

Case No.:

UNITED NATIONS DISPUTE TRIBUNAL

## **Introduction**

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA). He has seven substantive applications before the Tribunal in which he contests administrative decisions taken between August 2008 and July 2011. He alleges that each of the challenged administrative decisions are unlawful because they are in breach of specific regulations or rules and, in addition, are examples of a continuing pattern of abuse of authority against him by the Executive Secretary of the Economic Commission for Africa (ES/ECA).

2. In this case he: a) challenges the filling of the post of Director, African Centre

duplication of documents and evidence, the Tribunal would make its determination in the Trio first and refer to any relevant findings of fact and law made in the Trio in the subsequent judgments.

6. The Parties produced a bundle of all documents referred to by the witnesses or in submissions for the hearing. The Applicant's evidence comprised his sworn confirmation of the facts alleged by him in his application supplemented by his oral testimony. A portion of the synopsis of evidence of Mr. Adeyemi Dipeolu, Chief of Staff to the ES, given in Case No. UNDT/NBI/2010/045 was also referred to by the Applicant.

7. The Respondent called Ms. Doreen Bongoy-Mwalla, former Director of Administration at ECA from August 2009.

### **The issues**

8. The Tribunal identified the following issues which were agreed by the parties:
- a. Was the selection process for the post of Director/ACGSD handled correctly and lawfully?
  - b. Did the Applicant suffer any prejudice or damage by reason of the selection process that requires compensation?
  - c. Was the Applicant the victim of harassment and discrimination in relation to this case?

### **The Facts**

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

10. Until March 2003 he worked at the P-5 level as a Senior Economist in the Economic and Social Policy Division (ESPD) of ECA. His duties included the

management of the activities of the African Learning group as well as preparing reports, policy and position papers for the ES. From April to December 2003 he worked in the Office of Policy Coordination performing similar functions. In January 2004 he was transferred to the Trade and Regional Integration Division (TRID) where he worked under the then Director, Mr. HH. Following a four-month secondment from ECA in 2005 as a special adviser to the Nigerian Minister of Finance, he resumed working at TRID.

11. The ES relevant to this case was appointed in early 2006. In 2006, as a result of an ECA repositioning exercise all P-5 staff members were appointed Chiefs of Sections. The Applicant was made Chief of the Millennium Development Goals and Poverty Analysis and Monitoring Section (MDGs and PAMS) which was moved from TRID to ACGSD. The OIC of the ACGS at that time was Ms. R.

12. The Applicant applied, without success, for several D1 posts which had become available in ECA. In 2007 the Applicant applied for the D-1 post of Director of NEPAD and Regional Integration Division (NRID). He objected to the presence of a particular staff member on the Advisory Selection Panel (ASP) for that post on the basis of personal animosity between them but the selection process proceeded with that person remaining on the panel. The Applicant was not appointed. He did not challenge that selection process.

13. In April 2008 a vacancy was advertised for a D-1 post of Director, Office of the Executive Secretary, ECA. The Applicant asked the ES if he should apply for the post. The ES replied that the position should be left for another person whom he named.

14. The ES called the Applicant to his house late on 28 July to help prepare some urgent submissions. The ES informed the Applicant of his intention to create an L6/MDGs and Senior Policy Advisor Post in the Executive office and to appoint the Applicant to it. The Applicant said that the ES offered this as an acknowledgment of his high level of performance and high quality of

Selection Panels (ASPs) for promotion to D-1 posts had not been objective and fair towards him because of differences between them. The Applicant told the ES he could not accept the L6 post as he did not want to change his 100 series contract to a less secure series 200 one although the ES assured him that from the following year all contracts would be treated the same.

15. On 4 August 2008, the Applicant made a formal written complaint to the ES. The letter was headed “Complaint of victimisation by the ECA ASPs”. In the complaint he made two requests: a review of his performance at interviews for D-1 posts and an independent investigation of the workings of the recent D-1 ASPs. He stated:

I am led to the belief that I am being victimized by persons on the ASPs with whom I have had professional and work-related disagreements in the past. These disagreements, were not personal reasons but were instigated by differences in views of the way the interest of the institution was being served....the decision of the ASPs to not even place me on the roster, given the membership of the ASPs, can only be designed to ensure I am not competitive for any available D1 positions at ECA...it means I will not be considered from the roster for any positions in other Departments of the UN Secretariat.

16. He enclosed his December 2007 correspondence with the Human Resources Services Section (HRSS) about the membership of the interview panel for the NRID post in which he conveyed his concerns about the presence of Mr. HH on the ASP. He described him as “a man whose adverse feelings towards me are no secret”. The letter ended, “[a]ny hint of victimisation should not, in my view, be tolerated at ECA. It is my hope that my request for an independent review of the workings of the recent D-1 ASPs will be granted”.

17. The 4 August 2008 complaint was never investigated.<sup>3</sup>

18. In May 2009, Dr. Monique Rakotomalala was appointed to the post of Director of ACGSD. On 24 June 2009, the Applicant wrote to the Secretary-General

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<sup>3</sup> See *Nwuke*

to complain about discriminatory practices in appointments and promotions and abuse of due process in promotions at ECA specifically in relation to the process in the selection of Director of the Trade, Finance and Economic Development Division (D/TFED). His letter was referred to the Management Evaluation Unit (MEU) for review.

19. MEU gave its decision on the Applicant's request for management evaluation<sup>4</sup> on 3 August 2009. In relation to his concerns about the composition of the ASP which included a staff member he had named in his 4 August complaint but was yet to be investigated, the letter stated, "[i]n order to avoid even the appearance of conflict of interest, the Secretary-General considers that ECA should take appropriate action to ensure the integrity of the selection process including the selection panel".

20. In October 2009, the Applicant requested management evaluation of three other selection decisions. MEU responded on 3 December 2009. It recommended *inter alia* that for future vacancies for which the Applicant was a candidate, the ES of ECA should be urged to ascertain that all ASPs are established in a manner that guarantees fairness and impartiality of all the Panel members.

21. In December 2009 the ES implemented a restructuring of ECA. This resulted in TFED being abolished and replaced by the Economic Development & NEPAD Division (EDND). In the course of this restructuring, the MDGs and PAMS section, along with the Applicant, was relocated to the new EDND under the supervision of Mr. EN against whom the Applicant had lodged complaints.<sup>5</sup> The Applicant regarded these actions as a continuation of the pattern of "disrespectful treatment" of his person since his letter of 24 June 2009 to the Secretary-General.

22. On 8 February 2010 a Mission Report by an Office of Human Resources Management (OHRM) Support Mission to ECA, held between 29 October and 6 November 2009, was finalised. It reported *inter alia* that vacancy management and

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<sup>4</sup> *Nwuke* UNDT/2013/157.

<sup>5</sup> *Ibid.*



c. Languages: English and French are the working languages of the Secretariat. For this post, fluency in oral and written English or French is required. A working knowledge of the other is highly desirable. Knowledge of other official UN languages is an advantage.

d. Other skills: Comprehensive knowledge of UN policies, procedures and operations as they relate to social development issues is desirable.]

26. Paragraph 4 of the VA was entitled “How to Apply” and stated:

UN staff members must submit scanned copies of their two latest Performance Appraisal System (PAS) reports at the time of application to the appropriate Human Resources Office (HRO)/Personnel Office (PO) to the email address below, clearly indicating the vacancy announcement number. In case you have no access to the digitizing equipment, please submit hard copies of the two latest PAS reports to th



inflexible. He also alleged that on the eve of interviews for yet another post she had urged him to accept a L6 position offered by the ES or he would regret it.<sup>7</sup> The Applicant was also critical of other panel members for that selection exercise.

29. In the email, the Applicant also referred to MEU's recommendation that for future vacancies for which he is a candidate, the ES of ECA should be urged to ascertain that all ASPs are established in a manner that guarantees fairness and impartiality of all the Panel members. He stated, "[p]lease note I am not attempting in any manner 'to decide the composition of the selection panel' I am only stating that this ASP cannot give me the fullest regard as stipulated in the staff rules".

30. He copied this email to three individuals at OHRM. The OIC, HRSS acknowledged receipt and said she would respond as soon as feasible. On 5 May 2010 this letter was sent by one of the Directors who had been named in it to the ES, the Chief of Staff and the Deputy ES among others.

31. On 10 May the ES responded to the Investigations Panel's request for his

34. On 1 June 2010, the Applicant was invited to attend an interview for the ACGSD Post on 3 June. He accepted the invitation on 2 June without objection. The interview date was later extended to 10 June for reasons of “exigencies of office”.

35. The Deputy ES was interviewed by the Investigation Panel on 1 June. She was apprised of all the Applicant’s complaints, including the one against the ASP for a post that she had chaired,

36. The Applicant was aware that the Investigation Panel continued to interview other witnesses in the meantime and this knowledge caused him anxiety and emotional distress at a time that was already stressful for him because of the ongoing investigation into his allegations of harassment.

37. The Chair of the ASP for the ACGSD post was the Deputy ES. The other Panel members were Ms. Bongoy-Mawalla, and the Director of the ECA regional sub office. The OIC HRSS was an *ex officio* member. They were all women.

38. In her evidence to the Tribunal, Ms. Bongoy-Mawalla described the selection process. She said the ASP was appointed by the ES. The Panel members were selected to cover the competencies in the VA. One of the Panel members had worked in the Division some years before and the Deputy ES had experience in working in social development. The ASP reviewed the applications of all candidates and placed all those who had met the qualifications on a shortlist to be interviewed. An hour before the interviews the Panel members met to agree on the questions to be asked of the candidates and who would ask them. The *ex officio* member was there to ensure that the agreed ratings were applied. No record of that meeting was kept but the questions were typed up and given to the panel members.

39. The Applicant was interviewed by the ASP on 10 June 2010. Ms. Bongoy-Mawalla said that all candidates were customarily asked the same set of questions and this was followed in this case. At the conclusion of the interview of each

candidate the panel discussed the performance of the candidate during the interview and decided whether or not they reached the competencies required for the position. The panel then decided on the content of the report and the outcome.

40. The Applicant who was a 30/60-day candidate was not recommended for consideration for selection as he did not meet all the requirements of the job opening. Ms. Bongoy-Mawalla described him as knowledgeable during the interview but in some areas he did not convince the Panel that he had the full required competencies for the position. In particular he was questioned on areas of vision and skill and professionalism. The Panel found that he was more focused on the section where he was acting as chief rather than a full perspective of the whole division.

41. Ms. Bongoy-Mawalla said the Panel reached a unanimous conclusion about the Applicant following his interview. The Panel was not influenced by anyone outside the panel. The rapporteur of the ASP entered the assessment of each candidate into Galaxy.

42. The Deputy ES sent an interview report of the ASP for the post to the ES. It contained the preliminary evaluation of the candidates, the telephone interview and the evaluation of the candidates including a summary evaluation of the Applicant.

43. The Applicant told the Tribunal that on the basis of general knowledge in the office the successful candidate had not submitted PAS reports as, a6beds1esTJ-uding a

44. On 30 June 2010, the Report of the Investigation Panel into the Applicant's allegations of prohibited conduct against the ES was finalized. At the end of the wide-ranging report the Panel found that the allegations of harassment against the ES and another staff member were not substantiated. The Panel also made some general observations. These included that ECA was urged to follow up on MEU's recommendations to take appropriate action to ensure the integrity of the selection process for promotion to avoid even the appearance of a conflict of interest. It recorded that the ES had assured the Investigation Panel that each ASP has an external member to act as a balance in the functioning of the selection panels. It described this as a "commendable initiative".

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Applicant accepted the invitation to be interviewed for the post without reservation or objection to the composition of the ASP.

63. The ECA is a relatively small office with a small pool of individuals available to make up ASPs for senior posts.

64. The timing of the interview and the fact that the Deputy ES was called as a witness by the Investigation Panel into prohibited conduct does not imply a conflict of interest.

65. The circulation of the Applicant's 29 April 2010 email did not taint the selection process. There is no evidence that the Deputy ES was influenced by it or that she influenced other panel members.

66. The selection process as described by the witness showed that he was given full and fair consideration including being asked the same questions as the other candidates, the *ex officio* member ensured the ratings were applied consistently to all candidates, the candidates were assessed after each interview and the results entered into Galaxy.

67. The Applicant failed because in the overall assessment he did not meet the required competencies. The decision of the panel was unanimous and was not influenced by anyone outside the panel.

68. The evidence about the successful candidate does not show that she was not qualified for the post.

69. There is no requirement in ST/AI/2006/3/Rev 1 for candidates to submit their ePASs. The VA number was the most important thing to send to the CRB rather than the full title of the post.

70. The Applicant has no claim for compensation. The selection process was not flawed and he suffered no harm.

## **Considerations**

71. Apart from the numerous technical challenges by the Applicant to the lawfulness of the selection process his most serious allegations are of bias, discrimination and unfairness in the selection process.

72. The test for apparent bias is whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the Interview Panel was biased.

73. As stated in *Finniss* UNDT/2012/200:

[A]n interview panel in a selection exercise is not a tribunal and has no final powers of decision-making. It takes one step in a process but it is an important step. It is the only oppor



76. The Applicant put ECA on specific notice by advising the OIC HRSS in April 2010 that he had fears that he would not be treated fairly and fully by the selection panel appointed for the RIITD post and specifically referred to his concerns about the impartiality of the Deputy ES.

77. Before the interview of candidates for the ACGSD post, the Deputy ES who was on the selection panel had been copied in on the email from the Applicant which questioned her presence, among others, on a selection panel for another post for which he had applied and been interviewed in May 2010. The circulation of that letter to panel members was found in Case No. UNDT/NBI/2011/008<sup>8</sup> to have been sufficient to make a finding of apparent bias against the ASP. In addition the Investigation Panel had told the Deputy ES of all of the Applicant's complaints about her on 1 June.

78. The ES made his views about the Applicant very clear when he wrote to the Investigation Panel that the Applicant's allegations about the ASP panel members were "false and worrying" and "no doubt aimed at intimidating the panel". In spite of these views the ES appointed the Deputy ES as the chair of the selection panel for the ACGS D-1 post for which the Applicant was a candidate.

79. On the basis of these facts the Tribunal finds that a fair-minded observer would conclude that there was a real possibility that the members of the ASP including its chair had been biased. This does not mean that the ASP necessarily intended to act unfairly towards the Applicant, but given the information in its possession it could not have afforded him a fair consideration. The inclusion of the Deputy ES as chair of the panel was unlawful as it was in breach of the requirement for the panel to be fair and impartial or at least have the appearance of being impartial.

80. It is of concern to the Tribunal that according to MEU the ES advised it that the ASP for the Post had included the AU Commissioner for Social Affairs. As the

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<sup>8</sup> *Nwuke* UNDT/2013/159.

MEU was concerned about the impartiality of the ASPs this misinformation misled MEU on a critical point.

81. The fact that the Applicant accepted the invitation to the interview without raising an objection in this particular case does not mean that the apparent bias is mitigated. He had put the Administration sufficiently on notice before the interview for it to take steps to avoid the appearance of bias. The OIC HRSS was advised of his concerns. As the *ex officio* member of the ASP for the ACGSD post she was in a position to do this.

82. The selection process in this case was unlawful. The Tribunal holds that a fair-minded observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased against the Applicant. He was thus deprived of a full and fair assessment of his candidature.

### **Harassment**

83. By the time the selection exercise in this case was conducted, the Applicant had commenced numerous outstanding challenges against decisions of the ECA. All alleged harassment and discrimination against him. An investigation panel had been set up to investigate some of these claims. Other matters were before MEU or UNDT. In each case, the Applicant cited decisions made by ECA as examples of this harassment.

84. On the basis of the extensive documentary and oral evidence presented to it, the Tribunal concludes that senior members of the ECA administration had a negative attitude towards the Applicant, partly but not exclusively because of the numerous challenges to administrative decisions he made. The ES and others made a number of serious allegations about the Applicant's behaviour to the Investigation Panel. There was no evidence that the Administration ever invoked the performance management system to address these concerns.

85. The failure in this case to ensure the appearance of fairness in the composition of the ASP is an example of the systemic failures of the Administration in general and HRSS in particular to establish a fair and reliable system of recruitment and HR management as identified in the OHRM report. However, evidence of systemic failure is not sufficient for the Tribunal to find that the Applicant was a specific target of harassment and discrimination.

86. None of the Applicant's technical and minor objections to the ASP, including the lack of males on the panel and the lack of training of panel members have merit and are dismissed.

### **Conclusions**

87. The selection process for the post of Director, African Centre for Gender and Social Development was not handled correctly and lawfully due to apparent bias on the part of the ASP.

88. The Applicant suffered prejudice or damage by reason of the selection process.

89. The Applicant was not the victim of harassment and discrimination in relation to this case.

### **Compensation**

90. In his application, the Applicant sought rescission of the selection decision; retroactive promotion to the post in question; adequate compensation for the harm and injuries caused; and that: "I be made whole and granted any relief and remedies as permitted under the circumstances".

91. Article 10.5 of the UNDT statute materially provides that in cases of appointment the Tribunal may as part of its judgment order rescission of the

contested administrative decision and/or compensation that shall not normally exceed the equivalent of two year's net base salary of the Applicant.

92. Although the Applicant requested the rescission for the selection decision, the decision made is now three years old. Too much time has passed for the decision to be rescinded and the selection for the post recommenced.

93. The Applicant realistically submitted that he is aware that he has no expectation of selection for any post and on this basis the Tribunal finds that he has not suffered any actual monetary loss arising for his non-selection for the post.

94. The Applicant's principle claim is for the harm caused to him by the failure to afford him fair consideration of his application in spite of his efforts. He gave evidence of his frustration and loss of morale.

95. As UNAT held in *Wued 60e* rescit res petimths ne for the post