



Case No.: UNDT/NY/2009/085/
JAB/2009/049
UNDT/NY/2009/118
Judgment No.: UNDT/2010/087
Date: 6 May 2010

Introduction

1. This judgment deals with two separate but closely linked cases, which were heard together. After an interview process the applicant, a longstanding UNOPS staff member holding a 200 series contract, was not selected for a P-4 position with UNOPS as another candidate (on a 300 series contract) was recommended for the job by the interview panel (case 1). In November 2008 he was informed that his contract in New York would not be renewed beyond February 2009. He obtained an offer for another UNOPS position, but after discussions between the parties concerning the start date the Administration decided to withdraw it (case 2). The applicant is contesting both decisions.

Relevant legal instruments

2. Selection Policy for 2006 Transition Process, UNOPS/AI/DHRH/2006/4 of 28 April 2006 (in the following referred to as “the Policy”) provides as follows –

“Composition of the Selection Panel” –

16. The selection panel shall consist of the following members:

- a) One representative from the division/unit of the vacant post, with knowledge and expertise in the field relevant to the post, who will serve as the Chairperson of the selected panel.
- b) One UN staff member endorsed by the Staff Council.
- c) One UN staff member or one client representative with technical expertise in the field relevant to the post/function.
- d) One UN staff member with human resources expertise

All the members of the selection panel with the exception of the UN staff member with human resources expertise shall be voting members of the panel. The role of the UN staff member with human resources expertise is to oversee, facilitate and endorse the selection process. In particular, s/he shall ensure that the selection process is conducted in fair, transparent and expedient way and advise on the application of

UN Staff Regulations and Rules, as well as UNOPS policies and guidelines.

“VI. Recommendation of the Selection Panel” –

37. The recommendation of candidates shall be consistent with the candidates' scores obtained during the evaluation process (including any interviews), as depicted on the evaluation grid. Only on clearly justifiable basis may the panel recommend a candidate who is not the highest-scoring candidate, e.g. such recommendation is made pursuant to paragraph 38. The reasons for such departure from the scores shall be fully detailed in the minutes.

38. In applying the Staff Rule 109.1(c), due regard shall be had for a staff member's period of service with UNOPS and any obligations UNOPS has under the Staff Rules for long-serving staff members of the organization and other UN entities. Subject to the availability of suitable posts in which their service can be effectively utilized, UNOPS staff members and UNDP staff members seconded to UNOPS with 5 years or more of continuous active service will receive priority placement over equally qualified staff with less than 5 years of continuous active service with UNOPS.

39. Recommendations made by the selection panel shall, to the extent possible, be reached unanimously. If this is not possible, recommendations require at least a simple majority of the voting panel members as specified in paragraph 16a. If a majority is not possible, the Chairperson's vote is determinative and this shall be reflected in the minutes. Dissenting panel members shall have the opportunity of having their opinions reflected in the minutes.

“VII. Selection Review Process” –

42. All recommendations shall, where required as dictated below, be reviewed by a Selection Review Panel which shall be composed in accordance with the established rules governing the Appointment and Promotion Board (APB) and Appointment and Promotion Panel (APP). Such a Panel shall constitute the body established as required by Staff Rule 104.14 and shall follow the established rules of the Appointment and Promotion Board (APB) or Appointment and Promotion Panel (APP).

“Final Approval of Selection” –

45. Once the successful candidates has been approved by the Panel stated in Paragraph 43 and 44 above, DHRM will provide one document summarizing all recommendations made by the selection panel for the approval of the Executive Director and will attach information on the list of applicants, the vacancy announcement and the applications documents of the successful candidate.

Facts relating to case 1

3. The applicant joined UNOPS in 1988 and served until his separation in various capacities at the L-4 level. Until July 2004 he served on a 200 series contract under the former staff rules and regulations, but his position was abolished and instead he worked on other short-term and temporary appointments. In January 2006 it was decided to move the UNOPS headquarters from New York to Copenhagen, which entailed the reorganization of many positions in UNOPS. The post encumbered by the applicant as a portfolio manager in the Mine Action Unit, North American Office, was to be abolished by 31 March 2007. On 6 November 2006 UNOPS staff was presented with a preliminary report outlining the envisaged organizational changes. Regarding the applicant's field of work, it was stated in par 3 that –

It would appear that DPKO/UNMSA [United Nations Mine Action Support] will rely on UNOPS in the near future and business will be there at least at the present level ...

An organigram showed that “Mines” should be headed by a “Tadv” (whatever this means) at the P-5 level (P-4 was crossed out in the draft). This unit was to report to a “UNSEC G COORDINATOR P5”, which then again would report to the “Director”. In a series of emails in January 2007 the applicant informed the Director, North America Office, and the Human Resources Director about his concerns with this process of reorganization.

7. The evaluations of the candidates, particularly that of the applicant, incurred lengthy discussions among the panel. The three other panelists all indicated in their evidence that during the discussions they felt that the staff representative demonstrated bias in favor of the applicant. In addition, the human resources expert stated that after the interview he learned that the applicant and the staff representative were professional acquaintances, which led him to conclude that the staff representative had "an agenda" at the interview. Eventually, the applicant and the successful candidate received exactly the same scores and the panel could not agree on a final recommendation. The staff representative testified, in effect, that he knew the applicant as a critic of the Staff Council which he (the staff representative) did not appreciate and they were not friends or professional acquaintances. I accept that the staff representative appeared to be a strong advocate for the applicant's candidacy and was not in favour of that of the successful candidate. I accept that it may be that the staff representative expressed his views in such a way as to lead the

the interview and no reasons were formally provided. Several different explanations, all given ex post facto are referred to in the evidence, including the tie between the candidates, negative "comments from the panelists" to senior management about the staff representative's approach, the chairperson being a referee for the successful candidate, and feedback from the human re

vacancy, and on the whole more accurately reflect current UNOPS business strategies.

The panelist for technical qualifications also pointed out during the deliberations that there should be concern for [the applicant]'s limitations in mine action. To this point, and by his own admission, [the applicant] mentioned during the interview that he has only one and a half years of mine action experience, whereas the qualifications listed for the position require that candidates possess at least two to three years of experience in mine action.

The Panel with the exception of the Staff Representative agreed that the best overall candidate for the position would be [the successful candidate].

The Staff representative disagreed with such recommendation, stating that both candidates are qualified for the post and in such cases 100 series contract holders should be given preference over ALD [Appointments of Limited Duration] holders. [This appears to have been a mistake, since the applicant did not have a 100 series contract.]

In its conclusion the panel, except for staff representative, agreed to recommend the successful candidate for the post.

11.

... this performance puts down performance of a staff member who has been with the organization for over two decades ... [It] is unclear to me why I have to sign a protocol on reference checks, when, in fact, I did not check any references, but I have been given a paper to sign.

The human resources representative (copying the other members) that he would communicate the statement to the APB, but also stated that –

Concerning the protocol for reference checks, this was a request by the APB.

We will proceed with the APB meeting based on the fact that the majority of the panel, including the Chair, are of the same opinion.

13. In the reference checks, a reference from the Director of UNMAS was obtained. In his evidence, the UNMAS chairperson from the first interview agreed that he had provided input for this reference since he had a detailed knowledge of the successful candidate. He also said, that while the UNMAS Director had a general overview, he had also formed his own opinions. The following is an extract from an undated amendment document to the Interview Panel Report –

Upon submittal of the required reference checks, the following can now be concluded:

1. Both [the successful candidate] (top-scoring candidate) and [the applicant] (the second highest scoring candidate) received good-excellent rating on the personal reference checks.

...

3. Reference check (attached) for both candidates from [name], Director of the UN Mine Action Service, and a key UNOPS client in connection with the position, expresses concern that [the applicant]:

... has had a strained relationship with colleagues from UNMAS with whom he is supposed to interact, largely because of the perception within UNMAS that he ([the applicant]) is not capable of effectively managing mine action activities related to UNMAS ...

... There have been many instances where [the applicant] has been unable to provide UNMAS with timely and relevant information on where the Sudan programme starts from a financial perspective, leading to frustration and delays in UNMAS dealings with other key

partners including within DPKO itself and the UN Controller's Office

...

... [the applicant] possesses neither the required knowledge of mine action nor mine action programme management skills to serve UNMAS from a position in UNOPS. UNMAS has severe reservations regarding his suitability to supervise, mentor, and advise subordinate mine action Portfolio Officers in Copenhagen ...

... if he ([the applicant]) were to be appointed to the position in question, UNMAS would have to insist to UNOPS Senior Management that he is not responsible for managing UNMAS portfolios ...

In his reference check, the UNOPS senior portfolio manager & cluster coordinator, Mine Action Unit (the applicant's immediate supervisor) rated the applicant's level of performance as "very good" (second out of five rating options). He made the following comments concerning how well the applicant got along with colleagues, managers and clients with respect to resolving interpersonal conflicts on the workplace and working with a diverse workforce –

[The applicant] gets along very well with his colleagues. Some negative feedback has been received from project staff but upon review the issues are either outside [the applicant]'s control; are policy and procedure related; or derive from staff requests being declined. He did, however, allow himself to be swamped by day-to-day critical demands of his portfolio at the expense of investing more time in client relations. By the time corrective measures were attempted by [the applicant], the damage was already done. He is supportive of his project staff and Mine Action Unit colleagues. Apart from client relations, and unlike most other colleagues, I have never had to intervene to resolve interpersonal conflict involving [the applicant] within the unit. Conflicts of late, are not limited to [the applicant]. He is outspoken and cr

income goals set. In this way, he is reliable and a respected member of the mine action team.

14. After considering these reference checks, the interview panel upheld their initial recommendation of the successful candidate.

15. On 23 May 2007 the APB reconvened to review the selection process and held that –

Upon reviewing the additional materials submitted, the Board was satisfied with the references and PRAs [assumedly referring to “Personal Review Appraisals”] supporting the selection recommended by the interview panel. However, the Board was not able to find the same supporting information for [the applicant]. In particular, the Board noted that the HR department does not have [the applicant]’s PRA on file. [The applicant] was asked on 27 April 2007 to submit the PRA, but despite HR follow up did not do so.

In conclusion the Board agreed that they understand and support the recommendation of the first Board to conduct reference checks, and the Board felt that it was in a position to endorse the recommendation of the Selection Panel and recommend [the successful candidate] as the selected candidate for the position ...

16. On 31 May 2007 the applicant met with the UNOPS Executive Director who informed him of the APB’s decision, but also offered him a six-month temporary assignment in Nairobi. The Executive Director also informed the applicant that UNMAS had assessed his performance highly. Following up on the meeting, the applicant wrote an email on 8 June 2007 to the Executive Director in which he (inter alia) stated that –

In fact, since joining the MAU 20 months ago, I have NEVER been provided with any specific performance complaint, neither from UNMAS, nor my superiors.

On 15 June 2007 the Executive Director responded by email (copying the Human Resources Director and two other persons) that criticism related to the applicant’s “support on the Sudan portfolio”. The same day the applicant replied (copying the same persons as in the previous email) –

the Division Manager and [name of the same UNOPS staff member] were a combination of avoidance (due to lack of knowledge of how to use Atlas and of our need) and later, deliberate [sic] to make [the applicant], as well as myself, look unprofessionally. Related to this matter was the subsequent inability of UNOPS to provide support to the Mine Action Unit to meet its (increased) financial reporting obligations to the clients. This was linked to the negative audit report on UNOPS ... [P]reparation of financial statement was the responsibility of the Finance Division. This worked relatively well until mid-2006. Responsibility for financial report preparation became unclear and then dumped on the unit with no resources or capacity. Coinciding with the poor audit report on UNOPS overall, the client (UNMAS) became very unhappy with the inability of UNOPS to produce financial statements and in response, increased the reporting requirements. It is clear to me that both [the applicant] and I were professionally and deliberately compromised by the irresponsible behaviour of UNOPS management, namely the Division Chief, in not addressing the matter of financial reporting. We were not supported and we were exposed, without the protection and support of our

Nevertheless, as I discuss below, this reception demonstrates – together with the difficulties faced by the applicant in dealing with the problems with his portfolio not of his making – a significant conflict, not only of interest but also as to knowledge of the actual responsibilities of the applicant for the matters complained of in such strong, indeed, unmeasured, language.

Facts relating to case 2

18. In June 2007 the applicant accepted the offer of a reassignment to Nairobi, but due to his extended sick leave from 6 August 2007 to 7 October 2008 he returned to work in New York. Preparation then started for him to report to Nairobi, but on 31 October 2008 a team leader from Human Resources advised him by email that the assignment was out on hold until the 2009 budget had been finalized and his appointment was extended until the end of 2008. On 28 November 2008 the UNOPS Human Resources Director informed him that UNOPS had decided to reduce its Nairobi office and thus he would not be assigned there. Instead, his appointment in New York was extended until 28 February 2009. He was further informed –

I must also regretfully provide with formal notice that your appointment with UNOPS will not be extended further, and you will be separated from service with UNOPS effective that date. Should you be successful in securing a new position, would you accept another post in UNOPS, the foregoing would of course cease to be applicable.

I would encourage you to actively apply for vacancies at UNOPS and elsewhere. In this connection, I note that UNOPS had recently announced several vacancies as part of its 2009 staff rotation exercise. In view of the special circumstances described above, you may exceptionally submit applications for these posts at the very first round. Please note, however, that under the rotation policy staff cannot apply for posts in their current duty stations.

UNOPS will continue to provide any other assistance you may require in your search for alternative employment

19. The 2009 annual staff rotation exercise in UNOPS was presented as –

UNOPS' annual rotation exercise is part of the Staff Rotation Policy
(Organizational Directive 24), with the aim of increasing m864 Tw

It was my understanding that the UNOPS rotation would be effective in June 2009 to accommodate families with school age children.

My daughter started college this fall. However, my son is in 9th grade at UNIS and I do not want to uproot him in the middle of the school year.

Alternatively, if the rest of the family remains in NY for him to finish school, I will be burdened with 2 sets of household costs – which would cause financial hardship.

I hope that we can find a solution acceptable to everyone. E.g., I could go on mission to Johannesburg for a month so in the later part of the first quarter. Then work from NY until June, if necessary with an additional mission during that period.

22. On 31 December the General Counsel & Ethics Officer of UNOPS replied to the applicant's email as follows –

...

We need this post operational as early as possible. 1 February 2009 is the latest date, for operational reasons. We noted that you applied for this vacant post – not in the interim rotational reasons, as you know – presumably knowing it was needed urgently, and I think, if my memory serves me right, you had indicated (in relation to the Nairobi post) that you could be available in November 2008.

In any event, this is a crucial post operationally. It is also a good post for you to get back into the mainstream after your sick-leave, it's a post where your services are urgently required, and it is a UNOPS-regular one year contract. While we must insist on 1 February 2009 as the latest starting date, I'm sure that a flexible approach would be applied to short periods of advanced leave, if you needed to be in New York for your children at any specific time in the near future.

Please give me a yes or no to the offer that was made to you ... I sincerely hope the answer will be yes as I don't want you to miss this opportunity.

...

23. On 2 January 2009 the applicant replied to the General Counsel (copying the Africa Regional Office Director and the applicant's counsel) –

Thanks for your response ...

Obviously, I am disappointed.

You have a couple of wrong assumptions in it.

First, I was not aware that this ~~was~~ advertised outside of the rotation exercise. As you know, I received ~~an~~ termination letter on 1 December 2008, which also suggested that I ~~could~~ apply in the rotational exercise for which the deadline was a few days ~~ago~~. I clicked on the 'rotation exercise' link on the intranet and ~~printed~~ printed the TORs that were of interest to me. Nowhere did I ~~note~~ note that the Procurement Specialist post in Johannesburg was to be treated differently on the web page – if it was actually specified. I regret ~~that~~ having not noticed – however, the TOR do not stipulate a unique start date.

Hence, my impression that normal rotation will take place in June.

I have indicated my willingness to accommodate the organization as per my previous message. InD .Flac

Johannesburg in order to (establish the AFO LCPC [unknown abbreviation]; provide advice and support to AFO procurement activities, including the transition of SOOC to AFO and provide procurement services to existing and new AFO clients and projects etc . [sic]

These are key Business targets and to perform these tasks critical within the services area in Q.1 2009 and we are unable to adequately perform these tasks until the position is filled, so an early start date is critical.

I hope I am clear in this regard, any effort to ensure that we could start regular operations no later than 1st of February would be greatly appreciated.

25. On 15 January 2009 the applicant forwarded the following reply to the Africa Regional Office Director (copying the person from the previous email and adding Th46 Tw [(d. To brieficaingap:f 1.7312[(of (a)3.1(sE)4.9(Decemb15.Irwar)]ing.58to vateTD .000

In any case, the above issue has been overtaken by something of far greater significance, I am sure [the UNOPS Executive Director] can confirm to you that I have good reason to remain in New York to defend myself against a current, ~~real~~ ^{real} situation of defamation against my person by UNOPS. So far, UNOPS has taken no action to actually repair this situation, and though ~~the~~ ^{that} action may have been accidental initially, it is becoming malicious simply due to the detached, unconcerned and much delayed response. The information now available seems to suggest ~~dissemination~~ ^{dissemination} (or worse) by one (but possibly

Thanks [first name of the Africa Regional Office Director].

Yes, I know that in a parenthesis under para. 3.7 of AI/OEC/200S/05 it is stated: (As far as possible, ~~rotational~~ movements should occur in the third quarter of the year, during which the staff member completes his/her tour of duty ~~to take into consideration~~ leave periods and school calendars).

In this case, no consideration is given to the staff member, though I have made a reasonable proposal (~~which~~ can be adjusted) that would enable operations in this quarter.

I note that the relevant AI (under para 3.6.1 (d) also requires the ASB to consider the “special circumstances” ... relating to school/family ...

Please provide the records for such considerations. I presume the ASB has minutes and that [the Human Resources Director] can provide them.

28. On 28 January 2009 the General Counsel replied to the applicant’s email and stated (copying as in the previous email) –

... I note that the AI says “special ~~circumstances~~ circumstances on the application form”, not just “special ~~circumstances~~”? Were there any special circumstances mentioned on the application form? If so, please give a reference.

29. On the same day the applicant wrote the General Counsel back (copying as in the previous email) –

In [sic] was advised that I could ~~apply~~ for the Rotation in [the Human Resources Director]’s termination ~~letter~~ to me on 1 December – giving me 3 days to respond. I made ~~an~~ online application based on the instructions posted on the web page. I saw no reference to an application form, thus could not ~~mention~~ any special circumstances, and having the assumption that the ~~rotation~~ rotation would take place in June, I saw no reason to mention that issue.

But UNOPS HR is very much aware that I have children in school, since I apply for Ed Grant and I ~~present~~ ~~submit~~ that my HR folder has all that info. Did the ASB consider my case?

30. On 29 January 2009 the General Counsel ~~answered~~ answered the applicant (copying as in the previous email and ~~adding~~ two UNOPS legal officers) –

Thanks for confirming that the special circumstances were not included on the application form. It follows that ASB was not obliged by the AI to consider those special circumstances.

Yes, of course, the appointment to the post you have been offered, was considered by ASB, as are all appointments to 100 or 200 series posts. Although I am the Chair of ASB, I did not chair on that day, and thus I cannot tell you what was discussed and the discussion is, of course, confidential.

I was, however, personally pleased that you were offered this post, in spite of not being perhaps totally qualified for it, since I wanted you to have a chance to get back to work after your illness in a new position, where you could have a fresh start. I think [first name of the Africa Regional Office Director] is of the same view, but you will know that with a portfolio such as he has control, he cannot wait for ever for a Procurement Officer.

I believe that the time has come for you to make a decision. You were offered the post effective 1 February 2009 – it seems unlikely that you will actually meet that, but please come back with a sensible date in early February, or we will have to assume you are declining the offer.

31. On 2 February 2009 the applicant wrote to the General Counsel (copying the persons in the previous email) –

I must take exception to your condescending message below.

In particular, I find this sentence objectionable: “I was, however, personally pleased that you were offered [t]his post, in spite of not being perhaps totally qualified for it, since I wanted you to have a chance to get back to work after your illness in a new position where you could have a fresh start.” [my emphasis]

First of all, the issue of my qualifications is of no relevance to the ongoing discussion. Bringing it up at all is a classic example of subtle power abuse and I will not accept it. It is stunning to observe such behavior by an Ethics Officer. Furthermore you know perfectly well that I am over-qualified for most aspects of the post.

More disturbing, however, is witnessing the time and energy you expend on this exchange – about a distinctly mundane issue of a transfer date, while you totally neglect responding to a much more pressing subject. More than 4 weeks have passed since I notified you of a nasty breach of confidentiality by UNOPS. You have yet to provide a satisfactory response to any of the issues I have raised

to me (with the exception of a couple of dissembling and confused messages). My queries are basic and could have been replied to in a matter of a few days if UNOPS was acting in good faith.

Unfortunately, I have to repeat my earlier response as given to [the General Counsel]. In other words, I will respond to you as soon as UNOPS has clarified the situation. A clarification would:

- Acknowledge full responsibility for the breach of confidentiality
- provide an outline for how it intends to satisfactorily repair the damages caused
- assess responsibility and accountability for the persons involved
- provide a guarantee that the document will not reappear on the web some time in the next few months (it seems that UNOPS is of the opinion that it will not reappear, against all odds to the contrary)
- advise on what specific steps have been made to date to have the document removed from the UN database

Since UNOPS has already had more than a month to review all these issues and to take correctives, I trust that HQ will respond accordingly to the above by Monday. Otherwise, if there is no proper response, I will have to request an extension of the deadline you stated.

34. On 11 February 2009 the new UNOPS General Counsel (formerly one of the legal officers copied with part of the email correspondence) wrote to the applicant (copying the Africa Regional Office Director, the Human Resources Director, the UNOPS Executive Director and an unknown person) –

I am writing to provide the clarifications you have sought from UNOPS, as reiterated by you this last Monday in your email to [the first name of the Africa Regional Office Director], with respect to the inclusion of your name in Note 15 of the UNOP5 Financial Statements for the Biennium ending 31 December 2007. I have made this matter a priority since taking up my position as General Counsel on 1 February.

I would like to place on the record my sincere apology on behalf of UNOPS for the circumstances that led to the inclusion of your name in the Note to the UNOPS Financial Statements, and the consequent hurt that it has caused you. It was an error for UNOPS to have included such information, as it is generally the practice to keep personal information of individuals and companies confidential.

Last week I wrote to the United Nations Board of Auditors formally requesting that the original Financial Statements be redacted to eliminate your name from Note 15 the version that appears on the United Nations ODS. I will be following up with them so that our request can be addressed quickly as possible. As you already have been informed, UNOPS has redacted the document that appears on the UNOPS site in a manner such that any new searches referencing your name will not lead to that original document on our site. I understand that the issue of the cached original will resolve over time.

I am also exploring the possibility of including some written statement on the website with the redacted text to explain the redaction, and, without mentioning your name, identifying that an error was made with the disclosure and also explaining the UNOPS position with respect to contingent liabilities from open claims and cases; i.e., that legitimate disputes may arise from time to time between UNOPS and either companies or individuals, but that no inference may be drawn from the mere existence of a disput

anyone in UNOPS. In this regard it is noteworthy that the table contained all cases with UNOPS and not just yours.

Once again, I am sorry that this has happened. I am somewhat relieved by the fact that the disclosure involved an administrative dispute rather than anything that would have pointed to character or other aspect that could have impacted your name and reputation. This latter point, [the first name of the applicant], is not meant by me to excuse the mistake, and I do want to assure you that I will be diligently following this matter closely, should external factors unfold in a manner that could cause some potential for harm to your name or reputation through disclosure of the original text.

I hope that you now will be able to move forward with respect to the offer from UNOPS to assume the Procurement Officer position in South Africa by 1 March 2009, which I understand is quite critical for the operations of that office, and for which you have been selected. [The Africa Regional Office Director] will expect your definitive answer to his email by close of business, New York time, this Friday, 13 February 2009.

35. On 12 February 2009 the applicant TD .0004.75 0 TD .]e

Case No. UNDT/NY/2009/085/JAB/2009/049

UNDT /NY/2009/118

Judgment No. UNDT/2010/087

39. On 20 February 2009 the acting Human Resources Director wrote the applicant by email (copying the new General Counsel and the Human Resources Director) –

Further to [the first name of the new General Counsel]'s e-mail of 11 February and your reply (reproduced below for ease of reference), which [the first name of the new General Counsel] kindly forwarded to me: as [the new General Counsel] indicated, [the Africa Regional Office Director] and AFO needed ~~an~~ answer by 13 February 2009 as to whether or not you would be joining as a procurement specialist by 1 March 2009.

As you know, AFO have long needed the position to be filled, and have demonstrated tremendous patience by waiting well past the 1 February 2009 starting date that had originally been set. However, we have reached the point where AFO must move forward, even if it means without having you at AFO as you have not committed to the starting date.

It is against the above background that I must inform you that OEC/HR and AFO have identified another staff member to immediately take up the position of AFO procurement specialist. That person has just accepted this position.

Unfortunately, this means that the AFO position is no longer available to you. You will recall that [the Human Resources Director] had sent a memorandum to you on 28 November 2008 extending your appointment to 28 February 2009, also providing you with formal notice that your appointment will not be extended further, unless you secured and accepted another position in UNOPS.

I regretfully note that the foregoing remains applicable. As [the Human Resources Director] is currently on annual leave, I must inform you that you will be separated from service with UNOPS effective end of 28 February 2009. UNOPS will, of course, continue to provide any assistance or guidance you may require in your search for alternative employment. If UNOPS is able to provide any other assistance to you during the next few weeks, such as providing documentation in support of any application you may wish to file with the authorities for a change of USA visa status, please do let us know.

40. On 24 February 2009 the applicant responded (copying as in the previous email and adding his own counsel) –

Please take note that proceeding with my separation at this point would be illegal and would increase UNOPS' liability in this case. I therefore suggest that you retract your communication immediately.

I had long suspected that the interview that took place two years ago and the subsequent decision making process was not properly documented. Upon receiving a specific request from the JAB secretariat, UNOPS has now been forced to admit that no contemporaneous record exists (confirmed to me yesterday, though HQ staff would – or should – have been aware of the situation since well before your message was prepared, presumably with assistance from a legal officer). This admission will have a profound impact on UNOPS' case, as well as for the senior managers and other staff that

Applicant's submissions

General

41. The respondent has not been able to provide documentary material to substantiate the lead up to the abolishment of the applicant's position in the North American Office in 2006. Only rudimentary and preliminary proposals were presented to the UNOPS staff, and the person who was apparently the Human Resources Director at the time never responded to an enquiry by the applicant. The abolition of his post was questionable, the subsequent selection process was procedurally flawed and influenced by simultaneous consideration, which led to the applicant's eventual termination. The opening of a job fair to ALD staff (whose posts were not abolished) was an anomaly, and it is not proved that the policy change as expressed in the Policy was consulted with the Staff Council before being implemented or that the established policy on order of retention in service was respected.

Relating to case 1

42. The first interview process was flawed: the chairperson was not from the division/unit concerned and was external to UNOPS; the chairperson was a referee nominated by the successful candidate and declined to withdraw; the human resources expert was allowed to score the candidates; no minutes were produced and none of the deviations in the process were recorded or justified; the human resources expert discussed the details of the process with a person outside the panel; no reasons were provided explaining why the process was cancelled; and the human resources expert had not familiarized himself with the specific rules applicable to the UNOPS restructuring. The respondent has not been able to satisfactorily explain these irregularities. UNOPS could not have proceeded with the recommendation and selection of the successful candidate at this stage, since minutes would have been necessary and the Staff Council representative would have objected. Although not quite expressed in this way, I understand counsel's submission to be

that, in the alternative, the successful candidate should have been selected since, the scores being equal, the applicant should have been selected as a long-serving staff member with five years or more of con

Relating to case 2

46. The respondent did not provide any information concerning the process leading to the cancellation of the applicant's appointment to the Nairobi position as set out by the Human Resources Director's letter of 28 November 2008.

47. The new General Counsel offered the applicant the possibility of a global settlement of all his claims in which the applicant expressed his general interest. The applicant therefore suggested postponing his move to Johannesburg until 10–15 March 2009 to allow time for negotiation. The applicant never rejected deployment on 1 March 2009, but was simply awaiting management's decision on whether it agreed to the short postponement for which the new General Counsel had expressed support.

Respondent's submissions

General

48. UNOPS' Organizational Directive N 11, "HR Framework for the UNOPS Transition", set out the procedures applicable to the process of staff selection in respect of UNOPS' restructuring and transition process, including that all UNOPS staff members holding 100, 200 and 300 series positions of appointment were eligible to apply for vacant posts. This took effect from the first version of the policy of 1 March 2006 to the third version of 28 December 2006, which applied to the applicant. Contrary to the applicant's assertion, the opening of the job fair to ALD staff members (300 series staff members) was not an "anomaly".

Relating to case 1

49. The decision to cancel the first interview was reasonable because of the

Case No. UNDT/NY/2009/085/JAB/2009/049

UNDT /NY/2009/118

Judgment No. UNDT/2010/087

experiencing the stress of the restructuring exercise, to shoulder the additional burden of reviewing applications and candidates. The only exception was the NAO Director, but she did not possess a mine-action background and did not have the required "knowledge and expertise" as stipulated in 16 of the Policy. With no NAO staff members available, the best alternative was to seek the assistance of other senior UN persons who not only had mine action expertise, but also a reasonably good knowledge of UNOPS operations. The UNMAS

made. As for asking the UNMAS Director for a reference this was appropriate since the applicant had not provided any references himself as he was otherwise required to do.

54. The APB instructed the third interview panel to obtain performance evaluations for both candidates, but the applicant did not provide his 2005 and 2006 performance review reports as requested. The UN Administrative Tribunal found in UNAT 962 Bruer (2000) that a staff member, through his own fault fails to prepare performance evaluation reports, thereby precludes the Organization from assessing his performance and making a decision based thereon, cannot complain of prejudice or improper motivation if his contract is not renewed. (Since the absence of the performance reviews was not an issue as the matter ultimately unfolded, it has not been necessary to deal with this submission. Moreover, Bruer is not relevant to any issue in this case).

55. Both APBs were properly constituted. First, when the APB first convened, it decided not to simply endorse the selection panel's choice of the successful candidate but rather to seek further information through references and performance evaluations, which shows its objectivity. Secondly, the APB's composition was consistent with the APB composition for numerous other posts, which reflected the small pool of senior professional staff UNOPS Headquarters in Copenhagen and was not influenced by any prejudice against the applicant.

56. The Executive Director's selection of the successful candidate was not flawed and the applicant was informed about this

Relating to case 2

57. The 1 February 2009 start date was a bona fide operational requirement and in accordance with UNOPS' Staff Rotation Policy and the implementing administrative instruction AI/OEC/2008/05 in which par 3.7 states –

Reassignment action: The staff member should be reassigned to the new duty station, subject to successful government, medical and other clearances, as may be required. (As far as possible, rotational movements should occur in the third quarter of the year, during which the staff member completes his/her tour of duty to take into consideration leave periods and school calendars.)

In other words, while rotation should ideally take place in the third quarter of the year, operational requirements, such as having the Johannesburg post filled immediately, may dictate otherwise and the applicant was aware of this. Both the Rotation Policy and AI/OEC/2008/05 instruct applicants to indicate special circumstances for their applications, such as schooling/family or residence/employment of a spouse at a station. However, the applicant did not mention any such special circumstances and therefore estopped from claiming that he should not have been forced to relocate in February or March.

58. The respondent did not unlawfully rescind its offer to the applicant for the Johannesburg post. No contract was created because the offer was not unconditionally accepted. The applicant refused to accept a fundamental condition of the offer, namely the start date of 1 February 2009. This date was later revised by the respondent in view of the applicant's refusal to accept the dates offered by the respondent. The latest date offered by the respondent was 1 March 2009 with a deadline for the applicant to respond by 13 February 2009 (see the new General Counsel's email of 11 February 2009), but the applicant never did. The applicant was initially offered the position on 19 December 2008 which specified the starting date as no later than 1 February 2009. The applicant was told several times in writing about the urgent operational necessity of filling the post by that date. Nevertheless, the applicant would not and did not unconditionally commit to the offer. In total, he

was given four deadlines by which to unconditionally accept the offer, but in each case he did not. The former UN Administrative Tribunal stated in UNAT 5190 (1991) that –

... an offer creates a power of acceptance, which, if exercised within a reasonable time, operates to form a contract even though the acceptance states terms additional or different from those offered or agreed upon, unless the acceptance expressly made conditional on the offeror's assent to the additional or different terms.

The Administrative Tribunal concluded that it –

... cannot accept the view of the Applicant that one can simultaneously accept an offer while making it clear that a modification will have to be made in the date for commencement of his professional teaching duties. The date was plainly of the essence for an academic institution ... and the offer did not invite further negotiations with respect to it ... When an offeree acts as the Applicant did, his behavior indicates that a counter-offer is being made or contemplated and, therefore, no basis exists for finding that a contract was formed ...

59. Even though the offer automatically lapsed once the deadline of 13 February 2009 had passed, as no agreement was reached within in a reasonable period of time after the initial offer of 19 December 2008, the respondent was within its rights to withdraw it. The applicant attempted to negotiate a fundamental condition of the offer to which the respondent could not agree for operational reasons. The respondent kept the offer open for several weeks, but since no agreement was reached, it was eventually withdrawn. An offer can be withdrawn if it is not unconditionally accepted within a reasonable period of time: UNAT 4321 (1988).

60. The applicant had no right or expectation of renewal of contract, even if negotiations for a new contract were undertaken, as he held a 200 series contract. The applicant's contract expired on 28 February 2009, which he was informed about on 30 November 2008, and neither the offer nor the negotiations concerning the Johannesburg post created a right or an expectation of renewal. When the applicant

did not accept the offer concerning the Johannesburg post, his contract was not terminated but simply expired. The fact that there were ongoing negotiations with respect to the new offer created expectations of renewal. Ziegler, the former Administrative Tribunal noted that –

It is well settled that employment under a fixed-term appointment with the UN ceases on the expiration date of the contract. A controversy about the terms of an offer of further appointment does not create any expectancy beyond its terms and the offer can be revoked if not accepted and confirmed before it is withdrawn. Cf. Judgment No. 96, Camargo(1965) and Judgment No. 297, Panis(1982) ... Accordingly, the Applicant had no further entitlement to employment with [the Organization] after the expiration of his fixed-term appointment ...

At no time could the applicant have interpreted negotiations over the start date of the proposed Johannesburg post as creating an expectation of a new contract. He was several times advised that if he did unilaterally accept the offer UNOPS would recommence its search for a suitable candidate. The former Administrative Tribunal in UNAT 885 Handelsmar(1988) stated that, even if there is no express promise –

... the Administration's conduct may mislead staff into creating expectancy, calling for compensation.

However, the discussions between the applicant and the new General Counsel did not create such an expectancy of a later start date, and it became clear during their discussions that the applicant's primary objective was to reach a settlement to separate from service. The new General Counsel's communications did not amount to an agreement on extending the deadline March 2009 for the applicant to report

the applicant's candidacy had not been affected by illegality and he had been appointed, the applicant would never have been in the situation he faced in case 2.

Case 1

64. The legitimacy of the first interview process was called into question by both the applicant and the respondent for reasons that appear sufficiently described above. The applicant did not at the time suggest that, because of the tied scores, he was entitled to priority as a long-term employee whose post had been abolished. It is too late for him to raise that matter now. In substance, he acquiesced in the decision to conduct another interview. The Administration's reasons for deciding to start again were influenced by inappropriate

66. It was clearly proper for the second interview round to be disregarded and no discussion is needed.

67. The third and crucial interview is more problematical. It is evident that, as a major client of UNOPS, UNMAS had a substantial, in a general sense, legitimate interest in appointments to the post in question. Whilst one uses the terms "client" and "provider" to describe the way the relationship between UNMAS and UNOPS has been structured, it is imperative not to allow this "management-speak" to disguise the reality, namely that these are limbs of one body, namely the United Nations which have, where their functions interact, the same fundamental purpose, namely to foster, manage and deliver the objects which they were designed to serve. They are not to be thought of as competing independently. On the other hand, their different roles naturally and rightly influenced their priorities and could well lead to conflicts in which, say, the staff of UNOPS would need to refuse or qualify demands made by UNMAS. Although cooperation and mutual understanding were no doubt highly desirable traits of interacting management, the attributes, knowledge and experience they were required to have were not and could not be identical. In short, the attributes which UNMAS would prefer for an official of UNOPS with which they needed to interact at this level to have would naturally give first and at least significant importance to that Organization's perceptions as to how effectively it could perform its own functions. On the other hand, UNOPS had to take into account the management of all its other affairs, which inevitably did not only involve its relationship with UNMAS.

68. As is apparent from the material disclosed in the reference checks, the view of UNMAS was focused entirely upon its own interests, which it perceived were not adequately served by the applicant. It is legitimate that it should have this focus but the conclusions needed to be tempered by the interest not only of fairness to the applicant but objective rationality, by understanding the situation in which the applicant was placed and which was tellingly described by his supervisor. However, I infer from the fact that these strongly worded and uncompromising complaints

clearly did not qualify. An important objective of this requirement appears to reflect the proper consideration that the relevant division/unit of UNOPS had in selecting the best person for the post. What happened was that, so far from that interest being served, priority was apparently given to the interest that UNMAS had in the selection. In many cases, this might not matter but substantial conflict in viewpoint evident from the competing references gave this matter particular importance in the present case. Even though the Policy requires that chairpersons should have "knowledge and expertise in the field", there is no evidence that no one other than from UNMAS was available. The submission of counsel of the respondent that it was necessary to appoint an UNMAS staff member as chairperson since no competent UNOPS staff were available because of the cumbersome and burdening restructuring process of UNOPS is, in the absence of evidence, untenable. It would be especially unfair to act upon this submission since it is a matter of considerable significance that could not be tested by the applicant. The absence of any evidence that the Policy requirement as to the identity of the chairperson was even considered when setting up the interview panel gives additional support to the conclusion that appointing someone from UNMAS was avoidable.

70. Mere knowledge of or acquaintance with one or more candidates by a panel member does not disqualify her or him from being on the panel. It would be otherwise, of course, if there were a personal relationship (such as family or friendship) with or personal antipathy for a candidate. The impropriety here is the practical apprehension that objective and independent assessment will be adversely affected, quite apart from any issue of fairness. Where the member has another interest that could significantly affect his or her assessment this also should require exclusion from the panel. Here, the UNMAS chairperson, it appears, had an axe to grind from the point of view of the perceived disadvantage for UNMAS of selecting the applicant. From UNMAS's perspective, this would no doubt have been regarded as legitimate but, for the purpose of maintaining the integrity of the selection process, such an interest – especially where it appears from the references) its legitimacy

was based upon a misconception of the facts from UNOPS' point of view – deflected the process, which was, after all, to select the best person suitable for appointment to UNOPS.

71. The respondent argued that, as the applicant had not objected to the presence of the UNMAS representative on the interview panel, he is estopped from now relying on that point. However, he did not know until these proceedings that UNMAS – or, at least, a number of its senior officials – had such a strongly negative opinion about his performance. In such a case it is scarcely fair to hold against him the fact that he made no objection at the time: there would have been no grounds for him to do so.

72. Accordingly, the decision to place the chairperson in the interview panel was both contrary to the Policy and adversely affected the reasonableness and independence of its deliberations. It may be that departure from the Policy is not necessarily and of itself unlawful after all, it is a policy and thus inherently capable of variation in particular circumstances – however, a staff member is entitled to have the Policy implemented unless there are demonstrably good reasons for not doing so and the nature of the departure is not such as to undermine the fairness or objectivity of the process.

73. An additional departure from the Policy in this case was occasioned by the voting participation of the human resource representative. It is not obvious to me why the Policy denies him or her this role – absent any evidence – it should be inferred that there is some significant aspect of that person's responsibilities that renders it inappropriate, the most obvious being the "role ... to oversee, facilitate and endorse the selection process[and] ensure that the selection process is conducted in a fair, transparent and expedient way, in short, the conflict between being a player and a referee. This person's vote on the panel must be disregarded.

74. The result is that the chairperson should not have sat on the panel and the human resources representative should not have voted. There were thus two

substantial and unwarranted departures from the Policy, one of which significantly undermined the integrity of the panel's conclusions and the other which simply should not have occurred. They were merely formal in character but had substantive effect on the outcome.

75. I should add the additional comment that I do not accept the submission of counsel for the respondent that the dissent of the staff representative was based only on the mistake about the nature of the applicant's contract. I think it is clear that he considered the relative qualifications to be so closely matched as to require the priority which he mistakenly thought should apply.

Case 2

76. The crucial issue here is whether the respondent's offer had been accepted by the applicant and, thus, a binding agreement created. In this regard, it is important to note that the applicant was already a UNOPS employee when this occurred and rather than recruiting him for a new position the Organization was therefore offering a variation to an existing employment relationship. This is demonstrated by the UNOPS Human Resources Director in the letter of 28 November 2008 stating –

I must also regretfully provide with formal notice that your appointment with UNOPS will not be extended further, and you will be separated from service with UNOPS effective that date. Should you be successful in securing another post in UNOPS, the foregoing would of course cease to be applicable [Italics added.]

I mention, as a footnote, that when the applicant then secured such a position, parallel to the discussions concerning his departure the parties were also engaged in negotiations concerning the possibility of a "separation package" for the applicant. This would not make sense unless both parties acted under the assumption that although negotiations about the start date were on foot the applicant was still employed.

77. The present case therefore significantly identified to the issue in the judgment in *El Khatib* (United Nations Appeal Tribunal case no. 2010-034), which dealt with the withdrawal of an offer of appointment given to a UN staff member. The instant case concerns whether a binding agreement had been entered into by the parties and the content of its terms. *El Khatib* was about the effect of non-compliance with the UN staff rules which governed the appointment since the applicant was employed in the same line of command as her spouse.

78. From this point of view, the situation in this case can be approached in two ways: the first is that the applicant accepted the original offer from UNOPS, but that he subsequently attempted to re-negotiate the start date without withdrawing or qualifying his acceptance; the second is that the applicant only partly accepted the respondent's offer which could then be withdrawn. The choice between these characterizations of the events depends on the interpretation of the correspondence which is set out in full above.

79. In its original offer, while setting a deadline for the applicant's response on COB Tuesday 30 December 2008, UNOPS stated that –

The start date for this assignment is to be determined, but with reporting for duty in Johannesburg, South Africa no later than 1st February 2009.

80. In the applicant's first email (of 29 December 2008) in response to the offer he states –

I am glad to learn of the selection and will accept.

Note, however, that there is a problem with regards to timing.

In my view, in light of this unqualified acceptance of the offer, the mere identification of this ought not to be regarded as anything more than indicating a desire to discuss the timing of the start date. There is no suggestion that, absent agreement on this issue, the applicant would decline to comply with the specified date. In my judgment, the contract came into existence by this exchange although the applicant was attempting

to negotiate a variation of the start date. The ensuing discussion at no point involved the applicant repudiating the employment relationship by stating that he would not comply with the start dates as they were successively proposed. The indication of the deadlines simply meant, in my view, that the respondent intended at that time to end negotiations and insist upon compliance with the specified dates, the last of which was 1 March 2009. Although, following the email of the new General Counsel on 11 February, further negotiations occurred, the applicant did not say that he would not start work on the specified date of 1 March. The assertion that there was an expectation of a definitive answer by 12 February was plainly departed from because negotiations involving the start date continued and necessarily amounted to such an implicit departure. The respondent could not, in good faith, rely upon the specification of that date without notifying the applicant that it intended to do so.

81. It follows that there was no repudiation of the employment contract by the applicant and the refusal to employ him in the promised post was a breach of the contract by the respondent.

82. Another approach is to consider that the respondent had made an offer which was accepted subject to an agreement on date, about which question negotiations then followed. In my view there was an implicit representation that the respondent would hold open the offer for the purpose of those negotiations. This gave rise to a legitimate expectation that the respondent would not unilaterally withdraw its offer without giving notice of its intention to do so to the applicant. Although it threatened this from time to time by imposing various deadlines, the last of these was departed from by the negotiations with new General Counsel as discussed above. Accordingly, this deadline was implicitly revoked and none was in place at the time when the respondent purported to withdraw its offer in breach of its representation upon which the applicant and, for that matter, the respondent's Counsel were then relying. For the respondent, in the midst of these negotiations to simply appoint another person to the very post about which they were then negotiating with the

applicant was a serious breach of its obligations of good faith and certainly of its implied representations.

Conclusion

83. As to case 1 –

The panel recommendation cannot stand and the decision of the APB, based as it was upon a fatally flawed process, was in breach of the applicant's contractual rights to have his candidature adequately and properly considered.

84. As to case 2 –

The respondent was in breach of its contract with the applicant to appoint him