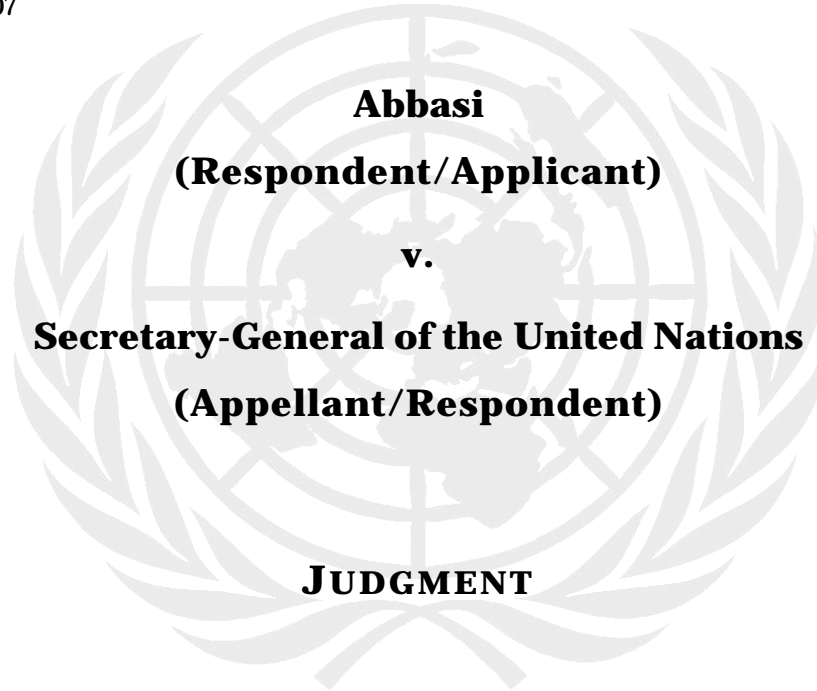




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-107



**Abbasi
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Sophia Adinyira
Judge Kamaljit Singh Garewal

Judgment No.: 2011-UNAT-112

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Raja Muhammad Farooq

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. In this case, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) awarded compensation to Farzana Abbasi (Abbasi) as a consequence of finding that she suffered from gender discrimination during the selection process for three vacancies for the position of Operations Officer in Pakistan with the United Nations Children's Fund (UNICEF).

2. This Tribunal holds that no gender discrimination took place against Abbasi and that, on the contrary, the Administration applied UNICEF's Gender Parity and Equality Policy in her favour. We do not find any violation of the right to be equally considered - or even favoured for reasons of gender - in the evaluation criteria applied or in the decisions taken by UNICEF during the selection process. The Judgment under appeal is vacated in its entirety.

Facts and Procedure

3. Abbasi first joined UNICEF in August 1987 as a Secretary on a fixed-term appointment. In December 2007, she commenced a temporary appointment as an Operations Officer in Abbottabad, Pakistan.

4. In August 2008, UNICEF advertised three vacancies for the position of Operations Officer in Peshawar, Lahore and Quetta, Pakistan. The vacancy in Quetta received the least number of applications. All duty stations had security considerations, particularly Quetta. Abbasi applied for all of the positions and indicated in her application that Quetta was her third preference.

5. Abbasi was one of the 21 candidates who were invited to take a written examination, which she failed with a score of 10 out of 30 points. Only five candidates passed the written examination. Eight candidates who failed the written examination, including Abbasi, were selected to proceed to the interview stage of the selection process. In accordance with UNICEF's Gender Parity and Equality Policy,¹ Abbasi was selected in order to have a woman among the candidates interviewed. She was also an internal candidate.

¹ UNICEF's Gender Parity and Equality Policy – The Gender Balanced Workplace (CF/EXD/2007-007).

6. In total, 13 candidates were interviewed for the three positions by the Selection Advisory Panel (Panel). The Panel ranked the candidates according to the total scores given for the following criteria: written examination, interview, qualifications and experience. Abbasi was ranked third out of the 13 candidates.

7. The Panel recommended one candidate for each of the three positions. The first and second-ranked candidates, P and L, were recommended for Peshawar and Lahore, respectively. Abbasi was recommended for Quetta. In December 2008, the Appointment and Placement Committee (Committee) reviewed the pool of possible candidates. Some members of the Committee suggested that Abbasi, being a single woman, “would find it difficult to be adjusted in Quetta”. The Committee did not agree on a recommended candidate for each of the positions; however it agreed on a pool of candidates for each of the three locations. Abbasi was one of the four candidates recommended for Peshawar.

8. The Administration of UNICEF proceeded to select the candidates in February 2009. At this stage, Abbasi was asked if she was interested in the position in Quetta, and she stated that she was not interested. The Senior Human Resources Officer recommended the appointment of two candidates for the positions in Peshawar and Lahore. The candidate recommended for Peshawar, P, was the highest-ranked candidate by the Panel and was an internal male candidate on an abolished post. P was not recommended for Lahore as the Chief Financial Officer for Lahore had a strong preference for candidate L. P was not eligible for Quetta due to UNICEF’s policy to rotate staff to new duty stations. The candidate recommended for Lahore, L, was the second-ranked candidate and was an external male candidate.

9. The Senior Human Resources Officer later considered that Abbasi was not eligible for any of the positions as she did not have a degree from a university recognized by UNICEF under Administrative Instruction entitled “Presentation of academic degrees” (CF/AI/2008-014), which came into effect on 1 January 2009 after the interviews were held. No candidate was recommended for Quetta and the position was subsequently re-advertised.

10. In April 2009, Abbasi requested administrative review of the decision not to select her for the positions in Peshawar, Lahore and Quetta. She later appealed the decision to the Joint Appeals Board in July 2009. The appeal was transferred to the UNDT.

11. The UNDT issued Judgment No. UNDT/2010/055 on 31 March 2010. The UNDT found that Abbasi was discriminated against on the basis of her gender. Under UNICEF's Gender Parity and Equality Policy, once Abbasi was invited to be interviewed after she had failed to pass the written examination, UNICEF was estopped from taking into account the scores for the examination in recommending and selecting the successful candidates. When the examination scores were excluded, she was the second-ranked candidate.

12. In light of Abbasi's experience, performance, qualifications, internal status and interview performance, there were sufficient grounds to infer that the reason why she was not offered an appointment in Peshawar and Lahore was her gender. Further, the UNDT found that there were no cogent reasons put forward by the Secretary-General to discharge the burden of proving that there was an innocent non-discriminatory reason for not recommending and subsequently appointing Abbasi as Operations Officer in Peshawar or Lahore.

13. The UNDT awarded Abbasi 12 months' net base salary at the rate applicable for the post of Operations Officer, plus interest at the rate of eight per cent. The UNDT also awarded compensation for distress of USD 30,000, plus interest. The UNDT found that Abbasi's distress was aggravated by the fact that, during the proceedings, the Secretary-General asserted that her degree was not from a recognized university.

14. The Secretary-General filed an appeal against the Judgment on 25 June 2010. Abbasi filed an answer to the appeal on 15 August 2010.

Submissions

Secretary-General's Appeal

15. The Secretary-General submits that the UNDT erred on questions of fact and law and exceeded its competence in concluding that UNICEF's decision not to appoint Abbasi constituted discrimination. The inclusion of the scores for the written examination as part of the evaluation of the candidates did not deprive Abbasi of the right to be considered equally for the positions. In this regard, the Secretary-General argues that the examination was one of four criteria for assessing the candidates; other candidates failed the exam besides Abbasi; and the decision to include the examination affected male and female candidates equally.

16. The Secretary-General also argues that the UNDT exceeded its competence by holding that UNICEF was required to ignore the written examination as part of the overall evaluation of the candidates. It is not the role of the UNDT to substitute its own judgment for that of UNICEF in deciding the criteria for the evaluation of the candidates and how to implement the Gender Parity and Equality Policy. UNICEF's obligation to give preferential treatment to female candidates under the Policy was met by giving Abbasi the opportunity to be interviewed, and UNICEF was entitled to consider the examination scores for all candidates at the later stages of the selection process.

17. The Secretary-General submits that the decision not to select Abbasi for Peshawar and Lahore did not constitute discrimination on the basis of gender. As the third-ranked candidate, Abbasi was not given her first or second choice and she declined the opportunity to be recommended for Quetta. Although the UNDT declined to address the issue of Abbasi's academic credentials, her Personal History Form indicated that she obtained her degree from a university that was not recognized by UNICEF.

18. The Secretary-General contends that the UNDT erred in ordering compensation for discrimination, distress and loss of opportunity of being appointed. Abbasi is not entitled to compensation as she was not discriminated against. The UNDT erred in law in finding that the distress caused to Abbasi during the litigation was a ground for awarding compensation. The UNDT also erred in finding that Abbasi had a right to be appointed to the post of Operations Officer and awarding compensation for the loss of the opportunity of being appointed. The Secretary-General also argues that the award of interest is punitive and therefore contrary to Article 10(7) of the Statute of the Dispute Tribunal.

19. The Secretary-General requests that the Appeals Tribunal annul the Judgment in its entirety.

Abbasi's Answer

20. Abbasi submits that the UNDT correctly decided the case and there are no errors in the Judgment. There was discrimination against her for the following reasons: she should have received higher marks given her experience as an internal candidate; the candidate selected for Lahore was an external candidate; the criteria for being selected for the three posts were the same and, as one of the top three candidates, she should have been offered the position in Peshawar and Lahore after declining Quetta; and UNICEF initially considered

recommending her for the Quetta position, a “hard and difficult” duty station, knowing that she would not accept it.

21. Abbasi argues that UNICEF’s official records include documents which verify that her degree is from a recognized university.

22. Abbasi submits that the award of damages for distress is reasonable as she has not been dealt with fairly, judiciously or equitably by UNICEF since she challenged the contested decision.

23. Abbasi requests that the Appeals Tribunal dismiss the appeal and affirm the Judgment.

Considerations

24. The Judgment under appeal awarded compensation to Abbasi as a consequence of finding that she suffered from discrimination on the basis of gender during the selection process for three vacancies for the post of Operations Officer in Pakistan.

25. This Tribunal holds that there was no gender discrimination against Abbasi and that, on the contrary, the Administration applied UNICEF’s Gender Parity and Equality Policy in her favour.

26. The UNDT has jurisdiction to rescind administrative decisions concerning the selection of staff on certain grounds. A decision not to select a staff member may be rescinded in circumstances where he or she did not receive fair and adequate consideration, there has been any kind of discrimination or bias against the staff member, or the proper staff selection procedures were not been followed.

27. In the present case, after considering the evidence and arguments provided by the parties and the detailed analysis of the issues in the Judgment under appeal, we conclude that the UNDT erred in finding that there was discrimination against Abbasi on the basis of her gender.

28. This Tribunal does not agree with the finding of the UNDT that UNICEF was required to ignore the results of the written examinations as part of the overall evaluation of the short-listed candidates to ensure that there was no discrimination against Abbasi.

29. Abbasi failed the written examination. Nevertheless, through affirmative action, the Administration gave her the opportunity to continue to the next stage of the selection process, as she was an internal candidate and the only woman competing. This was a correct application of the UNICEF's Gender Parity and Equality Policy. However it does not follow from the Policy that at the end of the selection process, the results of the written examination should have been ignored for the purpose of assessing the candidates.

30. It is important to recall that a number of the candidates who were short-listed to be interviewed, including Abbasi, failed the written examination. The results of the examination were taken into account in the assessment of all of the interviewed candidates. All of the candidates were therefore treated equally when it came to the consideration of the written examination as part of their overall assessment, and therefore there was no discrimination against Abbasi on this basis.

31. At the conclusion of the selection process, Abbasi was the third-ranked candidate. There were three positions to be filled, and Abbasi was properly considered for the post in Quetta, the location listed as her third preference in her application. Ranked third, she was entitled to her third choice of location, because the previous two positions of her choice were also preferred by the higher-ranked candidates and so, reserved for them.

32. The Gender Parity and Equality Policy would have implied offering Abbasi her first or second choice of location if she had been ranked equally with one of the other candidates, but this was not the case. Ranked third, she was entitled to her third choice of location. Abbasi was offered the opportunity to be recommended for the post in Quetta, but she declined this opportunity.

33. We do not find any violation of the right to be equally considered - or even favoured for reasons of gender - in the assessment criteria applied or in the decisions taken by UNICEF in this case. Abbasi has not persuaded this Tribunal that she had the right to be appointed to the positions in Lahore or Peshawar and there are no extraordinary reasons to disturb the Administration's actions during the selection process under challenge.

34. For the foregoing reasons, there is no basis for rescinding the contested decision and Abbasi is not entitled to any compensation. Therefore, the Judgment under appeal must be vacated in its entirety.

Judgment

35. This Tribunal vacates the Judgment under appeal in its entirety.

Original and Authoritative Version: English

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Garewal

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar