UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2009/067/ JAB/2009/015
	Judgment No.:	UNDT/2010/115
	Date:	25 June 2010
	Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Introduction

1. The applicant contends he was the victim of a pattern of harassment and abuse of authority which constituted retaliation for his reporting of alleged wrongdoing and that this resulted in his eventual separation from service. The applicant requested review of the decision not to extend his contract beyond 30 November 2008 on this basis. At the time of the reporting, the applicant was a Portfolio Manager (P-4) for Argentina in the United Nations Office for Project Services (UNOPS) in New York.

Note

2. As the instant case refers to multiple recruitment processes, each post has been numbered as per the parties' submissions for ease of reference:

Post 1 – Regional Director (D-1)

Post 2 – Senior Procurement Officer (P-5)

Post 3 – Senior Partnership Manager (P-5)

Post 4 – Manager, Argentina Operations Centre (L-5)

Post 5 – Deputy Regional Director (L-5)

Post 6 – Procurement Specialist – Transactional Catalogue Procurement Unit (TCPU) (P-4)

Post 7 – Business Process Specialist (P-4)

Post 8 – Team Leader (P-4)

Post 9 – Business Process Specialist (L-4)

Post 10 – Procurement Specialist (P-4)

Post 11 – Procurement Specialist (L-4)

Facts

3. In autumn 2005 the applicant reported the alleged wrongdoing of another UN staff member to the attention of his supervisor, the Regional Director, Latin America and the Caribbean (LAC) Regional Office (Regional Director). The applicant alleged that a Project Management Specialist of UNOPS was facilitating a "gnocchi" scheme whereby consultants who were collecting salaries on a monthly basis were not rendering any services. (The term "gnocchi" was used as it is traditionally eaten once a month on the twenty-ninth day.)

4. On 8 December 2005 the Project Management Specialist in question wrote an email to an acquaintance (role not specified) stating:

> In my office, things are becoming almost unsustainable and my contract comes to an end at the end of the year…
>
> Do you know a Chilean by the name of [Interim Executive Director (ED)'s name] from the United Nations??? He has been appointed by

months before the relocation date. This was already communicated to all staff some time ago.

I will find out what [the Interim ED]'s thinking is about the

> Following recent discussions between yourself and the Deputy Executive Director, you have been assigned to the post of Procurement Officer at the L-4 level with a duty station of Copenhagen, Denmark.
>
> In line with your status as an international professional staff member, you are hereby requested to relocate to Copenhagen effective 1 July 2006.
>
> I would therefore appreciate if you could please inform DHRM Whether you intend to move to Copenhagen by signing the below Statement of Intent. Please sign the below Statement of Intent and email it to hrtransition@unops.org by no later than noon 7 April 2006.
>
> Should you agree to relocate to Copenhagen, kindly note that your appointment will be extended until 31 December 2007.
>
> If you do not agree in writing by noon 7 April 2006 to relocate to Copenhagen effective 1 July 2006 you will not be offered a renewal of contract and you will separate from service with UNOPS effective 30 June 2006.
>
> …

18. By email of 6 April 2006 the applicant requested further time to decide, stating:

> You told me verbally yesterday that I was going to be given a reasonable amount of time to consider the offer to relocate to Copenhagen. As is, I am being given less than 24 hours to decide; a deadline which I find to be extremely tight, especially when as you know, the offer for Lima did not have the clarity that I needed to make a well informed decision and there appeared to be some confusing o nty th,4ccw Tc 0oxst b

> My main line of questioning was focused on when the decision to move the Argentina portfolio was made and why. The four separate interviews I conducted revealed that his report of alleged misconduct was not linked to the move of the Argentina portfolio nor to the decision to ultimately offer you a position in Copenhagen. Rather, the decision to move the Argentina portfolio pre-dated your complaint and was based on management's perception that clients were unsatisfied with you. All my interviews independently confirmed that management had been concerned for some time with your ability to manage clients in Argentina and had expressed a desire to change the manager of the Argentina portfolio. While your report of misconduct was a protected activity, I did not find that the fact that you reported it caused retaliation or threat of retaliation since the portfolio decisions had been suggested long before you submitted the allegations of misconduct by the [Project Management Specialist]. I understand that it would appear the decision to move the Argentina portfolio happened soon after you filed a complaint against [the Project Management Specialist] but based on information I gathered from the interviews, I do not find a credible link between the disclosure of wrongdoing and alleged retaliation.

The applicant raised a number of shortcomings and requested clarification on various elements of the report pointed out a number of shortcomings in the analysis contained therein and requested further clarification.

26. On 7 July 2006 the applicant reported his complaint to Office of Internal Oversight Services (OIOS).

27. In July–August 2006 the applicant brought the matter to the attention of OAPR.

28. On 5 September 2006, upon his arrival in Copenhagen to take up his new assignment, the applicant found there was no post of Procurement Officer as had been offered in his agreement to the transfer. The respondent disputes that there was no post. The applicant was assigned as a Business Process Specialist in the Organizational Effectiveness Centre (OEC).

29. In September 2006 a restructuring of the UNOPS headquarters began.

30. In September 2006 the applicant, as a member of the Procurement Review and Advisory Committee (PRAC), said he noted irregularities in a presentation made by the Interim LAC Regional Manager. The case was rejected. (On 30 October 2006, the applicant reported receiving a call from a high-ranking government official alerting him that the Interim LAC Regional Manager had called to inform him that his submission to PRAC had been rejected and that the applicant was personally responsible for the rejection. The ED conveyed that he was afraid both the applicant and the Interim LAC Regional Manager had "demonstrated poor judgment in commenting on the PRAC meeting" to government authorities. The applicant contends that this event and the applicant's involvement in the procurement audit of the Lima were the reasons behind his removal from the PRAC. This is contested by the respondent.)

31. By email of 22 November 2006 to the chair of PRAC, the applicant stated –

It n

never replied in writing but the applicant claims she verbally advised him that the then Deputy ED did not think that he was a team player.

34. On 2 April 2007 the OIOS report into the applicant's allegations of wrongdoing was transmitted to the ED. The report stated:

> 3. The OIOS notes that the allegation concerning "no-show" consultants contracted by ANSES was brought to the attention of the Office of Audit and Performance Review (OAPR) of the United Nations Development Programme (UNDP). After an assessment of the allegation, the Director of OAPR concluded that it was a low risk/low priority matter that did not warrant investigation, and that the matter be closed regardless of "potentially sufficient material to support the allegation".
>
> …
>
> 13. The OIOS concludes that despite indications of possible mismanagement concerning the ANSES consultancy contracts, no evidence could be found that [the project specialist] was involved in selecting consultants while he was in the employment of UNOP; or that he received kick-backs from consultants as alleged by [the applicant].
>
> 14. The OIOS concludes that [the Project Specialist] is in breach of Staff Regulation 1.2(m) in that he actively associated with the management of [company name] a company that he and his wife owns, as admitted by him during his interview with the OIOS.

The cover memorandum from the Under-Secretary-General for OIOS to the ED summarised the findings of their investigation as follows:

> The investigation found no evidence that [the Project Management Specialist] received any kick-backs from ANSES consultants. However, the OIOS found that [the Project Management Specialist] had a financial interest in a profit-making concern. Further, the OIOS found no evidence of retaliation against [the applicant].

The applicant has pointed to evidence, unnecessary to detail, that indicated local staff reported negative repercussions from their assistance to OIOS. The material is not cogent and does not justify this submission.

the recommended candidate did not meet the position's relevant experience requirements of 15 years of progressively responsible professional experience, his skills as a team player were "inconsistent" with his stated work experience as a consultant, his background did not meet the requirements, "no reference checks were submitted", "his English was poor" and there was a disappointment in the "poor quality of the interview report". The Board also requested guidance on whether it is permitted for a former (retired) ED of UNOPS to sit on the interview panel and recommended the position be re-advertised. On 9 April 2008 the ASB Chair agreed that, further to receiving additional information from management, there was sufficient evidence to satisfy the ASB, to proceed with the recruitment of both positions (posts #4 and #5).

57. In March 2008, the former Regional Director proposed that the applicant be assigned to a project in Uruguay, but both UNDP Argentina and UNDP Uruguay objected.

58. On 30 April 2008 the applicant applied to the position of Procurement Specialist (Team Leader, Global Procurement Support Unit) (post #10) and he was interviewed but not selected. The Director of OEC&HR had encouraged the applicant to apply and the Manager of the Global Service Centre had said she would "think about it". On 19 June 2008 the ASB recommended that the case be "rejected", as the second round of interviews was "invalid". The ASB had noted in its minutes that:

> Though an apparent conflict of interest existed with all the other panel members including HR representative being supervised by the chair, the first interview had clear outcome with a female candidate emerging with the top score of 94 compared to the proposed candidate's 92.
>
> The technical expert on the first panel who is the supervisor of the position, chaired the second panel, and was the previous supervisor and a reference of the proposed candidate. She is also the direct supervisor of the technical expert on the second panel.

> Both interview reports do not declare that the technical expert/chair had informed the panel prior to commencement of the interviews of her previous professional relationship with the proposed candidate
>
> No technical question was asked at the second round of interviews, yet the proposed candidate was scored 10/10 and [redacted] scored 5/10 for technical knowledge.
>
> The scoring for [redacted] on all of the selection criteria in the second interview is remarkably inconsistent with the panel's report on the similar selection criteria from the first interview.

On 19 June 2008 the ED endorsed the decision to proceed with the recruitment as per the recommendation of the interview panel.

59. On 29 June 2008 the applicant was informed that he had not been selected for the post #10.

60. From February until September 2008, the applicant worked on a roster project which developed into UNOPS e-recruitment project.

61. By email of 31 July 2008 the applicant received notification that his post would be abolished.

62. On 2 October 2008 the applicant applied for an L-4 Procurement Specialist post in South Africa (post #11) for which he was interviewed but not selected.

63. On 10 November 2008 the UN Office of Human Resources requested the applicant's services under a non-reimbursable loan for six months. The respondent declined, stating, *inter alia*:

> [The applicant's] present post is unfunded from 1 December 2008, and, although we could extend his post administratively whist he was on loan, we would not be able to hold his post for his return. It would seem inappropriate, therefore, to use the loan mechanism in this situation – much better would be a transfer, or if that is not possible, a new contract (albeit explicitly temporary) from 1 December 08 through 30 June 09.

64. On 30 November 2008 the applicant's contract with UNOPS expired. The ED gave evidence about the decision not to renew his contract along the following

Applicant's submissions

Scope of application

66. The applicant was the victim of a long pattern of harassment and abuse of authority because he reported alleged wrongdoing and this resulted in his eventual separation.

67. The scope of the case includes the following decisions which culminated in the final decision not to extend his contract:

1) Removal of the applicant's functions as Argentina Portfolio Manager after reporting of financial irregularities

2) Failure of the respondent either through the Interim Ethics Office or OAPR (Internal Audit)

Organization's policies on this issue. This characterisation being taken up by other managers was prejudice, as described in the UN Administrative Tribunal Judgment No. 1128, *Banerjee* (2003) as follows:

> The Tribunal is satisfied that acting upon an unverified notion about the character of a staff member without giving him the opportunity to refute that notion is prejudicial. Acting on prejudice is discrimination.

Respondent breached its contractual obligations under the relocation agreement

69. The respondent did not honour its agreement with regard to the offer of the non-existent procurement officer post in Copenhagen. The offer and acceptance of a post inducing the reliance of the staff member in relocating to a new station is an "enforceable claim" that the respondent has an obligation to honour. An offer and acceptance without reservations constitutes a valid contract of employment binding the parties as per UN Administrative Tribunal Judgment No. 519, *Kofi* (1991), and reaffirmed in judgment *Castelli* UNDT/2009/075, which states:

> The contract was created when the Administration's offer was accepted by the applicant ... the correct conclusion is, in accordance with the principles of contract law, that the contract was valid and fully enforceable once the unconditional offer was unconditionally accepted.

70. The post to which the applicant was assigned in Copenhagen, which had no procurement functions and no job description, was a "functional demotion, violating his right to fair treatment". The respondent must ensure "due regard is paid to the personal interest of the staff member concerned" (UN Administrative Tribunal Judgment No. 518, *Brewster* (1991)) with regards to transfers.

71. While the respondent has broad discretion in matters of assignments, that authority is not absolute, as per UN Administrative Tribunal Judgment No. 1029, *Banguora* (2001) which held: "Although the Administration has discretionary power, which means, necessarily, that staff members do not, strictly speaking, have a *substantial right* to secure a particular decision that should be protected, they do,

however, have a right to *fair and equitable treatment* because the Tribunal monitors the way in which that power is exercised".

Series of decisions based on false or misleading reasons

72. The series of decisions which are the subject of the instant case removed the applicant from a decision-making position, rendered him unassigned and led to his separation. The principal rule followed in investigation practices with respect to whether an act can be considered retaliatory is whether the Organization would have taken the same decisions absent the improper motives. The lack of explanation for the decisions and that they had no foundations in good management practice was indicative of retaliation:

> Put another way, ordinary management practice would have dictated that an organization that repeatedly solicited candidates for positions requiring his mix of skills and background would eventually find a suitable placement for a successful portfolio manager with 10 years of progressive experience with UNOPS with excellent performance reports.

73. If a false and misleading reason is given an action, it may be challenged and the giving of a false reason is of itself a breach of the right to be treated fairly, honestly and honourable and can be, of itself, the basis for compensation:

> The giving of a false or invalid reason for a discretionary decision is, in itself, maladministration which may breach a staff member's right to be treated fairly, honestly and honourably. A breach of such a staff member's right may entitle the staff member to compensation for that very wrong, rather than on the basis that the giving of a false reason is evidence in itself that, had it not been given, the staff member would have enjoyed an extension of contract or some other benefit that was "lost" because of the falsity of the reason proffered. (UN Administrative Tribunal Judgment No. 1238, *Albert* (2005).)

Removal of the applicant's duties and portfolio

74. The applicant's removal from his former duties occurred shortly after his official reporting of wrongdoing in Argentina. He reported to his Deputy ED on 8

March 2006. By April 2006, he was advised of his imminent reassignment and advised to hand over his functions and the initial decision to discontinue the Project Management Specialist's contract had been reversed. His portfolio was removed from him. In addition to not being allowed to take his portfolio with him, the applicant was offered a six-month appointment which was noted by the staff council representative as "fishy", a recommendation from the former Regional Director to reassign the applicant to Uruguay was rejected and then he was given a 24-hour ultimatum to relocate to Copenhagen or be terminated. Four days after the applicant filed a formal complaint of retaliation the Interim ED threatened the applicant with disciplinary action if the applicant did not immediately transfer his responsibilities to the Interim LAC Regional Manager and to cease contact with clients. These actions were justified by the Interim ED as in the interests of the Organization but any complaints about the applicant's performance were not properly recorded nor shared with the applicant and therefore their use is "suspect".

75. In a comparable UNOPS case, the Administrative Tribunal found in Judgment No. 1191, *Aertgeerts* (2004):

> In the present case, it is clear that professionally the Applicant had been highly regarded by his superiors for several years. In fact, in every aspect other than his relationship with clients, the Applicant consistently received praise from his supervisor. When the decision not to renew the Applicant's fixed-term appointment was then explained by his poor relations with clients and the financial risks involved with it, the Administration had to be able to substantiate these claims with the facts. As stated above, the Applicant had provided evidence to the contrary. The Tribunal therefore finds that the reason which served as the basis for the decision not to renew the Applicant's appointment had been disproved by the Applicant. Moreover, the Tribunal believes that the problems as identified in the report of the Rebuttal Panel, especially the failure of the Administration to document the Applicant's shortcomings and to counsel, guide, support and advise him, should have been dealt with much earlier. Rather than deciding that the Applicant's interpersonal problems were such that warranted losing a staff member who, professionally, was excellent, the Administration should have provided the Applicant with the necessary guidance to overcome this shortfall of his.

The applicant further submits that:

> The rationale put forward by [the Interim Executive Director] for the removal of the applicant from his job is suspect from both a substantive and procedural perspective. Substantively, the applicant has demonstrated his good relations with clients and performance assessments of his immediate supervisor that lack any justification for his removal. Procedurally, the use of private, undisclosed criticism violates due process.

76. The Administrative Tribunal has warned against the use of informal comments made against staff members as follows:

> It should be self-evident that the making of any informal comments without the Applicant having the opportunity to rebut those comments is a flagrant contradiction of transparency of the Staff Rules and cannot be tolerated. (Judgment No. 1209, *El-Ansary* (2005))

Applicant was not given full and fair consideration for posts to which he applied

77. With regard to posts for which he applied, the applicant was entitled to full and fair consideration based on the published rules for selection and the respondent has not met this burden, including excluding the applicant from shortlists for posts in Latin America and other procurement posts which were advertised externally, despite the availability of the applicant. The selection process was unfair, including arbitrary short-listing and thresholds being applied, evaluation based on a single interview and the ASB reviewing only the final outcome rather than the entire process.

Applicant was systematically removed from decision-making boards and panels

78. The applicant was systematically removed from any decision-making or oversight function within UNOPS, including unfair removal of the applicant from the PRAC (procurement review and contracts committee) after he noted some "irregularities" in a presentation made by the Interim LAC Regional Manager.

In Judgment No. 1052, *Bonder* (2002), the Administrative Tribunal judged the non-renewal of contract of a staff member illegal due to the egregious pattern of irregularities that preceded the outcome, discerning an overall picture of discriminatory and bad-faith treatment.

Compensation warranted for harm done to the applicant

86. As a result of the respondent's actions, the applicant was forced to leave UNOPS "under a cloud of doubt, suspicion and unfair defamation, which has caused severe emotional distress, needless dislocation and uncertainty and which has affected his professional reputation". Compensation is justified when the respondent's actions have resulted in deep humiliation, distress and financial and career uncertainty as in UN Administrative Tribunal Judgment No. 812, *Everett* (1997) and the Administrative Tribunal has awarded maximum damages where, for example, the respondent "failed to observe proper procedures and, in so doing, denied the Appellant due process" and for "distressing and unwarranted treatment at the hands of the Organization" (Judgment No. 807, *Lehmann* (1996)).

87. In conclusion, the applicant submits, *inter alia*:

> Loss of a job as a result of a retaliatory motive harms the entire organization not just the victim since it has a chilling effect on others who might be potential whistleblowers. The circumstances surrounding the treatment of the applicant's career and contractual status reflect not only an injustice but also a pattern of institutional failure. It is incumbent on the Respondent to ensure that, in the absence of its own adequate protections against acts of retaliation, UNOPS conform itself to the Organization's best practices and at a minimum ensure that other staff are not treated in a similar unfair manner.

88. On the matter of compensation, the applicant submits:

> At EMC rr.725 TDvnal ote0t on

> compensation. In addition, he requests appropriate and exceptional compensation in the amount that reflects the irreparable damage caused to his career and professional reputation and for the professional dislocation he has suffered and the abridgement of his rights by the respondent, as well as legal costs in the amount of $20,000.

Respondent's submissions

Timing of key decisions renders them non-retaliatory

89. The timing of particular events relative to the dates the decision-makers knew about the applicant's reporting of alleged wrongdoing make it impossible to conclude that they were influenced by the applicant's reporting of the alleged wrongdoing. Specifically, the Interim ED recalled:

> 20. I would like to make clear that when I made the decision to reassign the Argentina portfolio, I did not know that the Applicant had made allegations of corruption in Argentina.
>
> 21. I cannot remember for sure the exact time I learned about the allegations of corruption. The earliest date that I can now remember thinking about the alleged corruption is the time when [the Interim Ethics Officer's] report was released. Even though I was earlier interviewed by [the Interim Ethics Officer] (as may be seen from her report), I would like to stress that [the Interim Ethics Officer] never actually told me that it was related to an allegation of corruption on the part of [the Project Management Specialist] … It was not until the interview had gone for a while that I realized that she was actually discussing a complaint that the Applicant had made about me. However, [the Interim Ethics Officer] did not mention that the Applicant had alleged corruption on the part of [the Project Management Specialist], let alone that I was alleged to have "retaliated" against the Applicant because of these corruption allegations against [the Project Management Specialist]. In other words, I realized over the course of the interview that the Applicant had accused me of doing something, but I was never informed what the supposed reason was.

90. The applicant has not provided evidence that the Interim ED knew of the reporting of the alleged wrongdoing prior to 15 May 2006. The Regional Director informed the Deputy ED, not the Interim ED.

91. The inference should be drawn from the documentary evidence that the Interim Ethics Officer did not take any further action or inform anyone further.

92. Emails sent or received prior to ST/SGB/2005/21 on *Protection from retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations* coming into force on 1 January 2006 cannot be used to support a claim or retaliation.

93. The removal of the Regional Director by the Interim ED cannot be retaliatory as the decision was taken prior to the applicant reporting the alleged wrongdoing to anyone (except the Regional Director).

No adverse effect on career of applicant or others involved in reporting

94. There was no retaliation by the ED against the applicant as the latter was assigned an asset management project of critical importance after it was known that the applicant had reported alleged misconduct and the OIOS report had been issued. This also shows that the reporting of the alleged misconduct did not have a negative impact on the applicant's career.

95. The positive career developments and/or the personal opinion of the persons who made accusations against the Project Management Specialist show that there was no retaliation for reporting the alleged wrongdoing. One of these staff members left because of what he saw as a pay issue, rather than retaliation:

> Let me tell you that my contract will come to an end … They will create a competition for all posts (their intentions is to lower the monies they pay). Naturally, I will not participate, otherwise it would be tantamount to going along with the manipulation …

Both of the other staff members remain employees of UNOPS, and the former Regional Director has recently been issued a permanent contract. In his testimony, the former Regional Director said that he did not believe the Interim ED had led to the decision for him to be removed from the post of Regional Director of UNOPS LAC or that the ED had ever made a decision that negatively affected his career.

Ordinary professional relationships existed between the ED, Interim ED and the Project Management Specialist

96. The Interim ED and the ED had ordinary professional relationships with the Project Management Specialist rather than protectionist ones. According to the Regional Director's statement: "I don't think they were more than colleagues, but I cannot be sure". The Interim ED said this in his statement and that he had not known the Project Management Specialist for long enough to keep in touch "let alone 'retaliate' against the Applicant for making corruption allegation…" The email of 6 December 2005 from the Project Management Specialist to an acquaintance supports that he and the Interim ED did not know each other.

97. The relationship between the Interim LAC Regional Manager and the Project Management Specialist was also an ordinary professional relationship and the issue of him allegedly falsifying the latter's attendance records is not relevant for the present purposes, and if it were, the issue is now time-barred.

98. The most likely explanation for the change in the Deputy ED's decision with regard to whether to renew the contract of the Project Management Specialist was her realisation that the claims of the applicant were unsubstantiated rather than any pressure from the Interim ED.

99. The ED had an ordinary professional relationship with both the Project Management Specialist and the Interim ED. It was not unusual that the three of them were together at the signing of the host country agreement. The Interim ED, in his own testimony, stated that he never sought to influence the ED about the applicant's

eventually selected for the Team Leader post asked that the applicant not report to her so the Director of OEC&HR decided that the applicant should report directly to her.

103. There were some complaints about the applicant of a general nature, as referred to in the Regional Director's statement:

> b. To your knowledge did any of our substantive clients complain about [the applicant or the applicant's] services? Were there any other complaints of which you were aware and was [the applicant] informed?
>
> Answer: The only client who was complaining about [the applicant's] personality not about [the applicant's] performance was UNDP.
>
> h. Were you aware of any clients expressing a desire to change the manager of the Argentina Portfolio?
>
> Answer: None other than UNDP Argentina

104. The applicant had a difficult relationship with UNDP Argentina dating back to 2003, and while the reasons are contested, the applicant acknowledged that at some point it desired to remove the applicant from his position:

> In August 2003, [name] joined UNOPS as the new [ED]. One of the first activities in his new position involved a meeting with all the Resident representative, who coincidentally were meeting in New York…In that meeting [name], Argentina's UNDP Resident Representative appeared to have demanded and appeared to have obtained from the [former UNOPS ED] and "agreement to remove me from my job in exchange for new business and goodwill from the CO [country office]".

The decision to remove the Argentina portfolio from the applicant

105. On the decision to remove the Argentina portfolio from the applicant, the Interim ED described the context and reasoning as follows:

> d. On my trip from Chile to assume my duties as UNOPS ED a.i., I made a stopover in Argentina to meet with the then UNDP Resident Representative/UN Resident Coordinator ([name]) in order to explore the possibilities of UNOPS and UNDP working together, so UNOPS from then on could start servicing projects within its mandate. The reaction of [the UNDP Resident Representative/UN resident

Coordinator] was very negative: he stated that it was impossible to work with UNOPS because it did not honour its commitments. He explained that, in the past UNDP Argentina had had serious problems with the Applicant to the point that [the UNDP Resident Representative/UN resident Coordinator's] predecessor, [name], had complained to the then ED of(tj.18J0.001 Tc 0.11( )] 14.505 with(essnam)or, [nam to

the Deputy ED over some two weeks. This was noted in the Interim ED's witness statement:

> 6. I would first like to stress that this letter dated 6 April 2006 was not suddenly sent to the Applicant. Instead, this letter was sent to the Applicant only after a long series of discussions between the (then) UNOPS Deputy ED ([name], who retired later in 2006) and the Applicant. Indeed, [the Deputy Executive Director] had a much more active role in the discussions with the Applicant than I did. I mention this because I was surprised that [the Deputy Executive Director] was not the subject of the same accusations since even though I made the final decisions, she was very much involved in the reassignment of the Argentina portfolio and also to have the Applicant relocate to Copenhagen.
>
> 7. I cannot remember now the exact date when [the Deputy Executive Director] started discussions with the Applicant, but I do remember the discussions lasted some time, probably at least two weeks …
>
> …
>
> 9. I also attach, as Annex R-GF-3, a series of e-mails between [the Deputy Executive Director] and me starting from 29 March 2006. I would ask the Tribunal to note that in this e-series of e-mail, in particular in my e-mail dated 31 March 2006 to [the Deputy Executive Director], I state "[the Applicant] should give us an indication of what he really prefers. Based on that information we will make him an offer." I think it is clear from this e-mail that I never had any intention to negatively influence the Applicant's career.

111. The letter of 6 April 2006 was only sent when the applicant "refused to make any decision, notwithstanding [the Deputy ED's] efforts, and instead kept delaying. It was only after this refusal and repeated delay that I sent him the letter dated 6 April 2006 to the Applicant offering him the Copenhagen post. I did not think it was unreasonable to require him to give an answer by the next day, because he had had more than a week to think about the Copenhagen post", as per the Interim ED's statement. Moreover, other staff were requ

Transfer of the applicant to Copenhagen lawful under staff regulation 1.2(c)

112. The transfer of the applicant to Copenhagen was lawful under staff regulation 1.2(c) which provides:

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities of offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

The warning of disciplinary action was appropriate given the applicant's delays in handing over his portfolio. The Interim ED's desire to improve relationship between UNOPS and UNDP Argentina cannot be consider

unlawful. Specifically, in UNAT Judgment No. 518, *Brewster* (1991) there is a discussion as to what would constituted the "consultation" required in which it is said

> There is, so far as the Tribunal is aware, no definition in the Staff Regulations or Rules, or in the Tribunal's jurisprudence, of the concept of consultation, but on an ordinary construction, it would appear that the essential element is that he each part to the consultation must have the opportunity to make the other party aware of its views, so that they can be taken into account in good faith … This construction does not meant that the views of either party must necessary prevail or that one side or the other must change its position ...

115. The present case can be distinguished from the *Aertgeerts* case relied upon the applicant as the decision under appeal in that case was a decision not to renew the applicant's contract. In the instant case it was a decision to transfer the applicant to another position without any loss in level.

116. *El-Ansary*, as relied upon by the applicant, was not a case regarding the Executive head's authority pursuant to staff regulation 1.2(c) to reassign staff.

117. With respect to *Banerjee*, the respondent notes that the ED had witnesses to the applicant's conduct, while the decision-maker in *Banerjee* had not.

Disclosure that the matter was being investigated made in good faith

118. In June 2006, when the Interim LAC Regional Manager disclosed that the Ethics Office was investigating the matter, he was acting in good faith as this was done in a staff meeting, "not surreptitiously" and he did not disclose the nature of the questions being asked, therefore his disclosures were of a limited nature.

119. On the Interim Ethics Officer's report, it is correct and consistent with the Regional Director's testimony.

120. With regard to the submission that the applicant was told by the Ethics Office that the matter was closed and there was no appeal the respondent notes that the relevant documents show that the Interim Ethics Officer was *functus officio*, not that

there was no appeal and that the Interim Ethics Office specifically noted that although she was not forwarding the case to OIOS, the applicant had the opportunity to submit it to them directly or to request review of the decision under the staff rules.

OIOS involvement in reviewing issues viewed positively

121. The ED took steps to encourage staff to report wrongdoing, even prior to his

> to work as a procurement officer in the UNOPS Division for Procurement Services once he relocated …

123. Although the applicant claims he was not assigned procurement responsibilities, the organization chart of September 2006 notes him as a Procurement Track Analyst in the IBS Team. In his oral testimony, the ED explained that the IBS unit was a top priority with regard to change management and the applicant was responsible for the procurement track of this change management team which was not below the applicant's competence. The applicant's performance appraisal of 2007 specifically mentions that he was to "provide business & procurement consulting" so he did have some procurement work. Likewise, in the same appraisal, the applicant states he "carried out a comprehensive review of UNOPS handbook in order to identify those gaps not covered by the introduction of either the Procurement Manual or the Standard Operating Procedures …". The applicant also worked on recruitment for the e-roster and e-recruitment project for consultants. The Chair of the Headquarters Contracts and Property Committee (HQCPC), in her testimony of 10 December 2009, stated that UNOPS treated its consultant recruitments as procurement actions.

124. The lack of job descriptions applied to others in the IBS unit, as supported by the testimony of the Director of OEC&HR. She also stated that in her professional opinion there were two factors which contributed to his career difficulties: difficulty getting along with his colleagues and not enjoying his job.

125. An L-4 procurement position did exist within the Division for Procurement Services when the applicant arrived in Copenhagen, "procurement consulting" was noted in his performance evaluation for 2007 and the organizational chart of 2006 had him referred to as a "Procurement Track Analyst". The respondent notes that "the responsibility for the formulation of the reorganization of [the UN organization] falls within the Administration's exclusive domain", UNAT Judgment No 1254 (2005).

The applicant's exclusion from decision-making panels and committees

126. The applicant was not singled out in his exclusion from the HQCPC, PRAC's successor: the HQCPC Chairperson and PRAC alternate chairperson gave a statement which included three other staff members who were former PRAC members who were not appointed to the HQCPC. Similarly, for the APB, the evidence shows that the applicant was only excluded on that one day rather than as a rule because they had been frantically looking for someone to form a quorum and there is no evidence to suggest anything further.

127. With regard to the Interim LAC Regional Manager proposing administering more ANSES consultants, there should be no adverse inference drawn from him considering the project as the allegations with regard to the applicant were never proved.

128. There was no restriction put on the applicant by the Deputy ED with regard to participation in the mission to China, although the Deputy ED did not like the way it had been arranged. Any decisions regarding the release of the applicant were reasonable and based on availability.

The restructuring light

129. On the issue of whether the applicant was told that he would not be matched, the Director of OEC&HR denies saying this:

> I categorically state that I never told the Applicant that he would not be "matched" during the position matching exercise. The only reason that I can imagine for the Applicant making such a shocking claim is that he is referring to his misinterpretations of my attempts to help him move away from the "business process specialist" filed that he was obviously did not like, i.e. (my suggestion that he speak to [a UNDP colleague] about possible opportunities at UNDP procurement and (ii) my asking him whether he would be happier if he were to leave with an "agreed separation package".

She describes the many actions she took as a human resources professional and concerned colleague to assist him.

130. The applicant was neither singled out, nor highlighted as the only outstanding case, as verified by email from the Deputy ED shortly after the process: "We also never said that [the applicant] was the 'outstanding case'. The situation we have is that we have three individuals ([the applicant] is one of them) against two posts. Therefore, it's 'reduction in force' and all three will have to apply". This is supported by the Director of OEC&HR's statement, in which she states that she did not recall telling the panel that he was the only staff member that was not going to be matched but that she did make an initial error in one aspect of the position matching exercise, namely, the two other staff members were matched to posts but not the applicant and they were not meant to do this if there were more incumbents than posts. This mistake was pointed out to her by her direct supervisor and the panel was reconvened to correct the error. She also notes that some mistakes at that time are likely to have been due that she had been unwell.

131. The applicant was not singled out in his treatment. Others in similar positions were treated in the same way, for example, other UNOPS staff members who were assigned to the new Organizational Effectiveness Centre (OEC). In her testimony of 10 December 2009, one such colleague confirmed that prior to the restructuring she had worked at the Division for Procurement Services and then she had to take on a new role as Team Lead, Policy and Quality Assurance. In her statement, she stated as follows:

> 5. I was one of the staff members who was negatively affected by the Respondent's 2007 "restructuring light" process.
>
> 6. In particular, my pre-"restructuring light" post was abolished, and I was not "matched", even though the simpler and more logical thing to do was to just transfer me to another part of UNOPS to do another procurement job, without any change in my grade.
>
> 7. In addition despite all my years of good service with the Respondent, the Respondent refused to treat me as an internal candidate for the new post that I applied for (Team Leader, Global

Procurement Support Unit). Instead, I was treated as an external applicant. This was despite the fact that I had had a major role in the development of the Respondent's Procurement Manual (under the supervision of the chief of the Respondent's Division of Procurement Services (DPS)), and was, up to the time of "restructuring light", the "Team Leader, Policy & Quality Assurance (PQA)" of the Respondent's "Organizational Effectiveness Centre" at the same level of the post I applied to.

8. I believe that the planning for the "restructuring light" process was insufficient. I also believe that the time-table that the Respondent's HR staff set for the "restructuring light" process was overly ambitious and it was confusing due to the "restructuring light" and the merger with IAPSO taking place at the same time. This resulted, in my view, in unnecessary anxiety and confusion among staff. Some of us who were affected were so anxious that we had a meeting with a Staff Council representative ([name]).

9. I was worried about being left without a job through no fault of my own and I therefore began to apply for jobs elsewhere.

10. However, at no time did I see anything that suggested that the "restructuring light" process was "targeted" at me or anybody else as

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The selection of the candidate A demonstrates that, in fact, UNOPS gave priority to the "incumbents" of the abolished posts as she was a close second to the top-scoring candidate.

Other selection processes under scrutiny

141. The ED testified to taking a conservative approach to appointments and relying almost exclusively on interview panel members and the ASB members when deciding on staff appointments, with a few exceptions for the posts for people who would be reporting directly to the Executive Office.

Applicant did not apply for any portfolio manager positions

142. The applicant never applied for any portfolio manager positions during the relevant period.

Regi

Manager, Argentina Operations Centre L-5 (post #4)

144. With regard to this post and the applicant's questioning of why he was not short-listed, the respondent submits that this post was L-5 which was at a higher level than the applicant and that the reason for him not being short-listed, as explained by the Regional Director of LAC was "I don't consider he has the profile I am servicing for the consolidation of office in Argentina. He has valuable experience but right now I need other type of experience which I do finding the short-listed candidates…". In addition, the applicant was up against candidates of a very high standard, with the selected candidate having had a vast experience in the Latin American region and was a former Vice-Minister of Economy for the Government of Paraguay. The applicant has ignored that the ASB revised its initial recommendation after receiving some information from human resources which the then Chair of the ASB indicated would be sufficient evidence to support the appointment. With regard to the argument of the applicant that the person appointed was not fluent in English, it is not

> It would be otherwise, of course, if there were a personal relationship (such as family or friendship) with or personal antipathy for a candidate.

Procurement Specialist, TCPU (P-4) (post #6)

147. The applicant states it was unfair that he was not considered eligible for this position. However, the Officer-in-Charge, Procurement Support Office, UNDP in a contemporaneous email to the Deputy ED, gave a reasonable explanation for this: "I cannot support a displaced person being in job fair round 1, if that person was not initially affected by the merger and now has no post to throw in. Throwing in a post was a key condition to participating as voluntarily affected". The applicant does not provide any proof that his post was initially affected by the UNOPS-IAPSO partial merger or that he had "thrown in" his post i.e. a person not initially affected but "throws in" their own post so that there is an enlarged pool of applicants. The applicant was ineligible. The respondent further emphasises that the applicant was part of the restructuring light exercise, not the partial merger.

Senior Procurement Officer (post #2)

148. The fact that the applicant was not short-listed was not evidence of retaliation. Another internal staff member who was also a former Portfolio Manager with experience was also not short-listed and the successful candidate and the alternate candidate were of extremely high quality.

Senior Partnership Manager (post #3)

149. In response to the fact that his candidacy was not acknowledged, the respondent notes that this post was never presented to the ASB or filled.

Procurement Specialist (post #10)

150. There were three other candidates who scored higher than the applicant and the applicant does not dispute that he did not perform nearly as well as the two

candidates who were invited for the second interview (the scores were 94, 92, 71 and the applicant received a score of 68). In particular, the respondent notes that the applicant does not dispute that the portion of the minutes describing his interview were fair. The applicant has sought to rely on the subsequent debate as to which of the two higher-scoring candidates should have been selected (in particular, whether a second interview was necessary), but the essential issue is that there is nothing to indicate that the applicant was not treated fairly.

151. The most relevant portion of the ASB's minutes is "the first interview had a

153. Two separate selection process were attempted before resorting to transferring a staff from an office that was closing down.

The applicant's eligibility for rotation

154. With regard to the applicant's contention that he was excluded from participating in the staff rotation exercise, in spite of his apparent qualification under the policy and his imminent termination, the respondent submits that the applicant was not eligible because he did not have a post as required by UNOPS Administrative Instruction on Rotation which provides:

> 2.2.2 A staff member serving with UNOPS is subject to rotation if:
>
> …
>
> (c) the post he/she encumbers is included in the Executive Board approved staffing table;

This is a basic element of a rotation policy: the number of available posts must at least be the same as the number of staff members, otherwise an individual against a post would find himself without a post because of the policy. An exception was appropriately made for another staff member by the ED due to the serious health problems of the individual involved.

The decision of the respondent not to agree to the loan of the applicant

155. On the decision of the respondent not to agree to the loan of the applicant, the applicant was treated in exactly the same way as another staff member. Due to UNOPS difficult financial situation at the time, it had decided to avoid secondments and loans and opt for transfers instead.

156. On the decision to separate the staff

that the applicant remained in the UN system without any break in service, and started with the UN Secretariat as of 1 December 2008.

Receivability

157. The respondent maintains its position that the only decision which is receivable is the non-renewal of the applicant's appointment, as all the other decisions are time-barred pursuant to staff rule 111.2.

158. The pre-31 July 2008 events are only relevant insofar as they may show the Interim ED improperly influenced the ED not to renew the applicant's contract.

159. Assuming that the Tribunal concludes that the Interim ED made the wrong decision in 2006 to allow the applicant to be reassigned away from the Argentina portfolio and/or be transferred to Copenhagen, but it is not shown that Interim ED influenced the ED not to renew the applicant's contract in 2008, then the actions of the Interim ED are irrelevant for the purpose of this case.

160. All decision prior to that of 31 July 2008 are also time-barred, and are only relevant to the issue of whether the ED had an improper motive that continued until 31 July 2008. If no such motive exists, then the decisions are irrelevant.

161. Paragraph 2.2 of ST/SGB/2005/21 on protection against retaliation for reporting misconduct and for cooperating with duly authorised audits or investigations provides:

> The present bulletin is without prejudice to the legitimate application of regulations, rules and administrative procedures, including those governing evaluation of performance non-extension of termination of appointment. However, the burden of proof shall rest with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity referred to in section 2.2 above.

Paragraph 2.2 does not alter the time bar provisions of the then staff rule 111.2. In other words, an appeal must still be receivable before the Administration is required

e. whether the selection processes under scrutiny were lawful and afforded the applicant full and fair consideration for appointment; and

f. whether the non-renewal of the applicant's contract was affected by retaliation.

Discussion

Scope and receivability

169. The applicant has submitted that the scope of this case included the alleged failure of the respondent either through the Interim Ethics Office or OAPR to conduct a thorough investigation into the applicant's allegations of financial impropriety and retaliation. I directed early in the case management process that the truth of the applicant's allegations was not a relevant issue in this case. Nor, for equally obvious reasons, is the adequacy of the investigation into his claims. It follows, amongst other things, that whether there were widespread fraudulent practices involving the Project Management Specialist or not has not been examined by the Tribunal. No submission that depends on the truth of the allegations or the extent of any so-called frauds can therefore be accepted.

170. The applicant also submitted that the respondent failed to consider his allegations of retaliation. Even if this were so, and I do not accept that it was, this seems to me to a peripheral issue, since there is no asserted connection between this and any adverse decision about which the applicant complains.

171. The applicant questions a large number of decisions in order to prove his claim of retaliation and abuse of authority. The respondent submits that these decisions cannot be examined as the time for appealing them has long since expired. However, the receivability or otherwise of these decisions has nothing to do with their relevance. There is no presumption of any kind that, since they were not the subject of litigation, they were correct or that the staff member is unable to establish that they were improper if it is relevant to do so in connection with a case which is

receivable. Here, the issue is whether the particular decision actually being litigated breached his contract of employment as not having been made properly but, rather, as part of a pattern of retaliation and thus the evidence of the circumstances of prior decisions is plainly relevant. The demonstration of the distinction between receivability and relevance is obvious when it is realised that, even if the Tribunal were to determine, for the purposes of this case, that an earlier decision was retaliatory, it would not affect its legal status and no order could be made in respect of it.

172. As regards the respondent's submissions that certain decisions are not receivable because the bulletin on retaliation had not yet come into force at the time of said decisions, this is a *non sequitur*. First, as stated above, the question is not receivability but relevance. Secondly, a decision that was influenced by an intention to retaliate against a staff member would undoubtedly have been a breach of the obligation of the Organization towards the staff member that decisions must be made with regard only to relevant matters and without being influenced by extraneous considerations. Indeed, any acts of retaliation against a staff member for fulfilling his or her responsibility to report misconduct would, of themselves, constitute serious misconduct. The non-existence of the bulletin on retaliation could not affect these principles.

173. The respondent submits that para 2.2 of ST/SGB/2005/21 on protection against retaliation for reporting misconduct and for cooperating with duly authorised audits or investigations does not apply to impose on the Administration the burden of proving "by clear and convincing evidence" in respect of decisions made before that provision came into effect that "it would have taken the same action absent the protected activity". It is somewhat uncertain whether this provision concerns all questions about the administrative decisions specified, arising in any context, including proceedings in the Tribunal, or only decisions made by the Ethics Office in relation to complaints of retaliation. Having regard to the generality of the language, I consider that it applies to decisions that are the subject of applications in the

Tribunal. But it does not re

prefer to analyse it in terms of the actual case sought to be made, namely one of retaliation, of which the decision under consideration is said to be the ultimate result. Accordingly, I have used the term "institutional retaliation". One of the immediate results of this focus is the observation that "retaliation" is not quite so ambiguous a notion as "prejudice". It necessarily involves the notion of motive or reason for an action. Actions cannot be retaliatory objectively – they can only be so described if they occur for a particular reason. The attempt to ascribe retaliation to an institution is therefore bound to be problematical. The reference, in my view, by the applicant's counsel to the notion of institutional prejudice is therefore not helpful – not so much because the term is at all events ambiguous but, more importantly, because it obscures the real issue in this case.

175. If the concept of institutional retaliation means that it is unnecessary to consider whether a particular adverse decision claimed to exemplify such retaliation is in fact retaliatory and sufficient simply to point to a collection of such decisions, I consider that it must be wrong both in principle and logic. This is especially so when the decision-makers involved (and those constituting panels of committees making recommendations to them) are numerous and removed from the allegation that has, it is alleged, motivated the retaliation. In principle it is wrong because it implicitly or explicitly impugns the reputation of the individuals involved upon the basis that their recommendations or decisions are improper simply because they are adverse to the complainant and other decisions made by others, in which they were not involved, are also adverse. It is logically fallacious because it only operates where an examination of the particular decision shows a proper basis for it: if the examination showed that it was inadequately grounded, then it is improper for that reason and there is no need to resort to any notion of institutional retaliation to characterise it; if, on the other hand, the decision can be shown to be justified, it cannot rationally be characterised as retaliatory. And a mere accumulation of adverse decisions does not change this logic. Of course, decisions may be wrong for any number of different reasons. In cases of discrimination or retaliation, it may be very difficult to prove the motive for the impropriety. However, where there is a significant number of decisions that are

enough to justify a conclusion – at least on the balance of probabilities – that the adverse decision in question was improper. It seems to me that the passage from Judgment No. 1258 (2005) cited by the applicant goes or should be taken to go no

The relocation agreement

184. While there is not an adequate evidentiary basis to suggest retaliation played any role at all in the requirement of relocation, I have two concerns with regard to the relocation agreement: first, whether the applicant, having been given less that twenty-four hours to make his decision, was subjected to unfair contractual terms; and, secondly, whether the respondent breached the terms of the contract as there was no specific position for the applicant when he arrived there. On the first issue, I am satisfied that the applicant was aware that the offer was impending given his discussions of the Peruvian option and that he was not blind-sided by the offer. In fact, it appears that his managers had discussed the matter with him and while it is clear that he did not find the offer satisfactory and was not happy with the change, he was informed of the offer well prior to the twenty-four hour notice being given to him. Other staff members were also adversely affected as a result of the relocation period and also had to make difficult choices. I do not find that the terms of the offer were unlawful given the context under which UNOPS was operating and given the evidence of prior discussions regarding the impending changes. Moreover, the applicant was at liberty to express his concerns with regard to the agreement and did so.

185. Turning to whether the respondent breached the terms of the agreement in not providing the Procurement Officer post to which the applicant agreed, this issue is more troubling. The Business Process Specialist position was not the position to which the applicant had agreed and while it had some procurement functions, it was a substantially different job, as evidenced, *inter alia*, by the Organization's subsequent decision to advertise it externally. A review of the role on the documents provided indicates that the procurement functi

refusing to consider the further evidence, it may be that I would have permitted it. But I am far from thinking this is so.

Conclusion

191.