



**JUDGE MARY FAHERTY, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed

competencies for the G-6 Security Lieutenant posts. The interview panel considered the ability to carry a fire arm as a desirable skill for the post of Security Lieutenant.

... On 25 June 2010, the Programme Case Officer (“PCO”) submitted the list of the 11 candidates to the Secretary of the Central Review Panel (“CRP”), Mr. Sousa Jossai for endorsement.

... By a memorandum dated 13 September 2010 the CRP endorsed the list of recommended candidates and indicated that it was satisfied that UNON/DSS had properly applied the relevant evaluation criteria and the prescribed procedures under Administrative Instruction ST/AI/2002/6. The names of eight candidate selected from the list of 11 endorsed by the CR[P were] sent to UNON’s Director, Division of Administrative Services.

... On 16 September 2010, the eight candidates selected to fill in the eight vacant posts were notified of their selection. The Applicant was not one of the eight selected candidates.



... The Respondent produced two documents, that is, the Report of the SIU/UNICTR and the report of the investigation by DSS Compliance, Evaluation and Monitoring Mission to UNON. The Respondent submitted that he was unable to find any report on the 7.2 mm bullet that was allegedly found in Mr. Mkunde's office.

3. In Judgment No. UNDT/2013/035, the Dispute Tribunal held that Mr. Luvai's claim against the 2006 decision to revoke his licence to bear an official firearm that he had submitted to the MEU for management evaluation on 29 March 2011, like all of his other claims, was receivable, as it was interlinked with the selection process and did not stand alone. The UNDT noted that the MEU had dealt with the firearm qualification issue as part of Mr. Luvai's submissions on his non-selection decision. On the merits, the Dispute Tribunal determined that Mr. Luvai's candidacy for the Security Lieutenant posts had not been fairly and fully considered at the selection stage, that he was a victim of harassment in the workplace, that the Chief of UNON/DSS had abused and exceeded his authority by revoking Mr. Luvai's firearm licence without providing reasons for his decision and by not restoring his access to Lotus Notes after the investigations had been completed and no further action had been taken on the matter. It also determined that the Chief of UNON/DSS, the Assistant Chief of Security UNON and the Human Resources Officer, UNON, had abused their authority by usurping the powers of the Medical Director and declaring Mr. Luvai mentally unstable.<sup>2</sup> Consequently, the UNDT ordered that Mr. Luvai's licence to bear a firearm be reinstated, that his

timely request for administrative review rendered his claim regarding the 2006 decision not receivable and deprived the UNDT of jurisdiction to reach the merits of the claim. The Secretary-General maintains that a party who failed to raise any claim within the applicable deadlines should not be able to revive the claim by appending it to a claim regarding a more recent decision. If the UNDT's assertion of jurisdiction over time-barred claims were to be confirmed, time limits would essentially be re

UNON/DSS had subjected Mr. Luvai to harassment and abuse of authority, and finding that the Deputy Chief of UNON/DSS and the Human Resources Officer had abused their authority in respect of Mr. Luvai.

8. The Secretary-General requests that the Appeals Tribunal order the redaction of the names of the Chief of UNON/DSS, Deputy Chief of UNON/DSS and Human Resources

14. Mr. Luvai prays that this Tribunal deny the Secretary-General's request for confidentiality. In his view, the UNDT's discussion about these three staff members concerns their official duties and does not involve the disclosure of any personal and sensitive information.

### **Considerations**

*Did the Dispute Tribunal exceed its jurisdiction in reviewing the 10 October 2006 decision to revoke Mr. Luvai's firearm licence?*

15. The Dispute Tribunal ruled that Mr. Luvai's claim regarding the revocation of his firearm licence, as detailed in his UNDT application dated 28 April 2011, was "not an independent claim" and that it was "interlinked" with his challenge of the decision not to select him for VA 1 and VA 2. Accordingly, the UNDT determined that Mr. Luvai's claim regarding the revocation of his firearm licence was receivable.

16. To put this issue into context, some factual background is necessary. On 10 October 2006, Mr. Luvai was notified of the decision to revoke his firearm permit in the following terms:



18. Former Staff Rule 111. a, applicable at the relevant time, provided that “[a] staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed”. That Staff Rule also provided that “such letter must be sent within two months from the date the staff member received notification of the decision in writing”.

19. The jurisprudence of the Appeals Tribunal has consistently affirmed that the steps of management evaluation, or administrative review under the former internal justice system, “are required to be exhausted before the jurisdiction of the UNDT can be invoked”<sup>3</sup> In *Ajdini*, the Appeals Tribunal stated that the “UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review”,<sup>4</sup> reflecting the provision of Article 8(3) of the UNDT Statute which provides that the Dispute Tribunal “shall not suspend or waive the deadlines for management evaluation”. Accordingly, it follows that the 10 October 2006 decision would not, on a stand-alone basis, have been receivable by the Dispute Tribunal in 2011. The question to be decided is whether the events of September 2010 (Mr. Luvai’s non-selection for the two vacant posts) gave rise

selection for other vacancies as the basis for his non-selection for the posts in issue in this appeal.

22. In its response of 13 January 2011, the MEU stated as follows:

You contend that the failure to select you for one of the Posts came in retaliation for the fact that you previously challenged irregular vacancy announcements, and “as a show of impunity well-grounded in the fact that the Chief of the Security has the capacity of influencing the decisions of both the recruitment process and the Internal Justice System of the United Nations.” You assert that no explanation was given as to your unsuitability for any of the Posts. You contend that the candidates selected were either recently recruited, junior in rank and/or had been recently selected/promoted during an earlier “irregular” selection process. You argue that the SSS violated the princip[le] of preference for members of the international career service in filling vacancies, and failed to disclose any superior qualifications possessed by the selected candidates over your own.

In its comments on your request, SSS contended that it meticulously followed the requirements of the staff selection process and accorded you the full measure of your right to receive full and fair consideration for the Posts. SSS argued that your seniority did not in any way entitle you to preferential treatment in the selection decision for the Posts. SSS pointed out that you put forward no evidentiary support for your speculation of a conspiracy to prevent your promotion, and that your contention in this regard had no factual basis. It further contended that you were assessed and found to possess the qualifications and competencies for the Posts and, on the basis of that assessment, the interview panel placed you on a list of recommended candidates. The CRP subsequently endorsed you as one of the candidates possessing the competencies and other requirements for the Posts and you were rostered for similar posts accordingly.

It further stated:

Having regard to the documents provided to it by the Administration, the MEU noted that, contrary to the assertions in your request, you were not found to be unsuitable for the Posts. Rather, you were among the candidates recommended and endorsed by the CRP. Examining the selection process to review whether your right to the full and fair consideration of your candidacy was observed following the CRP endorsement, the record shows that, in deciding which candidates would be better suited for the Posts, SSS evaluated the candidates on job performance during their tenure with the Organization, compared their strengths and weaknesses, their skill sets, and UN core values and competencies. The distinguishing factor in the selection process came down to the desirable skills of the VAs, and specifically, “certified knowledge or sound experience in the handling of firearms.” The eight selected candidates had passed the

United Nations firearm qualification course, while you had not. Recalling that this skill was only considered as desirable rather than required, the MEU nevertheless considered this was a reasonable basis on which to choose from the eleven suitable candidates to fill the eight vacant posts.

23. While it is certainly the case that the ME

28. However, having reviewed the contents of the request for management evaluation and the response of the MEU thereto, the Appeals Tribunal is satisfied that there was nothing in Mr. Luvai's request of 21 November 2010 which suggested that he was challenging a decision made some four years previously. His request of 21 November 2010 is clear and unambiguous. It clearly identifies the disputed management decision as the failure to select him to fill the advertised vacancies and the selection of officers who were either unsuitable or themselves previously selected or promoted on an irregular basis. Indeed, much of

30. These findings were predicated on the UNDT's determination that it had jurisdiction to consider the revocation of the firearm permit, a determination that this Tribunal has found to be in excess of the Dispute Tribunal's jurisdiction. Thus, in as much as the UNDT did not have the statutory authority to receive the issue of the firearm permit revocation, it similarly

35. However, by 25 June 2010 and 2 September 2010 respectively, he was one of eleven candidates identified at the 30-day mark for transmission to the CRP for review. With respect to the first advertised vacancy, on 9 July 2010, he was evaluated by the CRP as one of eleven candidates suitable for selection or placement on the roster.

36. On 13 September 2010, he was likewise approved as meeting the requirements for the other advertised vacancy, either for selection or placement on the roster. It is common case that his name was duly placed on the roster for two years.

37. The Dispute Tribunal determined that Mr. Luvai was unfairly treated at the *interview* stage because the interview panel failed to consider the material issues regarding Mr. Luvai's firearm qualification and that this failure impacted unfavourably on his selection chances. This decision was arrived at on the basis of contradictions between evidence given by Mr. Luvai's superiors and the written record, in particular, Management's response to the MEU.

38. The Appeals Tribunal is satisfied that the UNDT erred manifestly in concluding that Mr. Luvai was unfairly treated at the *interview* stage, in circumstances where, as the record demonstrates, the interview panel recommended him as one of eleven candidates to be considered for selection notwithstanding that he had "not passed a UN firearms qualification course", *which was in fact the case*. Thus, while it was a material issue for the interview panel that Mr. Luvai could not satisfy this desirable skill, the panel did not however impede his progress to the next stage of the selection process.

39. The UNDT also impugned the process on the ground that Mr. Luvai's candidacy was not fairly considered at the *selection* stage.

40. The selection of duly qualified candidates for promotion is a power vested in the Administration. With regard to the circumstances of the present case, we are not satisfied that, as required by our jurisprudence,<sup>9</sup> Mr. Luvai has demonstrated by clear and convincing evidence that he was denied a fair chance of promotion. We do not regard the contradiction of Mr. Luvai having been placed on the roster notwithstanding, it would appear, reservations

41. Absent any evidence of consideration of irrelevant material or the omission of relevant factors or bias or discriminatory conduct on the part of the decision-maker, it was within the discretion of the Secretary-General to select those candidates who had passed the requisite recent firearm qualification course, and we accept the argument that the authorization to carry a firearm and to have up-to-date firearms training are factors to which

46. Under Section 6.1, the Organization retains “all rights in ICT resources and ICT data and in any work product of an authorized user using ICT resources or ICT data” and “the right to block or restrict access to any ICT resource or ICT data, at any time and without notice, when necessary for maintaining or restoring the technical integrity or performance thereof or for any other appropriate purpose, including prevention of any of the activities prohibited under section 5 of this bulletin”.

47. Among the myriad of prohibited actions under Section 5 is the prohibition on users “knowingly, or through gross negligence, using ICT resources or ICT data in a manner contrary to the rights and *obligations* of staff members”. (Emphasis added)

48. The Organization’s powers of investigation into suspected breaches of the code of conduct for users, as set out in the bulletin, are contained in Section 8 which, *inter alia*, provides: “At any time there is reason to believe that there has been use which interferes with the operation of ICT resources or technical disruption of ICT resources, ITSD or a corresponding office away from Headquarters may initiate monitoring or an investigation.”

49. In the present case, a Section 8 investigation was duly initiated on 15 April 2011, following the discovery of pornographic material on Mr. Luvai’s shared drive and it was duly conducted by SIU/ICTR, who reported on its fact-finding on 12 August 2011.

50. Mr. Luvai’s challenge to the suspension of his access to ICT resources in March 2011 was filed with the UNDT on 9 September 2011, approximately one month after the SIU/ICTR reported.

51. Hearings into his two UNDT applications were conducted between 11 October 2011 and 18 September 2012, and it was duly ascertained by the UNDT that, as of September 2012 and notwithstanding the factual findings of the SIU/ICTR, the Administration had not referred the Investigation Panel’s findings to the Assistant Secretary-General for Human Resources Management, pursuant to paragraph 3 of administrative instruction ST/AI/371 entitled “Revised disciplinary measures and procedures”.<sup>10</sup>

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<sup>10</sup> Paragraph 3 of ST/AI/371 reads: If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General for Human Resources Management, pursuant to paragraph 3 of administrative instruction ST/AI/371 entitled “Revised disciplinary measures and procedures”.



52. Commenting on this, the Dispute Tribunal opined that “if the withdrawal of [Mr. Luvai’s] access to Lotus Notes was imposed only to secure the integrity of the investigation, the proper procedure would have been to restore access upon the completion of the investigation. Surprisingly, this is not the case and so from August 2011 when the investigations were concluded to date [Mr. Luvai’s] access to Lotus Notes has not been restored while no disciplinary action was commenced against him.”<sup>11</sup> The UNDT formed its view that the access had only been suspended to protect the integrity of the investigation on the basis of an entry in the SIU/ICTR report to that effect.

53. In this appeal, the Secretary-General contends that the Dispute Tribunal “erred in concluding that the decision to disable [Mr. Luvai’s] UN e-mail account was unlawful” and that it erred in ordering that the access be restored.

54. Contrary to the general thrust of the Secretary-General’s claim, the UNDT did not specifically declare the initial suspension of Mr. Luvai’s access to Lotus Notes unlawful, rather, a careful reading of the Judgment shows that the Dispute Tribunal took issue with the absence of a referral under ST/AI/371, a circumstance the Dispute Tribunal considered as empowering it to restore Mr. Luvai’s access to Lotus Notes. Did the UNDT err in doing so? We are satisfied, given the particular circumstances of this case, that it did. We accept the

56. It may well be that in the future Mr. Luvai may initiate a request to his employer for the restoration of his e-mail access and depending on the management

we have set out above, we are satisfied that the generalized nature of his harassment claims, insofar as Mr. Luvai's non selection for the vacancies in question and the removal of his Lotus Notes e-mail account are concerned, does not meet the standard set by the jurisprudence of this Tribunal.<sup>13</sup> The documentary record does not establish that Mr. Luvai's allegation, that his Lotus Notes access was suspended to hamper his first application to the UNDT, has any credible basis, in circumstances where his Lotus Notes account was suspended because of the

64. The investigation mechanism and conclusions provided for by ST/SGB/2008/5 can

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Dated this 2<sup>nd</sup> day of April 2014 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Chapman

Entered in the Register on this 13<sup>th</sup> day of May 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar