UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/021/ JAB/2008/035 UNDT/NY/2009/121
Judgment No.: UNDT/2010/116
Date: 25 June 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

MESSINGER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
George Irving

Counsel for respondent:
Jorge Ballestero, UNICEF

Introduction

1. The applicant has filed two separate applications, which relate to three contested decisions. Two of these decisions were the subject of proceedings formerly before the Joint Appeals Board (JAB) in which are now before the Tribunal as a consolidated appeal (UNDT/NY/2009/021/JAB/2008/035, the "first case") and the other is an application newly file

agency was less valued and, eventually came to believe that a calculated scheme was underway to remove him. The following account deals with specific events that he points to as evidence of this scheme and upon which he relies to establish that the particular decisions in issue were improperly made.

4. By email dated 4 May 2005, the Director approved a change in the reporting line of one of the applicant's supervisees which took him out of the direct supervision of the applicant. The supervisee had made a formal request on the previous day on the ground that the change would better reflect the supervisee's actual work structure. Both communications were copied at the same time to the applicant, who testified that he would have objected had he been consulted beforehand but felt he could not do so after the decision was made. He felt that the change of reporting line without consultation was done to undermine his position. The Director, for his part, denied any ulterior motive and said that he had merely agreed to the proposal put to him by his deputies, not knowing until afterwards that the applicant had not been consulted. The supervisee's evidence was that the applicant was at least aware that the situation was seen as a problem and had participated in discussions about it. It seems to me that simplifying the reporting lines of the supervisee was a proper basis for the change and the overwhelming bulk of his work did not involve the applicant. It may be that the applicant was not sent a copy of the formal request until after the fact and this was unfortunate but I would not draw any sinister implication from this fact. Nor does the rarity of such a change in the middle of a reporting period seem to me to be significant. We are not dealing with the laws of the Medes and the Persians.

5. In 2005, a restructuring of DHR was arranged for the 2006–07 budget biennium, part of which involved the division of the Recruitment and Career Development Section (then headed by the applicant) into two new Sections: the Recruitment & Staffing Section (RSS) and the Talent Management Section (TMS). This was documented in an Office Management Plan. As part of this process, a Vacancy Bulletin for Chief/RSS was issued on 5 October 2005, with a closing date of 19 October 2005. On 28 October, the selection Advisory Panel (SAP) met and

conducted a desk review. According to the Human Resources (HR) Manual, an appointment of this kind required the SAP to include two Global Appointment and Promotion Committee (APC) members but, as it happened, it contained only one such member. This member expressed concern that interviews had not been held but the DHR representative explained, according to the SAP minutes, that there was only one internal candidate who was at that time in an abolished post and, hence, was appropriately appointed. The evidence does not permit me to conclude, one way or another, whether this process was proper either way, it is difficult to see how it adversely affected the applicant.

6. The Recruitment and Career Development Section was divided into RSS and TMS on 1 January 2006 and the applicant became head of TMS on 1 February 2006. The job description used for this position was the same as had been used for a Chief position in 1997. A new job description was created for the position of head of RSS. It was the applicant's case that the jobs were essentially duplicated (in a set-up for the abolition of his post), but the job descriptions carry quite different wording, despite structural similarities in the documents. For example, the supervisees, the purposes of each post and the duties and responsibilities, in addition to being worded in a very different manner, also appear to outline different substantive functions. It is evident also that the functions of the two posts actually differed substantially in terms of their actual operation.

7. The applicant alleged that the Director, together with the then Deputy Director/DHR (Deputy Director), created a hostile working environment for him during the 2005–07 period by making demeaning comments about him. It is the applicant's position that other staff members in the department were aware of this, and he provided their statements attesting to this during the proceedings. (I discuss the weight to be given to these statements later in this judgment.) One such occasion was a comment made by the Director about the state of the applicant's working space, in the context of a colleague potentially being required to share that space. The applicant testified that the Director said that garbage trucks would need to be sent to sanitise his

office. In his testimony, the Director said that he did not recall this until reading the applicant's statements in this proceeding, but that he did not use the word "sanitise". He said that his comment was that he would have to call in the garbage truck from the sanitation department to remove the old material from the office. However this may be, it was an ill-judged remark that, likely understood, was offensive and would have been better not made even if, as he said (and I am inclined to accept), he had not intended it offensively but humorously. It was said by the applicant that comments were also made about his clothing, though this evidence is rather lacking in detail and, accordingly, not only difficult for the Director to deal with but for me to evaluate. The Director said he could not recall having made comments about the applicant's appearance, other than to compliment him on his boots on one occasion. In fact he thought that the applicant's clothing was appropriate. He said that he was never made aware prior to the present proceedings, nor was he aware that any other staff thought that the applicant felt harassed by him and other supervisors. It was also not disputed that the Director had on one occasion likened the applicant to "Gandalf", (a wizard character in the *Lord of the Rings* books and films). The applicant viewed this as demeaning but the Director says it was, if anything, a statement of respect. Since the character is one of heroic wisdom and virtue, it is difficult for me to see how the applicant could think it demeaning even if it were intended ironically, which is how the applicant took it. The Deputy Director is also alleged to have introduced him as "Santa Claus" at a Christmas staff party to humiliate him, although she testified that she did not recall this. Again, context is everything, but I cannot see why in the applicant's case this was a demeaning comment.

8. A retired DHR staff member who had been a colleague of the applicant and who had worked with the DHR management (ex staff member) testified that, at a meeting in 2006 for the purpose of discussing the applicant's recommendation for a post, the Deputy Director commented that the applicant should no longer be allowed to represent UNICEF, which provoked laughter and affirmative body language from the Director and the other Deputy Director. The Director testified that he was not at

such a meeting and, furthermore, did not have such a view and would not have agreed with it. The Deputy Director testified that she recalled the meeting, did not recall making any such statement and does not believe that she made it. She stated that she had no opinion one way or the other whether the applicant should represent UNICEF and that, as the applicant was involved in many activities outside UNICEF, it would have been a surprising thing to say. It is always difficult to decide a conflict of evidence of this kind. I thought that the witnesses were sincere and honest, though obviously disagreeing. Certainly it is not possible but I am minded to think that the probability is that some remark or other was made about the applicant's representing UNICEF but that the ex staff member misinterpreted it as being genuinely critical of the applicant. It is clear that she had gained the very strong impression that the

with others. Nor is unwavering politeness, though no doubt ideal, essential for efficiency or effectiveness.

10. An example of this kind of judgment is the critical view evidently formed by the Director and the Deputy Director about one of the applicant's major achievements, the P2D Program, not so much of its content as its administration, which they thought was lax. This programme, I think it was accepted by the respondent, was very effective and widely acclaimed. The applicant was rightly proud of it. However, the views of the Director and Deputy Director about its shortcomings from a managerial point of view – whether right or wrong – constituted, I am satisfied from their evidence, of their conscientious judgment about problems they perceived in its administration, a conclusion strengthened by the lack of any cross-examination suggesting that they were mistaken or (more importantly) that it was motivated by ill-will. I would accept that it is very likely that these perceptions influenced their opinions about the applicant's administrative skills, probably adversely, but this would simply have followed as a matter of course and, in my view, not unreasonably. The criticisms referred to did not strike me as inherently arbitrary or excessive, let alone malicious although this evidence was given in a broad brush way. I do not doubt that the applicant felt keenly the lack of unqualified support – which also was reflected in lack of funding – and it is not surprising that he added it to the other slights to which he felt he had been subjected. But this is no real evidence of ill-will, let alone impropriety.

11. In an email of 2 February 2006 to various management-level parties in DHR, the Director criticised a draft "Recruitment Strategy for UNICEF International Professional Staff" which the applicant had prepared, stating it was "not well formulated both in style and content … a rather verbose and rambling document … even with a very gifted editor, I do not think we can usefully make a finished product of the draft", but that it could "remain an internal DHR working document and a source of some useful ideas". It gave specific examples of areas of criticism and concluded that there were "a lot of useful ideas in the document". The Director

actual chemistry of the situation as it was, I am unpersuaded that a reasonable person would regard them as more than somewhat heated at most. More to the point, I do not think that, realistically, they can be regarded as indicators of ill-will let alone evidencing a motivation that would go to the extreme of trying to destroy the applicant's career in UNICEF after so many years of faithful and outstanding service.

Abolition of post

13. I now move to the abolition of the applicant's post and his candidacy for the post of Chief/OLDS.

14. Despite the fact that the Deputy Executive Director of UNICEF had signed off on a summary of proposals in September 2005, noting that stability was recommended for a number of years after the 2006–07 DHR restructuring, a year later, in 2007, a second restructuring in DHR was initiated which resulted in TMS being abolished and the applicant's post along with it. His functions were redistributed to the Chief of RSS and the Chief of the newly created OLDS. I accept the evidence of the Deputy Director and the Chief of RSS that the possibility of a further restructure, involving a merger of DMT and recruitment functions, which implied – though this was not, it seems, expressly discussed – the abolition of the applicant's post, was discussed by members of the Division Management Team, one of whom was the applicant, during the June 2007 budget process. As a part of this process there was a retreat and consultants were hired. The applicant evidently expressed the view that the system was working well and questioned the need for change. Perhaps because he disagreed with the direction of opinion, he did not attend all the working groups dealing with the issues.

15. On 1 May 2007 the OLDS post was advertised at a P-5 level, with a closing date of 22 May 2007. Though the applicant did not apply for the position (perhaps because he simply wished to remain where he was and hoped the situation would not change), his name was added to the list of eligible candidates by DHR after the

circumstances this was not surprising and could not infer that this indicates anything sinister.

18. On 28 June 2007 DHR management asked the Disaster Management Team with the Office Management Plan (OMP) draft document for 2008–09. This document had been sent that morning by the Director, giving staff something less than two hours to provide input and stating that a meeting to deal with it would take place only an hour and a half later. The email commenced with the words "[a]s promised, please find attached the draft OMP", suggesting that this was not the first communication on the matter. Indeed, the Chief/RSS testified that it was the outcome of several months of discussions amongst the relevant staff. The timetable smacks of unseemly haste but nothing particularly significant, let alone sinister, seems to depend on this. The OMP referred to "the abolishment of seven (7) posts which could not be redeployed for technical reasons".

19. The applicant submits that this second reorganization was of dubious programmatic value and without input outside DHR management. He points to the fact that, out of the five abolished posts, four were vacant and the fifth post was his, thus no other staff were adversely affected or received a notice of termination as a result. The departure from the recommendation as to the need for stability and what is contended to be the singling out of the applicant indicates, he submits, that the restructuring was aimed at him rather than dealing with genuine managerial concerns.

20. Brief evidence on this point was elicited from the Director. In substance, he testified that the earlier proposals which had involved the reorganization of the applicant's responsibilities had represented a compromise which was criticised by the

colleagues, including junior colleagues, which were not copied to the applicant. The applicant alleged that they related to subject matter with which he was involved (the Organigram modifications and draft documents of the Division). The earlier email appeared to be a "reply all" to an email sent by the applicant's junior. A further email of 20 October 2007 from the Deputy Director to various parties also failed to copy the applicant, despite being in relation to new HR initiatives which fell under the applicant's purview. These apparent exclusions were not explained and are suggestive of exclusion but, without further information, it is difficult to draw any firm inference one way or another. The omission of counsel for the applicant to cross-examine about them also makes it unfair to draw any inferences of impropriety. If such is the case being sought to be made it is incumbent on the accusing party to put the accusation to the relevant witness to provide an opportunity for an answer. This is not only a rule of fairness but it identifies the issue to which the evidence is said to go. The other party cannot be expected to anticipate and answer every conceivable case: that is both impractical and wasteful. Litigation should not involve making a general case with a number of potential elements, not all of which are specifically identified, in the hope that the other side might fail to see one and leave it unanswered at the end

case and is thus productive of significant unfairness. This problem has been not insignificant in this case where, as is almost inevitable, in Rudyard Kipling's words, the tale has not lost fat in the telling. This is not because the protagonists are dishonest or unreliable but because of the natural effect of the lapse of time on memory, even where the person involved has been an uninvolved and concentrating witness, which is very rare. Mostly, the remark or event occurs momentarily and particular note is not taken at the time, so that when the person is asked to recall it, it has already been significantly distorted by the lapse of time, the attitude of the individual towards the issue, any predilection of favour or otherwise for one side or the other and all the other ordinary, human weaknesses of mind under which we all labour. Often, also, the events are stripped of contextual details that give useful information about reliability and enable a fair judgment to be made about their true significance. Sometimes contemporaneous documents or the logic of events shed light on the probabilities but sometimes they remain impenetrably ambiguous. Thus, while not placing the delays of the applicant in making complaints about the matters to which he has referred on the scales against him, those delays have made it much more difficult for him to persuade me that they occurred quite as he alleges and, even more, that they were the expressions of ill-will or suggested calculated scheme to remove him from DHR.

24. On 1 August 2007 the Deputy Director signed off on the DHR post budget submission as "Head of Office" of DHR. On the same date the Director approved the DHR post budget submission as "Approving official for the Executive Director [of UNICEF]". The applicant submits that this was inappropriate since it meant that the submission was approved by only one person. It strikes me that this was unfortunate and, perhaps, contrary to the sense of the rule as to approval of such submissions. But I do not see it as being significant to the issues in this case.

Non-selection for OLDS post

25. I now return to the consideration of the candidates for the OLDS post. On 17 September 2007, the interview panel issued a summary of the interview process and recommendations, which was signed by the Director/DHR on 24 September 2007 by way of an inscription which stated "I endorse the recommendation. Please refer to APC". This document stated that, following the receipt of seventeen applications, the short listing of seven of these, and the interview of six (one candidate withdrew), a female candidate was the leading candidate, and the only one who appeared to meet "the technical, managerial and strategic aspects of the post equally". Two male candidates, one being the applicant, were equally "next" after her, both being considered "suitable for the post, as alternatives". The panel's summary of the applicant's candidacy was as follows –

> [He] has a strong background in HR, from the administration of services, coaching, recruitment, talent management to career development and designing and delivering learning and development programmes. He developed the P2D initiative which has been very successful and spearheaded competency based learning. During the interview he conveyed excellent ideas with a real visionary approach to HR related issues, including learning and development. The panel noted that he is a positive and energetic individual with a passion for developing staff member's skills and competencies. His strengths are in his innovative approach and the ability to strategize and take ideas to a new visionary level and direction. However, the panel noted that he did not demonstrate awareness of how the Section could work towards delivering on the organizations' learning mandate, and what is needed to take the function to the next level. [He] is currently the Chief of Talent Management, overseeing performance management and career development, both of which will be transferred to the OLDS. It was noted that he is on abolished post.

26. The applicant has submitted, in substance, that the panel's conclusion must have been wrong, since he was rejected in favour of a fixed-term staff member at the P-4 level with only a few years experience in UNICEF, with no reference to his permanent status or to the provisions of Staff Rule 109.1(c). Staff Rule 109.1(c) provides that –

> … if the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments.

Of course, that rule cannot be relevant to the evaluation of the comparative attributes of candidates: it cannot make the staff member who is entitled to invoke it a better candidate. Nor did it require the applicant to be recommended for appointment in preference to a better qualified candidate. He was entitled to preferential appointment over a staff member with a fixed-term or indefinite appointment only if his qualifications in substance matched those of the other staff member. I note that the reference to the abolition of his post indicated that the panel was aware of the potential application of this rule – it necessarily implied in the circumstances a reference to his permanent status which, of course, they must have known.

27. The evidence does not permit the conclusion that the panel was mistaken in its evaluation of the comparative claims of the applicant and the preferred candidate. On the contrary, the reasons given by the panel adequately explain its recommendation, providing of course that they correctly record the conscientious judgment of its members. There is every reason to conclude that this was the case and no reason to conclude otherwise. Nor is there any reason to suppose that the members of the panel were influenced by any extraneous or irrelevant factors, including any adverse opinion of the applicant (if there was one) by the Director or the Deputy Director.

28. Accordingly, the preponderance of evidence supports the conclusion that the recommendation of the successful candidate by Chief/OLDS was entirely proper.

29. The APC met on 3 October 2007. The minutes record the endorsement by the APC of the interview panel's recommendation and its unanimous recommendation of the successful candidate, stating –

On 24 October 2007 he and five other candidates participated in telephone interviews for the Pakistan post. In a candidate assessment matrix, it was noted that the panel "was not oblivious to the fact that [the applicant] is already at the P-5 level, is undoubtedly a qualified and capable colleague on an abolished post. However, given the contextual considerations described above, the panel's unanimous recommendation is [another candidate]." The panel noted it was not comfortable with making an alternate recommendation, including the applicant, if the selected candidate was not available, but checked a box in the matrix noting its overall assessment of him as being "suitable".

32. On 14 November 2007 the SAP met to discuss the interview panel's assessment of the Pakistan post. The minutes recorded that three candidates had emerged as suitable for further consideration after the interviews, including the applicant. The case

applicant, a senior DHR staff member with an excellent reputation, was on an abolished post but was unable to obtain another position "because he is seen as not being in the good books of DHR management" in light of his complaints about harassment. On 28 November 2007 there was a meeting of the APC. The minutes of this meeting, noting that the SAP had failed to reach agreement, unanimously recommended the applicant for the post, with the other previously recommended candidate to be appointed should the applicant decline, stating –

> The Office recommended [other candidate] as the sole qualified candidate … [h]owever, at the SAP, DHR and the APC representatives were of the view that there were two equally suitable candidates for the position, [another candidate], a P-4, and [the applicant], a staff member at the P-5 level, on a permanent contract and on an abolished post. During its deliberations, the Committee felt that the Office's assessment of [the applicant] was inconsistent with the breadth and scope of his experience and qualifications [which] were on par with the Office's recommended candidate … given that [the applicant] is already at the P-5 level on a permanent contract and on an abolished post, these factors gave weight in favour of his application, in accordance with Staff Rule 109.1(c) which was read to the APC by its Chair.

The applicant points to the application of Staff Rule 109.1(c) in connection with his selection for this post and submits that this demonstrates an inconsistency with the approach taken in considering him for the DSL post. However, the situations were completely different: in the latter, he was less suitable than the recommended candidate; in the latter he was "on a par" with the recommended candidate. There is no inconsistency here.

34. On 29 November 2007 the applicant was offered the Pakistan post, with a seven-day deadline for a response attached. The applicant accepted the post within this period. The applicant submits that it was an unreasonably short time in which to require him to accept the offer. I do not see why this was so. He was an applicant for it, which indicated a certain intention. And, if there were some special reason why he wanted to delay acceptance, he could have requested an extension of time in which to respond, but he did not.

35. After the applicant's arrival in Pakistan he was informed that the Pakistan post was a P-4 post and that it was only temporarily adjusted to a P-5 level. Both the advertisement and the offer to the applicant referred to the P-5 level of the post without suggesting any restrictions or qualifications. However, as of 10 January 2008 this post was not approved for upgrade to the P-5 level, as noted in a document entitled "list of changes not endorsed by Global PBR for 2010–11". On 28 January 2010 the Director was copied on an email stating that the Pakistan post would be upgraded to P-5 from P-4 for the 2008–09 biennium with funding to be provided by the Regional Contingency, and that an extension would need to be sought for 2010–11.

36. (I point out that, in light of the clear representation both in the vacancy announcement and the letter of appointment to the applicant th

of Directors until January 2008 and was thus not available until then. I do not think that this can be correct, considering that the post was advertised on 3 December 2007. The other P-5 post in DHR was that of Chief, Human Resources Services whose incumbent was already serving beyond retirement age in 2007. It was thus known to DHR management that the post would have to be advertised shortly, which it was, in April 2008. The applicant also applied for four P-4 vacancies in DHR. One was the HR Policy Specialist post advertised on 1 October 2007. The Director testified that the applicant's qualifications were not suited for this post, but the applicant points out that he had served as Deputy Chief Personnel Policy Section at a P-4 level as well as Personnel Policy Officer at the P-3 level in the headquarters of the UN agency, UNRWA.

38. The applicant contends that he could have been placed in these posts rather than having been, as it were, forced to apply for and accept the Pakistan post. He points to the circumstance, which was only known to management, that he was a single parent having the care of his daughter who had a learning disability and was being educated in the United States and, accordingly, he naturally wished to remain in that country. The applicant submits that the Director could simply have placed him in one of the P-5 posts or even the P-4 posts pending the availability of a P-5 post.

39. The respondent denies that the Director had the authority to act as the applicant contends. Certainly, the Director was not cross-examined about this subject. Furthermore, aside from the contentions of the parties, there is no evidence one way or another that the Director did have the suggested authority. In my view, as earlier explained, the omission to raise such an issue with the witness whose conduct is in question must make it unfair to have regard to the imputation. I therefore do not accept the submission that the Director was in a position to place the applicant in these positions. Nor can the applicant make much of the submission concerning his qualifications for the HR Policy Specialist post unless he can show that the Director's position was untenable: a mere disagreement of opinion is insufficient. The failure to cross-examine on this point is decisive. The same is so of the P-4 positions, in respect

of which the additional allegation is made for the first time, in final submissions, that the announcements of their vacancy were deliberately delayed to prevent the applicant from applying for them rather than proceeding with the Pakistan post. The applicant has tendered emails that suggest that reasons given in evidence before the Tribunal by other relevant witnesses as to delays in classification and announcements of vacancies were untruthful or at least inaccurate. However, I am uncertain about the true effect of that material and doubtful that it is complete. Moreover, in light of the lack of cross-examination about the alleged contradiction, I consider that it would be unjust both to the witness under attack and the respondent to take notice of these allegations when there has been no opportunity provided to the witness to explain.

40. The unfairness of holding back an attack until a final submission is obvious: it is trial by ambush. It is also unpersuasive merely to make a counter assertion or even to provide some documentary evidence such as emails, since it is well within the bounds of reasonable possibility that the witness might have an explanation for the apparent contradiction or, for example, the documentary evidence might be incomplete. It is also inappropriate to make allegations of dishonesty in such circumstances when the basis for so doing is an apparent and unexplained contradiction between testimony and a document: on the face of it, it is not altogether common for people to recollect every email they have sent or seen or even every document they may have signed. Some practical common sense is required in considering these situations. Fundamentally, it needs to be clearly understood that it is both good sense and consonant with principles of open justice that the primary arena for litigating a case is in the courtroom, not in a closing submission long after the relevant witnesses have departed. In this respect I should mention the applicant's reliance in final submissions on statements made by persons for another purpose (here, the harassment investigation) or perhaps in another context (e.g. the Joint Appeals Board (JAB) proceeding). Such statements are not on the face of it admissible except by consent since the witness is, *ex hypothesi*, not available to testify in the Tribunal or be tested by cross-examination. The respondent has objected to the use of this material,

preferring simply to submit that they should be given little weight. I have already referred to this issue in passing but I wish to make it clear that I do not see how much reliance can be placed on such statements in respect of significant matters in real dispute between the parties.

41. I am inclined to accept the reasonableness of the evidence of the Director and the Deputy Director that there are sound administrative reasons for not placing a person holding a P-5 permanent position in a P-4 post; or, to put it perhaps more precisely, it is in the interests of the Organization to place a P-5 staff member in a P-5 post. Certainly the evidence does not justify the conclusion that such a view is so unreasonable as to bespeak either error or impropriety. If the applicant disputed this

2005 (the Policy) which provides for both informal and formal processes. The applicant initiated a formal process which, because it concerned a complaint about the conduct of the Director and Deputy Director of DHR, was addressed to the Executive Director who, in due course, delegated the conduct of the matter to her Deputy. On 27 July 2007 the complaint was sent to the alleged offender(s) for comment under para 35(c) of the Policy and then to an "appropriate investigative body" which under para 35(d) "shall be made up of one to three persons, as appropriate under the circumstances ... " who must be suitably qualified as specified under para 35(e). The investigative body then undertakes the task of fact-finding in accordance with paras 36 to 38, which do not need to be referenced further except to note the specific injunction in para 36(b) that it is to "remain neutral throughout the investigation and note that due process is essential to the integrity of the investigation … " and the right of the parties, under para 38, to suggest witnesses to be interviewed, the decisions as to which is "at the discretion of the investigating body".

44. The applicant submitted that sending the complaint to the Director and Deputy Director did not comply with the Policy for reasons that are unexplained but, at all events, quite mistaken and contended that it was therefore "a disparate ad hoc treatment of the applicant's complaint because it was against senior officials in DHR". This contention is baseless.

45. On 25 September 2007 the applicant was informed that the investigating body would comprise an investigator from the office of internal audit and an official from the office of the Executive Director. It appears, however, that this official had been himself the subject of serious allegations of harassment by a female staff member which, for reasons of personal embarrassment, were not the subject of a formal complaint. A statement has been tendered by the applicant from a past senior employee who confirms that the staff member had made a complaint about the official to her and had decided not to proceed formally. She was contacted by counsel for the respondent in response to a query made by me to ascertain whether any formal investigation was conducted and has obviously misunderstood the nature of his

inquiry. She says that she was told that the official's contract had been extended for the purpose of an investigation but I am satisfied that this was not said and, indeed, it was not the case. The witness did not give evidence in the Tribunal and the use of her statement by the applicant is an example of the dangers of untested written statements. Be that as it may, I am satisfied that there

completely conventional ones in the ordinary course) must give rise to a conflict of interest. Although, here the hope was that the Executive Director would approve an extension of his contract and, as I have said, there is no evidence that the Director or Deputy Director were involved, the fact they were so senior and the reputation of the Department was thus engaged, the circumstances overall gave rise to reasonable apprehension of bias constituted by a conflict of interest.

46. An additional, and to my mind, more significant issue concerning independence is raised by the fact that the investigator from the office of internal audit submitted an application, whilst the investigation was underway, for a P-4 post in DHR, with a closing date of 15 October 2007. The fact that he was not even short-listed, put forward weakly by counsel for the respondent as a defence to the integrity of the report, is plainly irrelevant.

47. On 15 October 2007 the report of the investigating body was delivered to the Deputy Executive Director. The applicant's complaints were rejected.

48. In my view, the investigation was hopelessly compromised by the lack of apparent independence of both investigators. As to the official, the evidence as to the earlier complaint about his conduct is not a sufficient basis to conclude that he was not adequately independent, although had he been the subject of a formal investigation and found guilty, this matter would acquire an altogether different aspect. Generally speaking, the test of integrity must be that which was applied to his wife by Julius Caesar, as quoted by Suetonius: "*Meam uxorem non tam suspicione quam crimine iudico carere oportere*" ("My wife should be as much free from suspicion of a crime as she is from a crime itself"). The circumstances concerning the official's imminent retirement, however, do create a reasonable apprehension of bias. Although the investigating body is not a judicial entity, and merely finds facts, the integrity of the entire process depends upon not only the absence of bias or conflict of interest but the absence of any reasonable apprehension of bias or self interest. The investigator from the office of internal audit had, by his application, also placed himself in a position of

a clear conflict of interest: it would be in his interest to do what he thought might have made his chances of success greater which, of course, might have been to give the

has heard and the statements of various witnesses that have been tendered. Leaving aside the obvious point that it is almost certain that the Tribunal does not have jurisdiction to do so, given the way in which these matters came before it, its duty is to make a judicial determination, not conduct an investigation and produce a fact-finding report, and this requires a procedure far different in my view from that envisaged by the Policy.

50. It is important to note that the question is reasonable perception and not the reality. Despite some suggestions in material produced by the applicant, there is not the slightest evidence of any agency that the investigators were in fact biased or their investigation anything but appropriate. The fact is that they made discretionary judgments about a range of matters from who to interview to what parts of the

52. This case was hard fought on both sides, which is not surprising considering the nature of the issues. However, some submissions made by counsel on both sides – especially, I regret to say, on behalf of the applicant – betrayed an inappropriate lack of objectivity and professional courtesy. It is important that counsel feel free to make all submissions thought to be proper on their client's behalf, but they are not their client's mouthpieces and should not make allegations of serious moral turpitude unless the evidence, realistically considered, justifies them. Nor is it proper, unless the circumstances are most exceptional, to make personal attacks on opposing counsel. It will be rare, at all events, that righteous indignation is effective advocacy but, more importantly, it is an abuse of the privilege accorded counsel to say what is believed to be necessary. It also embarrasses the Bench.

Conclusion

53. So far as the applications in respect of the abolition of the applicant's post and his non-selection for the Chief/OLDS post are concerned, they are dismissed.

54. So far as the application concerning the conduct of the investigation of the applicant's complaints of harassment is concerned, the Tribunal finds that the respondent was in breach of its contractual obligations to the applicant as embodied in CF/AI/2005/017, and directc .0152 Tw d(rprising co r945 -12onclusion)Tj /Td .2451 Tge rare

worker to remain in that employment and still retain his or her dignity. The existence of an effective investigative process hopefully operates to deter harassment and is thus very closely related to the economic as well as personal interests of the staff member. Although the applicant may still have his complaints investigated if he wishes, that investigation must inevitably be more difficult and less satisfactory because of the lapse of time. Compensation for the breach is appropriate and should not be merely nominal. I assess the amount payable at USD5,000. It is to be paid on or before 46 days after the date of this judgment and, if not by paid then, interest shall accrue at eight per cent per annum.

56. The respondent has asked for costs but it is enough to say that there was nothing in the conduct of this case on the applicant's behalf that could justify such an order.

(*Signed*)

Judge Adams

Dated this 25th