

The Application and Procedural History

1. At the time of filing the Application, the Applicant held a fixed-term appointment as an Administrative Assistant at the G-5/

6. The hearing commenced on 18 September 2013, and continued through 19 and 24 September; 16, 17, 22, 23 and 24 October; and 12 and 13 November 2013.

7. The Applicant and two witnesses testified in support of her case. The Respondent called two witnesses for his case.

8. Given the length of the trial and the number of witnesses who testified in this case, the Tribunal considered it necessary to request transcription of the trial recordings. The last of these transcripts was received by the Tribunal in October 2014.

Facts and Submissions

Applicant

9. Prior to entering into the service of the United Nations, the Applicant had worked for KPMG and the diplomatic mission of the Federal Republic of Nigeria in Kuwait.

10. The Applicant started working with the Organization in 2005, as an Administrative Assistant in the CAS Office based

her experience stems from having been brought up as an expatriate in Kuwait and her work with the Nigerian mission there

23. The reassignment decision also mentions the need “to staff the 19(t)-wfsc-16(e)3(d)-170(1w-17

after nur6(o)22(-22(e)3(r)] TJ ET Q q BT /F1 12 Tf 0 0 0 45 1 99.Tf 0 0 346s)81 10.9099.Tf 1E

34. The Applicant's reassignment to the Supply Section was done in the interests of the Mission following the restructuring of the CAS Office. The Respondent consulted the Applicant in good faith in advance of the contested decision. The position to which the Applicant has been reassigned corresponds with her skills, qualifications, and experience.

35. The impugned decision was not motivated by an improper purpose.

36. The decision to reassign the Applicant to the Supply Section was taken in the best interests of the Organization. The Applicant was informed that the reason for her reassignment was the operational restructuring of the CAS Office.

37. The restructuring of the CAS Office entailed: (1) an increase in workload arising from the transfer of responsibilities from t

While working in the CAS Office, the Applic

45. The fact that the Applicant had not received training in all aspects of her new functions in the Supply Section before her reassignment does not provide any foundation for a finding that her reassignment was improperly motivated.

46. The speculation by the Applicant's colleagues regarding the reasons for her

The preparation of the budget commenced in late March or early April 2012, following a senior staff retreat. As instructed by Headquarters, the CAS and the Acting CMS conducted a “task-to-task” review of the CAS Office’s staffing requirements. Following this review, the CAS and Acting CMS decided that the G-5 Administrative Assistant in the CAS Office would become the audit focal point, with responsibility for reviewing recommendations received from the OIOS Resident Auditor in Kuwait.

51. The CAS and the Acting CMS decided that another staff member in UNAMI had the necessary skills and experience to act as the audit focal point, as well as to perform the other functions of an Administrative Assistant. The Acting CMS explained in his evidence that he been contacted by OIOS in New York to assist in findi

54. The Applicant's evidence that she has experience in implementing audit recommendations as a consequence of her previous job as an Administrative Assistant with KPMG is irrelevant. The Applicant did not produce her Personal History Profile in support of her assertions that she had such experience. Both the CAS and the Acting CMS were not aware that she had any such experience, and the Applicant never once mentioned this experience to them. Nevertheless, it was for

CMS's email to the Applicant, as he had always spoken highly of the Applicant. The CAS spoke to the Acting CMS and defended the Applicant. She explained to him that the complaints related to extra services that could only be provided by the CAS Office on a voluntary basis (319(o)(c)(3)(a)-16(3)(e)-16(o)-2ASd) by the CAO

62. The CAS did what she told the Applicant she would do when matters came to a head with the Acting CMS, she resolved the problems directly with the Amman staff upon her return to Kuwait. The CAS stated in her evidence that the Applicant thanked her for her support after the CAS had her meeting with the Amman staff.

63. The Applicant's claims that emails sent by the CAS to her demonstrate improper motives have no merit. The CAS' correspondence was work-related, and made fair and appropriate enquiries of the Applicant.

64. First, while the CAS was in Baghdad, a Security Officer informed the CAS that someone had been in her office in Kuwait shredding documents. The CAS's email to the Applicant of 15 July 2012 enquiring about the matter was appropriate. The Applicant's email in response was defensive and evasive. Second, the CAS's email of 18 October 2012 requesting the Applicant to hand over the telephone directory of her contacts with the Government of Kuwait was a legitimate request.

65. The Applicant's claim that UNAMI was required to engage an Individual Contractor after her reassignment in order to do certain work that she had performed in the CAS Office is unfounded.

66. The Acting CMS and the CAS explained that the Individual Contractor's role was to act as a Protocol Officer to support the Iraq/Kuwait border project. It was necessary to retain a Kuwaiti national who could liaise with officials at the highest levels in the relevant Ministries in Kuwait. No-one in UNAMI had this level of access to government officials.

67. The Individual Contractor was retained at the level of a National Professional Officer (NPO-A), reflecting his academic qualifications and professiona

evidence that the Individual Contractor assisted the CAS Office in this respect, but explained that this was not the only work he did.

68. That the description of the Individual Contractor's duties in his Terms of Reference is similar to the description of the Applicant's protocol and liaison duties in her e-PASs is of no consequence. The Applicant's duties related to protocol and liaison support she provided in connection with the CAS's liaison functions as Head of Office in Kuwait. The Individual Contractor was retained to provide protocol support at a higher level, and on a separate project.

69. It was suggested in cross-examination of the CAS and the Acting CMS that UNAMI breached ST/AI/1999/7 (Consultants and individual contractors) as the services performed by the Individual Contractor were services that could be met from existing staff resources. This contention misrepresents the conditions under which individual contractors may be hired. Consultants may be hired if the need for the required services cannot be met from existing staff resources; and his/her work may involve functions similar to those of staff members or other functions that could be performed by staff members.

70. The Applicant's new position is at the G-5 level, the same level as her position as Administrative Assistant in the CAS Office.

71. The Applicant has the necessary skills and qualifications for the position she was reassigned to. As the CAS explained in her evidence, the education and experience requirements for a G-5 Administrative Assistant in the Supply Section are the same as those for the equivalent position in the CAS Office. The minimum requirements are a high school diploma and some years of experience as an administrative assistant, which the Applicant has.

72. The Applicant had some experience relating to UNAMI's supply operations as a result of her work in the CAS Office. The Applicant provided assistance to the

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positions as in the future due to the trend to “nationalize” positions in missions. Te”

81. The CAS's evidence should be accepted as it is consistent with both her and the Acting CMS's evidence of their career discussions with the Applicant.

Applicant's Closing Submissions

82. The Applicant avers that the decision was a veiled punitive measure resulting from her supervisors' reaction to the handling of staff arriving at the Kuwait office from Amman.

83.

that they would be provided with by the CAS Office and by the immigration rules applied by the Ministry of Foreign Affairs to United Nations national staff.

88. The Applicant explained how this friction resulted in complaints against the CAS which Mr. Arumugham blamed on her. These complaints resulted in the email exchanges at annex 10 to the original application where Mr. Arumugham sought to characterise the Applicant's behaviour as a conduct matter and issued the threat: "I will not take this lightly. I will resolve this when Padma returns."

89. Exactly one month later, following the return of

94. It is important to note that Mr. Arumugham and Ms. Nandkumar gave entirely conflicting evidence regarding the immigration rules, their implementation with regards to United Nations staff and the type of assistance offered to arriving staff by the CAS Office.

95. Ms. Nandkumar gave evidence regarding one staff member from Amman who

Mr. Arumugham explained how in this context any complaints by these staff were particularly significant.

100. Ms. Nandkumar's evidence contradicted that of Mr. Arumugham as she sought to minimize the importance of complaints by the Amman staff characterising them as an everyday reality of work of this nature.

101. Ms. Nandkumar gave evidence that the Applicant's treatment of the Amman staff had been appropriate and in line with CAS policies.

102. Mr. Arumugham described both the Applicant and Mr. Benromdhane as being "in denial" when he confronted them about problems relating to the Amman staff.

103. Mr. Arumugham's explanation of his email from 10 June 2012 is particularly problematic. He claimed never to have actually received a written complaint regarding the Applicant and accepted having misrepresented this in the email. Mr. Arumugham claimed that his reference to CDU was a response to a threat by Amman Staff to approach CDU with their complaints.

104. The Applicant submits that this account is simply not credible; the plain meaning of Mr. Arumugham's email is that he had received a complaint and intended to take it to CDU. This demonstrates that he had lost all perspective concerning the complaints made. It is indicative of an extreme reaction to the situation which supports the allegation that this was subsequently the motivation for punitive action against Ms. Haroun.

105. Mr. Arumugham claimed that on returning to the Duty Station, Ms. Nandkumar succeeded in satisfying the needs of the Amman staff.

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CAS Office. Mr. Arumugham confirmed that at the time he left the mission these functions were still performed by the CAS Office.

113. No specific evidence was provided of changes to the functions of the post previously encumbered by the Applicant resulting from the implementation of the KJSO. Nor was any evidence provided regarding why any such change would necessitate her lateral transfer from the post.

114. At paragraph 8 of the Reply this was advanced as one of the reasons that the Applicant could not continue in her post. In his evidence Mr. Arumugham clarified that in fact this was not the transfer of a new responsibility to the CAS Office. Mr. Arumugham stated that this responsibility had always been part of the CAS Office but had previously been performed by him.

115. This additional responsibility is the only specific change to the functions of the post previously encumbered by the Applicant identified in evidence before the Tribunal. No documentary evidence has been provided to support the assertion that this additional function accrued.

116. The Applicant does not accept that this responsibility accrued to her post. However, even if it did she submits that no convincing explanation was placed before the Tribunal as to why this additional responsibility could not have been performed by her with minimal if any additional training. The post remains an administrative assistant post, it is submitted that such a post would not be given responsibility for substantive work in relation to audit work. The Applicant has extensive experience working for one of the leading audit firms in the world as an administrative officer. Mr. Arumugham's suggestion that experience gained outside the United Nations would not assist is simply not convincing.

117. Instead of providing the Applicant with minimal training regarding one additional function of her post, the Respondent chose to transfer her to a post where

she needed to be completely retrained in order to begin to perform the functions of the post. They further filled her post with an individual with no experience of the other aspects of the CAS Office work resulting, the Applicant submits, in the need to hire an independent contractor to assist.

118. The reason this explanation for the transfer makes no sense is that it was not the real motive for the transfer. The Applicant submits that having selected the Applicant's successor, who happens to have audit experience, this justification was advanced purely to counter the Applicant's challenge to the reassignment.

119. The management evaluation of the decision to laterally transfer Ms. Haroun reads:

One of the important functions which you performed in the CAS's office related to preparation of documentation to obtain transit clearance from the Kuwait Ministry of Foreign Affairs (MOFA) – in

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127. Mr. Arumugham gave evidence that the head of Human Resources (HR) had informed him that the Applicant would be ill suited for HR work due to perceived shortcomings in her ability to understand and apply rules. This information allegedly

131. The Applicant submits that the recruitment of this individual contractor was in contravention of sections 1, 2 and 3 of ST/AI/1999/7. This demonstrates a disregard for the rules of the Organization on the part of those who decided to laterally transfer

137. The Applicant submits that these coincidences highlight the unlikely nature of the Respondent's account. This, combined with the numerous and serious inconsistencies between the two Respondent's witnesses' evidence and the documentary record further undermine the credibility of the Respondent's account.

138. By contrast, the Applicant's account is clear and simple. Her transfer was a direct response to the situation that arose with the Amman staff. It was the "resolution" referred to in Mr. Arumugham's email.²⁴ It was facilitated as soon as possible after the incident.

139. The need for audit experience on the part of the CAS Administrative Assistant was invented after the Applicant challenged the decision in order to justify the action taken by Mr. Arumugham and Ms Nandkumar. The justification was based on the skills of the incumbent.

140. The decision to transfer the Applicant had nothing to do with streamlining the functions of the CAS Office, budget restrictions, the implementation of the KJSO, the requirements of the Supply Section or her own career advancement. These reasons were a mere smoke screen to obscure the real and unlawful motive for the decision. This is why 46 days after her transfer it resulted in the need to recruit an additional member of staff in the CAS Office.

Deliberations

141. The issue in this case is whether the decision to reassign the Applicant from the CAS Office to the Supply Section was a valid exercise of discretion or whether it was motivated by extraneous factors.

²⁴ Respondent's Annex 10.

142. A determination on those questions must be based on the evidence before the court, which largely comprises the testimony of witnesses presented by both parties whose credibility will need to be assessed and evaluated.

143. The Tribunal will carefully scrutinise the evidence and analyse it in the light of the responses given by the witnesses and conclude whether or not the evidence is capable of belief.

144. The Tribunal will endorse the approach it took in the case of *Applicant* UNDT/2016/022 where the Tribunal stated,

As a trier of facts, a first instance judge has the means and power to assess the veracity and accuracy of a witness. There is no particular rule or formula that can be used in the assessment of credibility. In a jury trial, jurors are told to use their varied experiences in life to assess the credibility of witnesses. The same applies to a judge as a trier of facts. The judge should use his/her own varied experiences in life to engage in that exerci -22(h)19(e)-16(0gn.9981 Q q BT /A10(e)3(x)19(e)3(r)-7(c)-16(i)37()3(

148. Much of this case turns on the duties and responsibilities of the Applicant at the time of her reassignment, and the profile of the candidate then appointed to the CAS Office to perform the putatively “expanded duties and responsibilities” of the Administrative Assistant.

Extraenous Factors

149. Administrative decisions are dominated by discretion. Decision makers make myriad decisions involving many issues and how these issues are resolved depend on the exercise of the discretion that the decision makers wield.

150. What are the factors that the courts look at when called upon to judicially

153. In a discussion under the heading “Procedural irregularities”, C.F. Amerasinghe has this to say:²⁵

The need for a fair procedure to be followed in the taking of discretionary administrative decisions has been emphasized by IATs [International Administrative Tribunals]. The recognition of the right of staff members to a fair procedure in the taking of discretionary decisions is particularly important, because it is often difficult to prove the existence of irregular motives or *détournement de pouvoir* as a ground for judicial review of a discretionary decision. Thus judicial review of procedural errors constitutes a significant means of checking arbitrary action on the part of administrative authorities.

154. The former United Nations Administrative Tribunal has stated in general terms:

It is also true that the exercise of broad powers without adequate procedural safeguards inevitably produces arbitrary limitation upon the exercise of any power. The maintenance of the authority of the Secretary-General to deal effectively and decisively with the work and operation of the Secretariat in conditions of flexibility and adaptability depends, in its exercise, in large measure upon the strict observance of procedural safeguards. In a very real sense, the mode must be the measure of the power.²⁶

155. An administrative decision therefore must be based on the facts of a particular situation viewed objectively. This presupposes that the decision maker should be free from bias and prejudice; the person affected by the administrative decision is entitled to a full and fair consideration in the process;²⁷ the decision maker should not exhibit any discrimination towards the individual affected by the decision;²⁸ there must be compliance with existing rules and regulations.²⁹

²⁵ *Principles of the Institutional Law of International Organizations*, 2nd edition, (Cambridge University Press 2005), p. 305.

²⁶ UN Administrative Tribunal Judgment No. 4, *Howrani and Four Others* [1951], at p. 10.

²⁷ *Sefraoui* 2010-UNAT-048; *Charles* 2012-UNAT-242.

²⁸ *Planas* 2010-UNAT-049.

²⁹ *Abassi* 2011-UNAT-110.

156. As UNAT

“private arrangement” between her and Mr. Romdhane”. Her liaison responsibilities were limited, he insisted, to arranging his appointments with officials of the Ministry of Foreign Affairs or acting as an interpreter during meetings.

162. The Tribunal, after listening to the testimony of Mr. Arumugham, Ms. Nandkumar and the Applicant, finds that both Mr. Arumugham and Ms. Nandkumar played down the Applicant’s role and functions at the CAS Office. The Tribunal rejects the testimony of Mr. Arumugham that the Applicant had only a peripheral role in the processing of visa and residency permit applications by staff members.

163. Mr. Arumugham and Ms. Nandkumar made strenuous efforts to reduce the role of the Applicant to mere routine administrative functions. The documentary and oral evidence before the Tribunal suggests that this was untrue, and that both the Respondent’s witnesses were being economical with the truth in respect of her role and functions.

164. The Applicant was examined, cross-examined and re-examined before the Tribunal, which testimony the Tribunal finds to be consistent and credible. Cross-examination of the Applicant by the Respondent did not shake her testimony.

165. Secondly, there is evidence from Mr. Arumugham himself that Mr. Romdhane, whom he described as the focal person, had IT and language limitations. Curiously, despite being at pains to downplay the Applicant’s role and responsibilities, it was the Applicant and Mr. Romdhane who were taken to task when the staff from Amman made their complaints to the SRSG.

166. So great were the Applicant’s putative responsibilities that Mr. Arumugham held her responsible for the staff members’ difficulties and threatened her with disciplinary action for supposedly failing to deliver on her functions. Except for one email, where Mr. Arumugham told both the Applicant and Mr. Romdhane that he was

not happy about the way that the Amman staff were treated, there is no evidence of similar treatment being meted out to Mr. Romdhane who time and again was presented as the focal point in the visa and residence section of the CAS Office.

167. Thirdly, it is clear from the evidence presented to the Tribunal that although Mr. Romdhane remained in the CAS Office after the Applicant was reassigned, she continued to assist with visas and residence permits and supported the work of Ms. Zydan who was recruited to replace her.

168. Fourthly,

the visa and residency permit functions, ii) liaison with the Ministry of Foreign Affairs and other governmental bodies, which function included the drafting of *Notes Verbale*.

176. Mr. Arumugham featured as either first or second reporting officer in all three cycles. He consistently appraised her as frequently exceeding performance

180. On this particular point, it was not lost on the Tribunal that Ms. Nandkumar's testimony shifted significantly from one day to the other. On 23 October 2013, Ms. Nandkumar told the Court:

[W]hen I understood that it had to do with all these other extra services, I call them "extra services" that they were expecting from our office, you know, I think -- you know, I made it clear to Raja that, you know, this is done on a voluntary basis, that both Mustapha and Miriam would provide the services as much as they could but, you know, they really cannot be forced to -- to -- to drive someone around Kuwait if they did not want to. And -- and I kind of clarified that with him; that -- that the office had done what they had to do in terms of getting the visas and filing the application, but they -- you know, the staff member could not be forced to go out and drive a staff member to -- to the police station in order to get -- to get the fingerprint or whatever.

So you -- you know, these are my staff members, this is my office and I think they are doing a good job and I recall the conversation with Raja going along those lines where I -- I defended my staff members. If there was a perception that they were not being helpful /F1 12 Tf 0 0 0 rg 0.9981 0 0h 0 0 r 0

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however conceded that Ms. Zydan had no professional audit qualifications or experience beyond having been an administrative assistant to the resident audit officer. He also testified that Ms. Zydan would spend about 15% of her time on audit duties while the rest of her time would be devoted to dealing with administrative matters, helping with visa and residency permits, verifying documents, protocol responsibilities of the CAS, liaising with the country team and monitoring and reporting of the recommendations. With the exception of the so-called audit duties all the other duties were also being performed by the Applicant.

187. Mr. Romdhane testified that Ms. Zydan was dealing mostly with visa and residency permits as well as drafting *notes verbale*. Mr. al Essa told the court that he too was dealing with visa and residence permits in the CAS Office with Mr. Romdhane and Ms. Zydan. Ms. Zydan was dealing mostly with visas and residence issues. He added that his duties were previously performed by the Applicant. His work also included customs clearance with the Ministry of Foreign Affairs.

188. Interestingly, while Mr. Arumugham denied that Mr. al Essa was working on visa and residence permits, Ms. Nandkumar conceded that he was assisting with visa and residence permits.

189. Both Mr. Arumugham and Ms. Nandkumar testified that, with a view to reducing the budget, somebody with wide experience in audit work had to be recruited in the CAS Office. There is no evidence that Ms. Zydan had that experience or that she performed audit support functions for the CAS Office.

190. The evidence, in fact, shows that Ms. 0(s)8.9981 0 0 1 281.28 168.96 Tm [(t)81 0 0 1 296.4 228

irrelevant”; that “she did not produce her Personal History Profile in support of her assertions that she had such M9 h ET81(o)-20(n)19(s)8()-10(t)-22(h)19(a)3(t)-22()-119(ot)4t he had s9

commensurate with the skills, qualifications and experience of that staff member. In the case of *Rees*³¹, UNAT held,

Staff Regulation 1.2(c) provides that “[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations”.

It is for the Administration to determine whether a measure of such a nature is in its interest or not. However, the decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures. An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member’s grade; whether the responsibilities involved corresponded to his or her level; whether

examinations, vaccinations, the sick-bay, medical supervision of the crèche and consultations at the request of staff. In the same period the applicant acted as replacement for the head of the medical branch. The European Court of Justice held that the transfer of the applicant was arbitrary and unlawful as the new posts did not comprise duties related to the practice of medicine.

197. The Respondent must be able to support the decisions it makes on the basis of facts. Decisions made arbitrarily, or on the basis of prejudice or other improper motivation,³³ make for poor management and invariably results in a waste of the Organization's resources and r manag0aty.pooQ q BT /F1 12 Tf 0 0 0 rg 0.9981 64 613.68 Tm ((

Registry was informed that the Applicant was separated from service. There is therefore no decision to rescind.

202. She also requested “compensation for the moral injury and prejudice” resulting from the unlawful reassignment.

203. In *Gakumba*³⁵, UNAT made a distinction between an award of compensation under articles 9.1(a) and (b) of the Statute of the Appeals Tribunal, articles that are mirrored verbatim in articles 10.5(a) and (b) of the UNDT Statute. The relevant extract from *Gakumba* reads:

This compensation [for humiliation, embarrassment and negative impact of the Administration’s wrongdoing on the staff member] is completely different from the one set in lieu of specific performance established in a judgment, and is, therefore, not duplicative. The latter covers the possibility that the staff member does not receive the concrete remedy of specific performance ordered by the UNDT. This is contemplated by Article 9(1) (a) of the Statute of the Appeals

Moral Damages

206. The Applicant has also requested moral damages for injury and prejudice resulting from the unlawful reassignment.

207. In *Asiarotis* 2013-UNAT-309, UNAT elaborated on the principles governing moral damages,

To invoke its jurisdiction to award moral damages, the UNDT must in

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Accountability

216. This case has brought to light how actions by two top officials have literally destroyed the Applicant's career. They have taken decisions in clear breach of their duties as managers as if the duty station was their fiefdom.

217. It is this Tribunal's finding that Mr. Arumugham and Ms. Nandkumar either deliberately ignored or feigned ignorance of the pertinent principles governing the role of a manager or supervisor contained in the 2014 Standards of Conduct for the International Civil Service (Standards of Conduct). The 2014 Standards of Conduct were revised by the International Civil Service Commission and approved by the United Nations General Assembly in 2013. The first Standards of Conduct were drafted by the International Civil Service Advisory Board in 1954. It was revised in 2001 and 2013, which is now the current version which was approved by the General Assembly in its resolution 67/257. In the foreword to the Standards of Conduct it is stated "The Standards of Conduct apply to all staff members, i.e. international civil servants, as defined in the Staff Rules and Regulations". In paragraph 3 of the 2014 Standards of Conduct it is stated,

The values that are enshrined in the United Nation organizations must also be those that guide international civil servants in all their actions: fundamental human, rights social justice, the dignity and worth of the human person and respect for the equal rights of men and women and of nations great and small.

218. The Tribunal accordingly directs the Registry to serve a copy of this judgment on Secretary-General and the Under Secretary-General for Field Support so that their attention is drawn to the conduct of these staff members under their charge.

(Signed)

Judge Vinod Boolell

Dated this 11th day of May 2016

Entered in the Register on this 11th day of May 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi