



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/038

Judgment No.: UNDT/2021/056

Date:

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 Shefa (“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

- 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

inform the Applicant of the office's decision at the longlisting 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) 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 he 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 formal recruitment, 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. He advised him that the Applicant should be formally notified immediately.

20. On 22 June 2020, the Director of OAI further discussed 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. q () m4 (nt)e5sN3 (e)4 (e)4 (d)6 (A)4 (p.n21 Td (2 (h

Consideration

28. The

(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*

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), 0 Tc fi4 (0.004 </MCID 2 >-2 ())3 (, 0 Tc fi)tonterp22 (i)--32.0

55. However, paragraph 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 decision may seem to contradict the contested decision, that does not bar the Administration from correcting its previous erroneous decisions. As the Appeals Tribunal held, "previous findings of the Tribunal do not constitute a bar to the Administration from correcting its previous erroneous decisions." The Appeals Tribunal held, "previous findings of the Tribunal do not constitute a bar to the Administration from correcting its previous erroneous decisions." Hosotd [(nd i (i)-2 (on5(n)-3.9 (t--6.1 (r)4J 0 Twd (as)Tj 0)-4 (e))TJ 0 Tc oTw (4 (A

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. The Applicant is entitled to, as a staff member of the Organization, for her applications for posts in the Organization to receive full and fair consideration.

61. Moreover, staff rule 3.10 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 ~~K2011~~ 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 ~~knocking~~ ~~knocking~~ them to the door (para. 36). As stated above, the Applicant has no right to promotion to a particular post and therefore the nonselection for the post can in no way be construed as constructive dismissal.

63. Based t. (s)-1 (n)-4 (l2 Tc)6 (tt)-2 (4 t)-

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 the para. 73 of the Policy provides that it is “expected that no information be shared with the candidates until 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, yet, upon her inquiry, notified her of the contested decision on an exceptional basis.

68. Accordingly, the Tribunal does not find that the decision to not 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