' in Communication, and she was also ranked 'proficient' in Following instructions and procedure. For Working with people and Drive for results, she was ranked as 'developing proficiency'.

² Section 1.5, CF/EXD/2009-008.

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. The Panel found one of the three interviewed candidates not suitable for the post. It found two of them suitable and recommended them as such, one of whom was the Applicant.

46. In recommending the Applicant for selection, the Panel noted that in both the interview and in the performance rating for the previous year she had areas of 'developing proficiency'. It then qualified its recommendation by adding that the Applicant engage in a formal development and mentorship programme with clear indicators with her supervisor to address her developmental areas and that her progress be monitored on a quarterly basis against the indicators.

47. The Panel added that the Applicant be informed of this requirement in her letter of offer to be agreed to in writing as a condition and that the employment contract for the GS7 post be for a period of one year in order to ascertain her progress. The Panel added that the renewal of her contract be dependent on her progress and commitment in the mentorship programme to be reported upon by her supervisor and reflected in her mid-year performance review.

48. With regard to the Applicant's last two PERs for 2011 and 2012, the Panel noted that she was rated overall proficient on the core competencies and also developing proficiency in her PERs for 2011 and 2012. It noted also that her overall rating in the PERs was "Proficient" in the core competencies.

49. Although it had ranked the Applicant second to the other recommended candidate, the Panel noted that the Applicant was on an abolished post. It recalled paragraph 5 of the Deputy Executive Director's memorandum of 22 September 2011 that had directed that candidates on abolished posts who show the competency for a post should be considered above other candidates.

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 LCRB³ 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 can neither override nor replace the Panel's opinion regarding the qualification of a candidate with its own.

53. After reviewing the recommendations of the Panel in its meeting of 21 February 2013, the LCRB asked the Panel to clarify whether or not they found the Applicant suitable for the post.

54. It further observed that if the Panel considered the Applicant not suitable for the post, its recommendation should be changed and the only suitable candidate recommended. The LCRB continued that if that was the case, the Panel should write the justification as outlined in the Deputy Executive Director's memorandum giving strong reasons regarding how the Applicant's relative competence and integrity dictate that she could not be given the post.

55. The Panel responded on 26 February 2013 and informed the LCRB that the Applicant was suitable. It added that in paragraphs 6 and 7 of its report sent to the LCRB, it already indicated that the Applicant was suitable and that that was the reason it had recommended her. If she was not suitable, the Panel added, it would not have recommended her.

³ Section 1.6, CF/EXD/2009-008 and CF/EXD/2009-009.

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, the UNICEF Country Representative decided not to approve it.

60. She referred the recommendation back to the Selection Panel and queried why it found the Applicant suitable for the post despite rating her as “developing competency” in two core areas during the interview just as she was similarly rated in the 2011 and 2012 performance appraisal periods while on the GS6 level.

61. She pointed out that in spite of those ratings; the Panel was recommending the Applicant for a promotion at a GS7 level which would require more interaction with internal colleagues and external stakeholders. She queried if the Panel had considered the image and reputation of the Organization in recommending the Applicant.

62. She continued that according to UNICEF Human Resources policy, the office could not put the Applicant on probation and that only suitable candidates are appointed and given a two-year contract.

63. The Panel reconvened to consider the comments of the Country Representative. This time around, they concluded that the Applicant could not be recommended.

64. They sent this new recommendation to the LCRB which also endorsed the new decision not to recommend the Applicant. The LCRB while doing so again concluded that the Panel had followed due process and did not compromise the Deputy Executive Director's memorandum concerning preferential treatment for internal candidates. It then sent its new endorsement of the Panel's decision not to recommend the Applicant to the Country Representative.

65. The Country Representative as Approving Authority then approved the non-recommendation of the Applicant and the other recommended candidate was selected.

Issues for determination

66. The singular issue that arises for the Tribunal's determination is whether the decision not to recruit the Applicant in view of all the surrounding circumstances was unlawful.

67. In arriving at its decision, the Tribunal will examine whether any procedural irregularities occurred in the selection process. It will also consider whether the Approving Authority exceeded her authority in any way and if undue influence was exerted on the Selection Panel as to affect the outcome of the selection process.

Were there any procedural irregularities during the recruitment process?

68. The impugned selection process at the UNICEF South Africa Country Office which is the subject matter of this Application was to be governed by two UNICEF Executive Directives, namely CF/EXD/2009-008 and CF/EXD/2009-009. One of these legislations was the Staff Selection Policy while the other laid down the functions and roles of Central Review Bodies (CRB) in the Organization.

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 Bodies shall review these recommendations, subject to the provisions of section 7. The Executive Director has delegated the authority to make the final selection decision on the basis of geographic location, category and function of the respective post.

71. It is clear from this provision that there are three different levels in the UNICEF selection process. The first level is specifically provided for under section 1.5⁴ and is the assessment of shortlisted candidates by a selection panel which will conduct an oral interview among other things. The Panel is responsible for deciding on the list of recommended candidates. The said Panel is established, in the case of recruitments in the general service category in country offices, by the Deputy Country Representative or Chief of Operations.

72. The second level in the process is the review by the CRB or LCRB in the case of general service posts such as in this case. The LCRB reviews the selection process carried out by the Panel. The purpose and scope of this review is to ensure that the Panel complied with provisions of the United Nations Staff Regulations and Rules; applicable UNICEF policies, including the Staff Selection Policy⁵; and the evaluation criteria as stipulated in the vacancy announcement.

73. Section 5.1(b) of CF/EXD/2009-009 clearly stipulates that when the LCRB has questions or doubts regarding the proper application of the applicable procedures by the Panel, it shall request the necessary information and if the questions and doubts are resolved, to its satisfaction it shall send the recommendations of the Panel

⁴ CF/EXD/2009-008.

⁵ Ibid.

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 7.3⁶, 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 Approving Authority may return the case to the LCRB for further review giving reasons. Another option was not to agree with the LCRB and make a selection decision and inform the LCRB of the decision made and the reasons for making it.

⁶ Ibid.

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 that the Approving Authority acted in accordance with the provisions of section 7.4 by directly querying the Selection Panel regarding its recommendation of the Applicant.

82. Also at paragraph 33 of the Respondent's Reply, he submitted that the Approving Authority acted exactly as expected of her by choosing not to agree with the LCRB, made a selection decision and informed the LCRB of it giving reasons.

83. Clearly these submissions taken together are either confused or lacking in honesty in so far as they misrepresent the true state of the applicable law. Section 5.5(c) as already stated above provides that where the Approving Authority chooses not to agree with the LCRB, the only option open to him or her was to make a selection decision and inform the LCRB of it while giving reasons for doing so. The Approving Authority in this instance did not act in accordance with any UNICEF legislation or Executive Directive on recruitment selection.

84. It is agreed on all sides that the Selection Panel conducted an assessment of shortlisted candidates, found two candidates suitable and recommended the Applicant for selection in view of the memorandum of the Deputy Executive Director even though the other recommended candidate was ranked higher than her.

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 as to 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.

91. He further submitted that the Approving Authority had an obligation to enquire with the Selection Panel whether the Applicant possessed all the core and functional competencies required for the post in order to confirm the Applicant's suitability for the said post.

92. It is absolutely important for the Tribunal in deciding whether the Approving Authority had exceeded her powers in any way as to affect the outcome of the selection process to look to the intendments of section 5.5 of CF/EXD/2009-009 in particular and other relevant provisions in CF/EXD/2009-8.

93. Legislation such as CF/EXD/2009-009 which spells out the role of the Central Review Bodies in UNICEF's Staff Selection Policy and other Executive Directives and memoranda concerning staff selection are usually made with a view to ensuring, among other things, independence, transparency and the absence of undue influence in the selection process.

94. Both CF/EXD/2009-008 and CF/EXD/2009-009 which were the two principal legislations governing the selection process in issue are far from ambiguous with regard to the roles of the different parties to a UNICEF selection process. The roles of the Selection Panel, the LCRB as in this case and the Approving Authority are all well-defined and distinct.

95. The prescription of roles for all of the actors in a recruitment process is aimed at ensuring fairness and clearly demonstrates that none of the said actors is to have a monopoly of the process. As earlier stated, the prescription of roles for the different actors is intended to ensure independence, transparency and the absence of undue influence.

96. The Approving Authority who makes the final selection decision is expected to act within his or her mandate and cannot ignore the extant provisions of applicable legislation.

97. In *Verschuur*⁷, the UN-Habitat Executive Director after receiving a list of recommended candidates which had been approved by the CRB in a selection process instructed the selection panel to reduce the number of recommended candidates. This resulted in the removal of the name of Mr. Verschuur and two others from the said list.

98. The United Nations Appeals Tribunal (UNAT) upheld the decision of the Dispute Tribunal in its interpretation of sections 7 and 9 of ST/AI/2006/3 (Staff selection system) and reiterated that it is not for the head of department who makes the final selection decision to intervene in the evaluation process conducted by the programme manager, the CRB and the selection panel leading up to recruitment.⁸

99. UNAT emphasized that the head of department is not entitled to exclude a candidate from the list of qualified candidates but only to discharge her mandate as provided for in the relevant recruitment legislation. It was up to the head of department when the recommendations came to her to ensure that the established procedures are respected and to make a selection decision.

100. In the instant case, it must be borne in mind that the Applicant was recommended for selection and appointment by both the Selection Panel and the LCRB even though she was ranked second to another recommended candidate.

101. The Respondent's submission here is that no rules were breached or irregularity committed when the Approving Authority referred the case back to the Selection Panel querying their recommendation of the Applicant for the upgraded post. This position is untenable because the clear intendment of the authors of CF/EXD/2009-008 and CF/EXD/2009-009 is that the Approving Authority be insulated from the Selection Panel in order to ensure the independence of the said Panel and the integrity of the recruitment process.

⁷ Judgment No. UNDT/2010/153.

⁸ 2011-UNAT-149.

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 memorandum⁹.

104. The said memorandum titled 'Corporate Support to Staff on Abolished Posts' was addressed to Regional Directors, Headquarter Directors and UNICEF Representatives. It directed that, "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 relative competence and integrity dictate otherwise".

105. The memorandum continued that:

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 process did not match those required for the post.

106. It is obvious that the Approving Authority in this case who happened to be UNICEF's Representative in the Country Office while evidently disagreeing with the LCRB's recommendation regarding the Applicant's candidature was not confident or comfortable about giving 'strong reasons' with respect to the Applicant's 'relative incompetence and lack of integrity' as she was required to do in the circumstances.

⁹ Applicant's Annex 9.

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 writing for the non-selection of the Applicant too onerous a task in light of the directives in the Deputy Executive Director's memorandum. She therefore resorted to acting contrary to UNICEF's staff selection legislation and policy by directly approaching the Selection Panel with her queries about the Applicant's suitability.

109. There is no doubt either that she achieved the desired result when without any further evaluation of the candidates, the Selection Panel reversed its earlier decision that the Applicant had met the minimum requirements for the post. The LCRB then followed suit in this somersault and for the third time in the same selection process found that all necessary procedures had been complied with in spite of the reversal of a decision it had earlier approved.

110. The undue influence exerted by the Approving Authority on the Selection Panel leading to it reversing its earlier decision concerning the Applicant's suitability is evident in the stark contrast to the Selection Panel's position when it stood its ground early in the selection process following a query by the LCRB as to why it found the Applicant suitable.

111. The Tribunal finds and holds that the Approving Authority in this case by directly approaching the Selection Panel to procure a reversal of the recommendation of the Applicant as a suitable candidate had monopolised, sullied and tainted the

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 selection in spite of finding that she was rated as "Developing Proficiency" in two areas of competency.
- c. 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.
- d. The Approving Authority found the obligation of making a justification in writing for the non-selection of the Applicant too onerous a task in light of the directives in the Deputy Executive Director's memorandum. She therefore resorted to acting contrary to UNICEF's staff selection legislation and policy by directly approaching the Selection Panel with her queries about the Applicant's suitability.
- e. The undue influence exerted by the Approving Authority on the Selection Panel leading to it reversing its earlier decision concerning the Applicant's suitability is evident in the stark contrast to the Selection Panel's position when it stood its ground early in the selection process following a query by the LCRB as to why it found the Applicant suitable.

f. The Approving Authority in this case by directly approaching the Selection Panel to procure a reversal of the recommendation of the Applicant as a suitable candidate had monopolised, sullied and tainted the entire selection process through undue influence contrary to the principles of independence and fairness and the legal intendment of relevant UNICEF legislation.

Judgment

113. The Tribunal awards the Applicant compensation amounting to two years' net base salary at the GS7 Programme Assistant level for the loss of opportunity caused by the failure by the UNICEF Administration to follow its own guidelines, rules and procedures since were it not for these failures, the Applicant had a 100 % chance of selection for the said post and a two-year contract.

114. Having found that the Applicant's non-selection for the contested post was the result of undue influence exerted by UNICEF's Representative in the Country Office, the Tribunal also awards the Applicant three months' net base salary at the GS6 Programme Assistant level.

115. The total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 11th day of November 2015

Entered in the Register on this 11th day of November 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi