



## Introduction

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA). He has seven substantive applications<sup>1</sup> before the Tribunal in which he contests administ

## Procedural Matters

6. The Applicant has represented himself in all of his cases since February 2010. Before the hearing of the substantive applications the Tribunal heard and decided a number of interlocutory matters. These included applications for suspension of action<sup>2</sup>, challenges to receivability, and numerous motions on admissibility of documents and confidentiality.

7. Hearings were held in the seven cases over eight consecutive working days in September 2013. The Trio was heard from 9-11 September 2013. In preparation for these hearings the Tribunal made several case management orders, which included the consolidation of the Trio of cases.<sup>3</sup>

8. In accordance with these orders, the Tribunal received oral and documentary evidence in each case on the clear understanding of both parties that, to avoid duplication of documents and evidence, the Tribunal would make its determination in the Trio first and refer to any relevant findings of fact and law made in the Trio in the subsequent judgments.

9. The background to all of the cases is set out in full in this judgment. Where relevant they are repeated in summary form in the four other cases. This judgment

11. The Applicant was given time to respond in writing. His opposing submissions were considered by the Tribunal.

## Issues

12. The Tribunal identified the issues to be determined based on the pleadings of the parties, the Tribunal's previous rulings and the orders made by UNAT in *Nwuke* 2010-UNAT-099. The parties agreed on the issues at a case management hearing. Following the hearings the wording and sequences of some of the issues have been slightly modified by the Tribunal for consistency of expression and to reflect the chronology of events.

13. The issues in Case No. UNDT/NBI/2009/044:

- a. Was there a failure by ECA to investigate the complaints against the Advisory Selection Panel (ASP) made by the Applicant on 4 August 2008;
- b. Was there a failure by ECA to investigate the Applicant's 29 June 2009 and 12 March 2010 complaints against the ES/ECA to the SG?
- c. If there were failures were they lawful?
- d. Was the decision of 15 June 2009 to require the Applicant to be interviewed for the post of D/TFED lawful?

14. The issues in Case No. UNDT/NBI/2010/045:

- a. Did the October 2009 selection decision for the post of D/TFED amount to harassment and discrimination against the Applicant.
- b. Did the changes to the management structure of ECA in September 2009 have a legislative mandate?
- c. Was the transfer of responsibility for the MDGs to EDND lawful?
- d. Was the transfer or redeployment of the Applicant to EDND lawful?

15. The issues in Case No. UNDT/NBI/2010/077:
- a. Did the ASG/OHRM decide to initiate disciplinary proceedings against the Applicant without duly informing him and if so was it lawful?
  - b. Was the decision of the ASG/OHRM of 12 August 2010 not to declassify her letter of 30 July summarizing the conclusions and recommendations of the Investigation Panel lawful?
  - c. Was the decision of the ASG/OHRM not to provide him with a copy of the investigation report lawful?
  - d. Was the appointment of a non-United Nations staff member (Ssekandi) to membership of the Investigation Panel lawful?

#### The Evidence

16. The Parties produced a bundle of all documents referred to by the witnesses or in submissions for the hearing. The witnesses in the Trio of cases were: the Applicant, Mr. Abraham Azubuike, the then President of the ECA Staff Union, Mr. Hachim Koumare, former Director of the ECA Sub-regional Office in Central Africa and Dr. Monique Rakotomalala, former Director of the African Centre for Gender & Social Development (ACGSD). Some of the evidence given by Ms. Doreen Bongoy-Mawala in Case No. UNDT/NBI/2011/001 was relevant to Case No. UNDT/NBI/2010/045. The Applicant's evidence comprised his sworn confirmation of the facts alleged by him in his applications and subsequent documentation supplemented by his oral testimony.

17. The Respondent called Mr. Adeyemi Dipeolu, Chief of Staff, Office of the ES, ECA.

## The Facts

### ***Background***

18. The Applicant joined the United Nations on 1 June 2001. He currently holds the P-5 position of Chief of the New Technologies and Innovation Section in the Special Initiatives Division at ECA.

19. Until March 2003 he worked as a Senior Economist in the Economic and Social Policy Division (ESPD) of ECA. His duties included the management of the activities of the African Learning group as well as preparing reports, policy and position papers for the ES. From April to December 2003 he worked in the

Dipeolu and others, he requested that Mr. HH not be on the panel to interview him for this post. He set out full reasons for this which included Mr. HH's "malignant prejudice" towards him. The Chief of HRSS replied that the ES handled the appointment of members of the ASP and she could not discuss the issue until after the interview which she advised him to attend. She told him that if he felt he was not handled properly in the interview he could bring his concerns to the attention of the ES.

24. The Applicant attended the interview. Mr. HH was on the panel. The Applicant was not appointed but did not formally challenge the selection process at this time.

25. Up to November 2008 the Applicant's relationship with the ES was cordial. This was substantiated by other witnesses who noted that up to this time the ES often relied on the Applicant's abilities as a speech writer and policy analyst. While on mission in Copenhagen the Applicant informed the ES of his intention to apply for the D-1 post of Director, Office of the ES of the ECA (Chief of Staff). The ES told him not to apply as the position should be left for Mr. Dipeolu who was then his Special Assistant.

26. The ES called the Applicant to his house late on 28 July to help prepare some urgent submissions. At that time the ES informed him of his intention to

complaint he made two requests: a review



Landlocked Developing Countries and Small Island Developing States (OHRLLS), the Applicant was placed on the roster for D-1 posts.

33. On 27 November 2008, the ES called the Applicant to his office to inform him of a written complaint made against him from a member of his section. He was not shown the complaint or told the identity of the complainant. The Applicant says that the ES told him to move with his P-5 to the executive floor under the ES' direct supervision or he would set up an investigation panel including an OIOS investigator to investigate the allegations. The Applicant chose to be fully investigated. He said he was deeply humiliated at this meeting.

34. On 20 December 2008, the Applicant asked the Chief of HRSS for a copy of the complaint referred to by the ES. He was given it. In his response he said he rejected the allegations and asked for an investigation into them. No investigation ever took place.

35. The Applicant said from then his relationship with the ES "went into the freezer".

### Trio Facts

#### *TFED post selection*

36. A vacancy for the D/TFED position was announced with a closing date of 7 December 2008. On 8 October 2008 the Applicant was advised by OHRM that he had been rostered against that post. In answer to his query, the Chief of Staff told him that as a roster candidate he did not have to apply.

37. On 6 January 2009, the Applicant was advised that on completion of the selection process for a D-1 post with ESCWA in Beirut for which he had applied, he had been placed on the roster of candidates as set out in ST/AI/2006/3 (Staff selection system) for one year.

38. In early January 2009, the Applicant wrote to OHRM regarding utilizing pre-approved rosters for recruitment and his status as a rostered candidate in

particular. On 13 January the Chief of Staffing Service, Strategic Planning and Staffing Division, OHRM replied. He quoted from section 7 of ST/AI/2006/3 and added:

As recent as last month, OHRM has been discussing the issue of how to enhance the use of rosters. A proposal for roster based recruitment was made to the GA, which was not approved but deferred for future consideration. Nonetheless we continue to highlight the advantages of selecting candidates from the roster whenever possible.

39. On 31 March 2009 the Chief of HRSS took action on the Applicant's 4



body (CRB) as “appointable” to the post. He also gave his analysis of the relevant administrative instruction. He referred to two appointments to senior ECA posts directly from the roster without advertisement in 2008 and 2009.

49. By email of 13 June 2009 the Applicant formally advised ECA and Chief of the Staffing Service Strategic Planning and staffing Division in OHRM of his decision not to attend the interview since his interpretation was that as a roster candidate he did not need to appear before an ASP again. He would not attend the interview unless New York advised him otherwise. He received no response from OHRM.

50. In the meantime on the directions of OHRM, HRSS was directed to discuss the matter with the Applicant and the chairman of the selection panel but this did not occur. On 16 June the Chief HRSS stated in an internal email that the problem to be addressed was that the Applicant had not been given clarification on his query.

51. The Applicant was in New York on 24 June 2009. He met with the ES and Mr. Dipeolu in the cafeteria in the Secretariat Building to discuss his concerns about the selection process for the TFED post. There are differing versions of the meeting but it is sufficient to note that no resolution was reached. The ES told him that the interview process was closed and that he would now look at the candidates. He also told the Applicant that he could refer his concerns to responsible officers of the organisation and he would not hold that against him.

52. The Applicant sent a memorandum dated 24 June 2009 to the Secretary-General under the subject heading “Lack of due process, merit based consideration and discrimination in the UNECA”. He asked for relief in the nature of restraints on the recruitment process for the TFED post until a decision could be made on his complaint of 4 August 2008 and “that due process, respect,

53. The Applicant told the Tribunal that this letter was the only way for him to protect himself. At that stage he did not know about the internal justice system

57. In response to the MEU's query about the Applicant's 4 August 2008 complaint, the Chief of HRSS also explained that the proposed chair of the panel to investigate it had been selected for another D-1 ASP for which the Applicant had applied. For this reason no action was taken due to lack of capacity at the right level to undertake the review of the complaint. The Applicant is sceptical of these reasons but the fact remains that no investigation was made into his complaints of victimisation by the ASPs.

58. On 29 July 2009, MEU contacted the Applicant to ascertain if he would be willing to be interviewed. He indicated orally and in writing that he had no intention of doing so because the fundamental issues that concerned him about the composition and behaviour of the ASPs, including the presence of Mr. HH on the panel, had not been resolved.



67. That meeting was presented with the recommendations of a consultant who had been re-engaged to make an assessment of the changes effected under the 2006 reorganisation. He recommended further organisational changes including the reconfiguration of two current programmes, TFED and NRID, into one division of Regional Integration, Infrastructure and Trade (RIIT) of which the MDGs and PAMS was a section.

68. The SMT set up a working party comprising Mr. Dipeolu, Mr. Koumare, Ms. Bongoy-Mawalla and Mr. Urbain Zadi to examine the recommendations as not all members agreed with them. Their mandate was to work on “operationalizing the new ECA structure” and providing the larger SMT group with more information.

69. The Applicant heard of the proposals “on the grapevine”. He obtained a copy of the consultant’s power point presentation and discussed it with colleagues.

70. On 7 October 2009, Mr. Azubuike was authorised by the Staff Council to write to the ES expressing concerns about the lack of consultation about the proposals and requesting a meeting to discuss these. He received no response.

71. The Applicant sent an email to Mr. Dipeolu on 12 October 2009 expressing his concerns about the proposals and the impact of the new structure on his career. Mr. Dipeolu did not respond to this email.

72. The Applicant filed an application for Suspension of Action of the restructuring proposals on 14 October 2009. This was rejected as he had not sought management evaluation.

73. Mr. Dipeolu referred the Applicant’s concerns about the restructuring to the ES. Ms. Bongoy-Mawalla said that she had several meetings with the Applicant and together with him put suggestions to the ES in an attempt to resolve the



situation. Proposals included moving the Applicant from the then TFED where he would be under the supervision of Mr. EN to another division.

74. On 19 October 2009, the Applicant requested a second management evaluation of the decision of the ES to fill the TFED post and for a review of the decision to transfer the MDGs and PAMs to another division. He also complained about discrimination and harassment.

75. The OHRM Support Mission to ECA led by Mr. Frank was carried out between 29 October and 6 November 2009. Its Terms of Reference included providing advice on a broad range of human resources management issues

79. The Applicant wrote a memo to Mr. Dipeolu on 26 November giving his reasons why the decision to restructure should be reconsidered. He asked that if

During that meeting the Applicant got an SMS informing him that the new structure was announced.

84. Mr. Azubuike asked if the Applicant was amenable to mediation. The Applicant says by then physical assaults and threats against him had started. He wanted the matter resolved. He complained formally to the United Nations Department of Security and Safety (UNDSS) at ECA but no investigation was ever conducted or advised to him. Mr. Azubuike believed an agreement had been reached that the Applicant would be removed from EDND but this was broken and the move took too long. He wrote a letter of complaint to Ms. Bongoy-Mawalla about this but received no response.

85. During this time the Applicant applied to Mr. EN, by now his supervisor, for leave to visit a physician in New York for surgery. This application was refused. His leave was eventually approved by Ms. Bongoy-Mawalla.

86. At the end of December 2009 while the Applicant was in New York, Mr. EN gave directions to have the Applicant's MDGs and PAMs section moved to the 6<sup>th</sup> floor where EDND was located. Ms. Bongoy-Mawalla told Mr. EN that the Applicant would move when he returned.

87. On 25 January 2010, having received no outcome to the committee's attempt to resolve the issue of his redeployment, the Applicant requested management evaluation of the decision of the ES to redeploy him from ACGSD to EDND.

88. On 28 January 2010, the Tribunal issued Judgment No. UNDT/2010/017 in which it found that the Applicant's Case No. UNDT/NBI/2009/044 was not receivable.<sup>7</sup>

89. On 8 February 2010, the Applicant filed Case No. UNDT/NBI/2010/045 with the Dispute Tribunal.

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94. At the end of the meeting the ES arranged for the Applicant to meet with Ms. Bongoy-Mawalla and Doretta Miraglia to have parallel negotiations about his redeployment out of EDND.

95. The Applicant told the Tribunal that by this time given the 28 January 2010 UNDT judgment on receivability of his complaint about the investigation and the latest MEU decision of 3 December, he had decided not to take matters any further and was considering leaving the ECA and the United Nations. In his mind it was not a place for someone like him. However, because of the way he was

dated 27 April 2010 in which he sought either a return to RIITD or to ACGS; or assignment to a sub-programme to be created for social development and would comprise of MDGs/LDCs; or assignment to a new section – Strategic Policy Initiatives Section.

100. He also applied for two newly advertised positions of Director of ACGSD and Director of RIITD. The selection processes for these posts are the subject of Case Nos. UNDT/NBI/2011/001 and UNDT/NBI/2011/008, respectively. He continued to work on the third floor on a project that was near completion.

101. The Applicant's e-PAS was to expire on 31 March. His supervisor, Dr. Rakotamala was responsible for finalising it



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litigation is not often the best recourse and affirmed his readiness and willingness to explore an informal resolution of the matter.

116. The ASG replied on 8 September 2010 that if he wished to submit the memorandum informing him of the outcome of the fact finding investigation to MEU it was his prerogative to do so. On 15 September she wrote again reminding the Applicant of his obligation under the Staff Rules to exercise discretion and advising that the administration had complied with its obligations under section 5.18 of ST/SGB/2008/5. She noted that in his proceedings before the UNDT, the Respondent had been required to submit a copy of the investigation report on a confidential basis to the Tribunal following which the Tribunal would make further directions.

117. The Applicant responded that marking the memorandum strictly confidential was not in his interests. He feared that he could be subject to disciplinary measure if the Organization had reason to believe that he did not exercise his discretion by using the memorandum. The ASG responded by noting the contents of his letter.

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120. On 11 December 2010, the Applicant filed another Application with the UNDT.<sup>8</sup>

121. A new ES was appointed and took up his post in September 2012. The Applicant was appointed Chief of the New Technologies and Innovation Section in the Special Initiatives Division at ECA.

Case No. UNDT/NBI/2009/044 and issue 1 of Case No. UNDT/NBI/2010/045

*Applicant's submissions*

122. The principle submission of the Applicant is that his allegations of discrimination, harassment, abuse of authority and retaliatory actions are evidenced by a series of consistent adverse employment actions which resulted in the consistent and egregious violations of his procedural and substantive rights as provided by the express laws of the Organisation.

*Investigations of Complaints*

123. The failure to investigate his first formal complaint of 4 August 2008 in which he requested an investigation of the ASPs appointed to evaluate his applications for D-1 positions was a violation of his due process rights and his right to an investigation under ST/SGB/2008/5 as affirmed by *Nwuke* 2010-UNAT-099.

124. OHRM did not take any action as required by section 5.14 of ST/SGB/2008/5 into his second complaint dated 24 June 2009 to the Secretary-General against the ES. The allegations in that letter and his subsequent complaints on 12 March 2010 are yet to be investigated. The Investigation Panel that was set up was not an independent panel as required by the ST/SGB. It conducted a fishing expedition to find something that would justify the non-renewal of his contract. It amounted to an investigation into his conduct.

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<sup>8</sup> Registered as Case No. UNDT/NBI/2010/077.

*The decision to interview the Applicant for the TFED post*

125. The Applicant submits that, as he was rostered against the post, his name should have been presented to the decision maker without any review of his suitability against the post. It is not his case that he believed he should have been appointed. The requirement for him to be interviewed for the TFED post was unlawful because:

- a. Under ST/AI/2006/3, there was no necessity for him as a rostered candidate to be interviewed at all.
- b. The ES was improperly motivated. He said he did not want to have him in his office. His complaints about the ASPs were probably taken by the ES as a challenge to his authority and explains why they were never investigated.
- c. There is a lack of clarity about whether the ASP or the ES made the decision to interview him. A decision without an author is a nullity.
- d. The ES assumed the roles of both hiring manager and Head of Department which carry separate responsibilities under ST/AI/2006/3.
- e. The Interview Panel included a person who had recently encumbered the vacant post. This is prohibited by the OHRM terms of reference (TOR) for the interview process under the staff selection system. That person was also ill motivated against him.
- f. The “mutating reasons” for the requirement to be interviewed, which ranged from the lack of similarity between the post and the one against which he had been rostered to the key importance of the Division in the ECA work programme.
- g. In view of the way other individuals had been selected for D-1 posts, the requirement for him to be interviewed was discriminatory and an example of the harassment he alleges. He claims he had a legitimate expectation not to be treated in a manner different from other ECA staff members who had been directly selected off the roster.
- h. He was not fully and fairly considered for the post.
- i. It is not possible to say with any certainty that if the 4 August 2008 complaint had been properly investigated that none of his subsequent grievances would have arisen

126. The Applicant reduced these arguments to three main points in his closing submissions: the interpretation of the ST/AI, the doctrine of legitimate expectation and the composition of the ASP for the TFED post.



an improper purpose. The applicant bears the burden of proving discrimination. The evidence shows the ES had high esteem for the Applicant. He was not the victim of harassment.

132. The ES/ASP had a legitimate reason to interview all candidates including rostered candidates to determine the most suitable. The Post for which he had been rostered was in the same job family and at the same level as the TFED post but had significantly different functions. This justified the requirement to interview all candidates.

133. The Applicant was invited to interview alongside other candidates. He declined several times to be interviewed in spite of MEUs confirmation that the hiring manger had the power to interview him. He declined the suggestion by MEU that he be interviewed and showed himself to be inflexible and unreasonable. The Applicant did not mitigate his loss.

134. The Applicant's claim that he was not fully and fairly considered for the post was made orally but in any event the records show that he was fully and fairly considered by the ASP which led to his being short-listed and invited for interview.

135. The ASP was constituted in accordance with ST/AI/2006/3. The TORs relied on by the Applicant were not approved by OHRM. There is no prohibition on the inclusion of a person who had recently encumbered the post.

their role and responsibilities in maintaining a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority”.

137. The SGB defines prohibited conduct as discrimination, harassment, sexual harassment and abuse of authority. The latter definition in section 1.4 is relevant to this case.

Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion...

138. The list of general principles in section 2.2 states that:

The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventative measures and the provision of effective remedies when prevention has failed.

139. Managers and supervisors have an obligation to ensure that complaints of prohibited conduct are properly addressed in a fair and impartial manner (section 3). A failure to meet the obligations under the SGB may be considered a breach of duty which may be reflected in a manager’s annual performance appraisal and he/she may be subject to administrative or disciplinary action as appropriate.

140. Section 5 of the SGB concerns corrective measures. Individuals are encouraged to deal with their problems as early as possible after it has occurred and, under section 5.3, managers have a duty to take prompt and concrete action in relation to allegations of prohibited conduct. Failure to take such action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

141. The SGB sets out a system of informal and formal proceedings. Pursuant to section 5.17, the officials appointed to conduct a fact-finding investigation shall

ascertained in the process and attaching documentary evidence. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

142. Thus the SGB sets out the duties of the administration and emphasises the serious consequences of a breach of the manager's duty to address complaints in

*2008 Complaint*

145. The evidence in this case establishes that the Applicant submitted a complaint dated 4 August 2008 to the ES which, although was not framed in the language of the SGB which had been promulgated in February 2008, contained an allegation of improper use of an ASP position by a person who was in a position to improperly influence the career of the Applicant. That amounted to a complaint of abuse of authority which entitled the Applicant to an investigation into its merits.

146. ECA took no formal or documented steps on this complaint for seven months after receiving it. There was no evidence on or explanation for this delay. After the seven month delay, the ES authorised a panel to look into the complaint but it did not undertake the formal fact-finding investigation delineated in section 5.14 of the SGB because of difficulties in convening a panel. One year later, on 3 August 2009, the MEU recorded that the complaint had yet to be investigated.

147. The Tribunal does not accept the Respondent's submission that the Applicant's claim about the 4 August 2008 complaint is moot as the Investigation Panel set up in 2010 considered it. The Investigation Panel was convened in response to his complaints made in March 2010. The Panel noted that the 4 August complaint had no real follow up due to lack of capacity at the right level

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149. There were profound consequences of this breach of the SGB. The failure to address the Applicant's fundamental grievance of unfair influence and manipulation of the ASPs and selection processes for the D-1 posts which the Applicant applied for or was rostered against in 2008, significantly contributed to

152. The Tribunal finds that no prompt and concrete action was taken by OHRM in relation to the 24 June 2009 complaint in breach of the SGB. In contrast, the Applicant's March 2010 complaint was promptly and thoroughly investigated.

***TFED Post Selection***

153. This part of the Application is not a

for the advertised vacancy, subject to the provisions contained in section 9.2 below. The other candidates shall be placed on a roster of pre-approved candidates from which they may be considered for future vacancies with similar functions.

158. The Tribunal notes that the language of this section is discretionary but only once a list of candidates has been approved by the CRB.

159. Section 7.4 provides that:

The programme manager shall evaluate new candidates and roster candidates transmitted by OHRM or the local personnel office for consideration at the 15,-30-or 60 day mark on the basis of criteria pre-approved by the central review body (emphasis added).

160. Section 7.5 states:

For candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required. Competency based interviews must be conducted in all cases of recruitment or promotion. Programme managers must prepare a reasoned and documented record of the evaluation of those candidates against the requirements and competencies set out in the vacancy announcement.

161. Section 7.8 stipulates:

Should an eligible roster candidate be suitable for the vacancy, the programme manager may recommend his or her immediate selection to the head of department/office, without reference to the central review body, as provided in section 9.4.

162. The interpretation of the meaning and intent of section 7.8 is central to this part of the claim. Read in isolation it could be interpreted as a section which enables a programme manager to recommend immediate selection of a rostered candidate without further evaluation. However rules cannot be interpreted in isolation. They are subject to both their internal and external contexts.<sup>9</sup>

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<sup>9</sup> Cross Statutory Interpretation, 2<sup>nd</sup> Ed (Oxford University Press), p. 48.

163. In the internal context, the placement of section 7.8 at the end of Section 7 is important. The object of section 7 as a whole is the proper and transparent consideration and selection of candidates. The requirements that all candidates, including roster candidates, must be evaluated (section 7.4) and that competency based interviews are required (emphasis added) in cases of recruitment and promotion (section 7.5) all precede section 7.8. To interpret it without reference to the purpose and scheme of the whole of section 7 would be to defeat the object of the section.

164. The Tribunal finds that section 7.8 requires the programme manager to

legal right in private law to receive *such* treatment. The expectation may arise from a representation or promise made by the authority including an implied representation or from consistent past practice.<sup>10</sup>

168. In *R v. North East Devon Health Authority*, the Court held that:

The court's task... is... limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power.... It is for the court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power.<sup>11</sup>

169. The doctrine has been applied to the law of international civil servants from at least 1956 when the International Court of Justice gave an Advisory Opinion on Judgments of the Administrative Tribunal of the International Labour Organization ("ILO"), 23 October 1956. Having surveyed the current rules and practice concerning fixed term contracts, the IJC held at p 92:

The practice as here surveyed is a relevant factor in the interpretation of the contracts in question. It lends force to the view that there may be circumstances in which the non-renewal of a fixed-term contract provides a legitimate ground for complaint.

170. To be legitimate, an expectation does

Case No. UNDT/NBI/2009/044  
UNDT/NBI/2010/045  
UNDT/NBI/2010/077

they were not approved by OHRM. They are therefore of dubious worth to this case.

176. In this case the Administration did not address the question of whether Mr. HH should have been on the selection panel where the Applicant was a candidate. It took the view that the composition of the ASP was for the ES alone to determine. While that is correct, the ES does not have unfettered discretion. Any allegations of bias or ill motivation towards a candidate should have been taken into account in that selection process. There is no evidence that this happened.

177. Mr. HH's presence on the ASP predictably added to the Applicant's belief that his chances of a fair consideration were limited. This was noted by MEU in its 3 December 2009 report in which it urged the ES to ascertain that all ASPs are established in a manner that guarantees fairness and impartiality of all Panel members.

178. However, the inescapable fact is that after consideration, the Applicant was invited to an interview for a post against which he had been rostered. This was in accordance with the ST/AI. He refused to attend. On the face of it some of his reasons had some merit, such as the presence of Mr. HH on the ASP, but by not attending the interview the Applicant lost all chance of consideration for the post.

179. In conclusion, the Tribunal finds that the invitation to the interview was lawful. The Applicant was not justified in refusing the invitation to be interviewed for the TFED post either by his interpretation of the ST/AI or by a legitimate expectation.

*Did the October 2009 selection process for the post of Director TFED amount to harassment and discrimination against the Applicant?*

180. The Tribunal acknowledges the Applicant's deep sense of grievance that he was treated differently in this case from others and his belief that this disparity was motivated by a deliberate attempt to victimize him by preventing his promotion to a D-1 post. Much of this stems from the breakdown in the relations

with the ES including the Applicant learning of the ES' reported statement that he did not want the Applicant in his office and the failure of ECA to take any decisive action on the 4 August complaint. However the Tribunal is limited to determining the facts of each particular case as it was presented to it.

181. In this case, like the Applicant, the successful candidate who was also rostered against the post was required to be interviewed before he could be considered for selection. The invitation provided the Applicant with the opportunity to be fully considered in the selection process.

182. The New York meeting with the ES and the Chief of Staff did not go well for the Applicant who did not appreciate being rebuffed by the ES. However it was the Applicant who had sought that meeting. Although he did not get the response he wanted this does not constitute harassment by the ES who invited the Applicant to seek remedies if he wished.

183. The Tribunal finds that the Applicant was not discriminated against or harassed in the selection process for the TFED post. He was treated no differently from the other applicants in his situation nor was he harassed by being required to be interviewed for the post.

Conclusions on Case No. UNDT/NBI/2009/044 and issue 1 of UNDT/NBI/2010/045.

184. The Tribunal concludes that:

- a. ECA contravened ST/SGB/2008/5 by failing to investigate the Applicant's 4 August 2008 complaints against the ASPs and his complaints against the ES of ECA made on 24 June 2009.
- b. The decision of 15 June 2009 to require the Applicant to be interviewed for the post of D/TFED was lawful; and
- c. The Applicant was not subjected to discrimination and harassment by being invited to interview for the TFED post.



UNDT/NBI/2009/045

Applicant's submissions

*Legislative mandate for changes to ECA management structure.*

185. The Applicant submitted that the changes to the management structure for ECA in 2009 had no legislative mandate because:

- a. They were not endorsed by the Commission of the ECA/ECA Conference of Ministers of Finance, Planning and Economic Development.
- b. The changes to the work programme of sub-programme 10 - Social Development (to which the MDGs and PAMS belonged) was not presented to the Committee on Human and Social Development, the oversight committee, which met in Addis Ababa on 15 October 2009.
- c. The ES of ECA was in breach of ST/SGB/151 (Administration of the Staff Regulations and Staff Rules) because he did not have the authority to make the changes when an SGB on the proposed new structure was never promulgated.
- d. There was no consultation as required by ST/SGB/172 (Staff-Management Relations: decentralization of consultation procedure) and ST/SGB/274 (Procedures and terms of reference of the staff-management consultation machinery at the departmental or office level) paragraph 3.

*Was the transfer of responsibility of MDGs/PAMs to EDND lawful?*

186. The Applicant submits that while the Secretary-General has discretion in the way programmes are arranged, that discretion must be exercised properly by his agents acting under his delegated authority. The ES' authority to move and change structures is limited in the absence of an enabling law.

187. The stated purpose of bringing all the development frameworks together was not met. Not all development frameworks were transferred to EDND.

*Transfer or redeployment of Applicant to EDND*

188. The Applicant submitted that this transfer was unlawful because:
- a. A Staff member has the right to a peaceful working environment (ST/SGB 2008/5).
  - b. The move was improperly motivated. Assigning him to work under a person occupying a post that is subject to his litigation was a deliberate effort to harass, humiliate, intimidate and abuse, an attempt to vitiate or extinguish Case No. UNDT/NBI/2009/044 and to obstruct justice.
  - c. Staff members have the right to be consulted in advance of decisions which may have substantial implications for their careers, welfare and working conditions (ST/SGB/274 paragraph 4). No consultation was provided and the Applicant's efforts to discuss the effects on the new structure on him were treated with scant regard.

Respondent's submissions

*Legislative mandate for changes to ECA management structure.*

189. Under article 17 of the Charter of the United Nations, the General Assembly is vested with the authority to approve the United Nations budgets and office structures.

190. Under the Financial Rules, the Secretary-General decides on the programme content and resource allocation of the proposed programme budget. Heads of Departments are responsible for preparing proposals for programme budget for the forthcoming budget period. The budget describes any change to the work programme, organisational, structure and resources.

191. The Secretary-General presents the proposed budget to the General Assembly for review and approval under Financial Regulation 2.7. Upon approval of the programme budget the organisational structure set out in the budget becomes effective.

192. Heads of Offices may redeploy posts within their office whenever necessary to ensure immediate programme implementation (Rule 04.01.4 of the Finance and Budget manual).

193.

199. The restructuring was not directed at the Applicant. There is no evidence of arbitrariness or improper motive for the move which was a minor rotation of some sections. The Applicant was the only one who complained.

200.



Case No. UNDT/NBI/2009/044  
UNDT/NBI/2010/045  
UNDT/NBI/2010/077  
Judgment No. UNDT/2013/157

*Was the transfer of responsibility of MDGs and PAMS to EDND lawful?*

competence and skills; and, whether he or she had substantial experience in the field.<sup>14</sup>

218. Further, UNAT held:

The UNDT recognised that “it is for management to organize its affairs in the best interests of the Organization and that it may



position which he was eventually transferred to was largely non-productive, that transfer was not challenged by the Applicant.

*Disclosure of the investigation report*

227. The Applicant asserts that the report of the Investigation Panel contains adverse material against him which he should have had the opportunity to comment on.

228. There is no provision in ST/SGB 2008/5 which restricts the right of a staff

*Declassification of ASG/OHRM letter*

232. It is within the discretion of the ASG/OHRM to declassify or not a letter she wrote to a staff member. The ASG/OHRM allowed the Applicant to share the letter with whomever he wanted. The confidential nature of the document was meant to preserve the interests of the Applicant in view of the sensitive matters contained therein. It was the Applicant's decision not to share the letter with MEU.

*Disclosure of the investigation report*

233. According to section 5.18 of ST/SGB/2008/5, the Applicant has no right to be provided with a copy of the investigation report. The ASG complied with the obligations. In any event the claim is now moot as the Applicant was provided with a redacted copy of the report in the context of the present proceedings.

*Was the appointment of a Non United Nations staff member (Ssekandi) to membership of the Investigation Panel lawful?*

234. The Respondent does not deny that one panel member was not a staff member but submits that the Applicant was aware of the identity, employment history of that person from the beginning of the fact finding investigation and did not raise any objections at the time.

235. OHRM appointed a panel from outside ECA to ensure an unbiased and fair investigation.

**Considerations on UNDT/NBI/2010/077**

*Were Disciplinary proceedings initiated against the Applicant?*

236. The Investigation Panel was convened by the ASG/OHRM in response to the Applicant's 12 March 2010 complaint under ST/SGB/2008/5. The SGB was promulgated with the express purpose of ensuring that all staff members of the Secretariat are treated with dignity and respect and are aware of their role and

responsibilities in maintaining a work place free of any form of discrimination, harassment, including sexual harassment, and abuse of authority.

237. On receipt of a formal complaint a responsible officer under section 5.14 reviews the complaint to establish if it is made in good faith and if it warrants formal investigation.

238. A fact finding investigation under section 5.14 is to be conducted by persons who have been trained in investigating allegations of prohibited conduct. The SGB contemplates that disciplinary proceedings may be initiated but only following the investigation and report and after consideration by the ASG/OHRM.

239. Section 5 of the SGB provides for disciplinary proceedings where the conduct of the alleged offender amounts to misconduct (section 5.18 (c)) or where the report indicates that the allegations of prohibited conduct were unfounded and based on malicious intent (section 5.19).

240. In the course of its investigation into the Applicant's complaint of prohibited conduct, the Investigation Panel canvassed the counter allegations of misconduct made by the ES against the Applicant. It set out the ES' allegations but it did not reach any conclusions about them and did not make a recommendation that disciplinary proceedings should be initiated against the Applicant. There is no evidence that the ASG/OHRM considered taking disciplinary action against the applicant under section 5.19.

241. In the long history of this case, on the one occasion that the ES threatened an investigation into alleged misconduct by the Applicant, no action was taken to pursue that in spite of the Applicant agreeing to such an investigation.

242. The Tribunal therefore finds that no formal charges of misconduct have been made against the Applicant during his time at ECA and no disciplinary action taken against him. Any allegations made against him during the course of his

243. This is unsatisfactory and unfair to the Applicant. Specific and serious allegations of misconduct by him were made directly to him and to the Investigation Panel. The administration has failed in its responsibility under ST/AI/371 to properly investigate these to a final conclusion leaving the allegations outstanding and unresolved.

244. However, the Applicant's claim in this part of his case is that the Panel had improperly initiated disciplinary measures against him. The Tribunal finds that no disciplinary measures were initiated against him.

*Declassification of ASG/OHRM letter*

245. The Applicant's approach to this issue demonstrates his unfortunate capacity to be blinded by his adherence to strict formalism. His request for clarification about the use of the ASG's memorandum was prudent in light of it being marked strictly confidential but his unwillingness to accept and act on the ASG's advice that it was his prerogative to present it to MEU was pedantic and unreasonable.

246. Whatever the label on the memorandum, the Applicant was not precluded by the ASG from using it to pursue his lawful right to request management evaluation.

*Disclosure of the investigation report*

247. In the cases of *Bertucci* 2011-UNAT-121 and *Calvani* 2010-UNAT-032, UNAT upheld the proposition that in accordance with article 9.1 of the Statue of the UNDT and article 18.2 of the Rules of Procedure of the UNDT, the UNDT has discretionary authority in conducting proceedings, including being entitled to order the production of any document in the interest of justice and for the fair and expeditious disposal of the case. In addition, the Tribunal has the power to redact any document to preserve confidentiality.

248. However, the powers of the Tribunal are different from the disclosure obligations of the Administration stipulated in section 5.18 of ST/SGB 2008/5 which states:

- (a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusion of the investigation.

249. In light of the indication that no prohibited conduct took place, the administration acted correctly in terms of section 5.18 of the ST/SGB 2008/5 by providing him with a summary of the findings and conclusions of the Investigation Panel Report. The Tribunal finds that the ASG's summary was a very full and accurate account and caused the Applicant no detriment. There was no breach of the rules or of the due process rights of the Applicant.

250. If an aggrieved person does not accept the outcome of a summary, he or she may challenge it before the Tribunal and in so doing request the full report thus preserving his or her right to disclosure as appropriate. That is what occurred in this case. The Applicant challenged aspects of the investigation report, the Tribunal ordered the release of the full report with limited redactions and the Applicant therefore has had the opportunity to read it.

*Was the appointment of a Non UN staff member (Ssekandi) to membership of the investigation panel lawful?*

251. Section 5.14 of ST/SGB/2008/5 requires that where a complaint warrants a formal fact finding investigation the responsible officer shall promptly appoint a panel. The panel is to consist of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the OHRM roster.

252. The section contemplates the selection of either an internal panel of staff members or one selected from the OHRM roster. It does not specify what the OHRM roster is but unlike the case of the internal panel it does not require that

the persons on the OHRM roster should be staff members. In the absence of any evidence on this point the Tribunal may infer that the OHRM has a roster of suitable persons to undertake investigations of this sort as required.

253. The evidence is that the selection was made by OHRM and not from within the immediate organisation concerned. In light of the Applicant's persistent allegations of harassment, discrimination and bias by the administration of ECA towards him, that decision was necessary in terms of section 5.14.

254. On the evidence available to it, the Tribunal finds that the Investigation Panel was lawfully convened. In any event, the Applicant expressly disavowed any criticisms of the independence or 2.4(t.4(l) 2f-6.1( R)-5(M (c)-2.lcrit).0899 b0 Tc( is )-10.6.Etblaw41

*Abuse of process, systematic*



263. The failure by ECA to investigate the Applicant's 4 August 2008 complaint about the composition and conduct of the ASPs became an underlying complaint of the Applicant in the Trio of cases and subsequent challenges to selection decisions that he could have no confidence in the ASPs appointed by the ES to evaluate his candidacy for vacancies while the 4 August complaint remained uninvestigated.

### Compensation

264. The Tribunal asked the Applicant what outcome he wanted to achieve as a result of his litigation. He replied at length but concluded "just to tell my story and vindicate my rights".

265. The Applicant did not seek financial redress in this Trio of cases. There will be no award of compensation.

*(Signed)*

Judge Coral Shaw

Dated this 4<sup>th</sup> day of December 2013

Entered in the Register on this 4<sup>th</sup> day of December 2013

*(Signed)*

Abena Kwakye-Berko, Acting Registrar, Nairobi