



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

LUVAI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

FINAL JUDGMENT

Counsel for Applicant:

David Andati-Amwayi

Counsel for Respondent:

Joerg Weich, Human Resources Management Services
United Nations Office at Nairobi

APPEARANCES/LEGAL REPRESENTATION

1. The Applicant was represented in this application by Mr. David Andati-Amwayi.
2. The Respondent was represented by Mr. Joerg Weich of the Human Resources Management Services at the United Nations Office at Nairobi (UNON).

CASE BACKGROUND

3. The Applicant joined the United Nations in May 1996, as a Security Guard at the General Service (GS) level 3. In October 2004, he was promoted to the level GS 5 as a Security Sergeant. The Appellant is currently on a fixed-term appointment which is due to expire on 30 June 2010.
4. On 19 December 2006, a vacancy announcement No. VA 06-SEC-UNON-412200-R-Nairobi for the position of GS 6 – Security Lieutenant, was advertised with a deadline for applications on 18 January 2007.
5. On 22 February 2007, another vacancy announcement No. VA 06-SEC-UNON-412367-R-Nairobi for the position of GS 7 – Security Inspector was published in Galaxy with a deadline for applications on 24 March 2007.
6. On 23 March 2007, the Chief of Security and Safety Services issued a memorandum entitled “Criteria for Promotion” providing guidelines for promotion to the GS-5, GS-6 and GS-7 positions.
7. On 27 April 2007, a meeting of supervisors and staff from the Department of Security and Safety at the United Nations Office in Nairobi (DSS/UNON) and Human Resources Officers was held. The staffing and recruitment procedures were discussed at that meeting. The Applicant and some other staff members raised certain concerns about the vacancy announcements that had been made.
8. On 11 June 2007, the Applicant sent a memorandum to the Director-General of UNON in which he informed her that he had written on 30 May 2007

to the Chief of Human Resources Management Services (HRMS) and that a copy had been sent to the Chief of DSS to contest the then on-going recruitment and promotion exercise.

9. In response to the said memorandum, the Director-General of UNON directed the setting up of a panel to review the promotions exercise in the light of the allegations of impropriety made by the Applicant and another staff member. The Applicant was requested on 21 February 2008 to provide to the review panel documentation in support of his allegations.

10. On 27 June 2008, the Chief of DSS issued a memorandum in which he announced the reassignments of Security and Safety Personnel effective from 1 July 2008.

11. Thereafter on 26 August 2008, the Applicant and two other staff members of the DSS wrote to the Secretary-General of the United Nations requesting administrative review of the new reassignments within the DSS which were based on the promotions exercise about which the Applicant had complained.

12. The Administrative Law Unit (ALU) replied to the Applicant's request for administrative review in a letter of 30 October 2008. The reply stated that the records showed that the Applicant did not apply for either one of the posts advertised in *Galaxy* in accordance with ST/AI/2006/3 ("Staff Selection System") and that as a result the selection process that resulted in the contested decisions did not create direct legal consequences on his terms of employment.

13. On 1 December 2008, the Applicant submitted an incomplete statement of appeal to the Nairobi Joint Appeals Board (JAB) in which he contested the advertisement of the GS7- Security Inspector post and followed it up on 31 December 2008 with his complete statement of appeal.

14. In reply to the complete statement of appeal on 9 March 2009, the Respondent denied the allegations of the Applicant relating to the promotion exercise.

15. This Tribunal having come into operation on 1 July 2009, its Registry on 8 July 2009 and 30 July 2009 advised the parties that the appeal then pending before the Nairobi JAB had been transferred to the UN Dispute Tribunal in accordance with ST/SGB/2009/11: *Transitional Measures Related to the Introduction of the New System of Administration of Justice*.

16. A status conference was held on 13 August 2009 during which the parties were given pre-hearing directions. Timelines were set and the number of witnesses and length of upcoming hearing were discussed. The Applicant's Counsel did not attend and the Tribunal was informed of his ill-health. On the same day, the parties were advised by letter that in order to avoid any potential conflict of interest a UNDT Legal Officer had been excluded from the proceedings due to his previous position of Acting Secretary of the Nairobi JAB and member of the panel established by the Director-General, UNON in response to the Applicant's memorandum to the Director-General contesting the selection process for the said vacancy announcements.

17. A pre-trial meeting was held with the parties on 14 September 2009. At that meeting, the Tribunal invited the parties to identify the issues for trial and gave directions as to how the Tribunal expected the trial to proceed.

18. When the matter came up for hearing on 16 September 2009, the Applicant's Counsel prayed the Tribunal to adjourn the proceedings on the ground that he had been on sick leave since February 2009 and was not in a position to assist his client until after 23 September 2009 when he would have returned to his normal duties. The Respondent did not object. The Tribunal issued a scheduling order to adjourn the hearing to 22 October 2009 when the matter was heard.

THE APPLICANT'S CASE

19. The Applicant alleges that there was corruption in the process of the promotions of Security Personnel at UNON that started in December 2006 and that there was an error of omission which amounted to taking a gamble on his career prospects.

20. He also alleges a lack of respect for the rule of law, disdain and impunity, blatant abuse of authority and blatant favouritism on the part of the Respondent against him.

21. It is also the Applicant's case that his rights were injured as a result of certain illegal actions during the promotion exercise on the part of the Respondent. The said illegal actions consisted in the advertisement of VA No. 06-SEC-UNON-412200-R-NAIROBI which showed one vacant Security Lieutenant position while the actual number of vacant posts for Security Lieutenant were seven. Similarly, only one Security Inspector post was advertised under VA No. 07-SEC-UNON-412367-R-NAIROBI when there were actually two vacant posts. While the Respondent later re-advertised the posts of Security Inspectors, those of Lieutenants were not re-advertised. As a result the Applicant was not given a fair chance of participating in the process.

22. Officers junior to the Applicant were promoted to Security Lieutenant, one level above him while disregarding the Applicant who is a Security Sergeant. The promotions were in breach of Sections 5.1 and 5.2 of ST/AI/2006/3 and Section 3.2 of ST/AI/1999/7.

23. The Applicant additionally alleges that the re-advertised post of Security Inspector was a deception and forgery against him while the posts were earmarked for others.

24. The Applicant alleges that four staff members within the Security Services were granted Special Post Allowance improperly to his exclusion. Also, seven staff members who did not apply for the vacancies were illegally promoted. These actions were taken to settle personal scores against him.

25. It is also the Applicant's case that he protested the illegal promotion exercise to the Director-General of UNON on 11 June 2007 but received no response. Instead a Panel which he describes as moribund was set up in response to his allegations. The establishment, composition and mandate of the Panel were never disclosed to him.

26. The Applicant seeks the following remedies:
- i. That the Tribunal order payment of salary to him at the rank of Security Lieutenant from 27 June 2008 at level G-6/II.
 - ii. An order that he be promoted to level GS-7 - Security Inspector for which he applied on 24 September 2008 under VA No. 08-SEC-UNON-419417 and paid salary at that level from 27 June 2008.

Alternatively, he asks for compensation in the sum of:

- i. 30, 000 USD for mental anguish and suffering;
- ii. KSH 396, 670, 512 for lost opportunities, including employment, education and social benefits and,
- iii. USD 15, 000 for moral damage.

THE RESPONDENT'S CASE

27. For their part, the Respondent states that due to a technical glitch the vacancy announcements for the posts of Security Lieutenant and Security Inspector did not show that there were two Security Inspectors posts and six Security Lieutenants posts to be filled. Five candidates were short-listed for the GS-7 post of Security Inspector and six for the GS-6 posts of Security Lieutenants.

28. The Human Resources Management Services (HRMS) of UNON followed the staff selection procedure as provided for under ST/AI/2002/4 and ST/AI/2006/3.

29. The Respondent denies that the Applicant's rights were injured and states that the Applicant could suffer no injury as he did not apply for any of the advertised positions. In support of their argument, the Respondent cites the decision in the case of *Andronov* by the United Nations Administrative Tribunal (UNAT) in Judgment No. 1157. In fact, it was the Respondent's submission that the application in itself is not receivable.

30. The decision to advertise the post was taken by the Administration with the intent to fill two positions at the Inspector level (GS-7) and six positions at the Lieutenant level (GS-6). This is evident from the *Galaxy* records and was communicated to the Security Staff, the Applicant, included on a number of occasions before the advertisement. It is therefore incorrect for the Applicant to claim that he had not applied because there was only one position advertised in both vacancy announcements.

31. The Applicant has not provided any evidence to show how the advertised vacancy announcements influenced his decision not to apply. Clearly, ST/AI/2006/3, Section 6.1 requires that if a staff member is interested in a position, then he/she must submit a written application for consideration.

32. With respect to the allegations of abuse of authority raised by the Applicant, the Director-General of UNON convened a panel to review the recruitment exercise. That panel concluded that there was no abuse of authority to either invalidate the process or to initiate a formal fact-finding investigation.

HEARING

33. On 22 October 2009 this matter was heard. The Applicant gave oral testimony and was the sole witness for his case while the Respondent did not call any witnesses. Both parties thereafter made oral submissions in support of their cases.

PRELIMINARY ISSUES

Receivability

34. One of the issues raised in the Respondent's reply is that of the receivability of this application. In other words, the Respondent challenges the jurisdiction of this Tribunal to entertain this application. The Respondent has submitted that since the Applicant did not apply for any of the vacant positions advertised, he is not individually affected and the manner of the publication of the vacancy announcements does not have any direct legal consequences for the

Applicant. There is therefore no administrative decision that the Applicant can contest in this regard.

35. This argument is in line with the reasoning in the case of *Andronov* in which the United Nations Administrative Tribunal (UNAT) defined an administrative decision as being characterized by the fact that it is unilaterally done or taken by the Administration, is of individual application and carries direct legal consequences for the Applicant.

36. Much as I agree that an administrative decision is one done unilaterally by the Administration, I am not compelled by the reasoning that for a decision or an act to be defined as an administrative decision, it must be of individual application. Where the act of the Administration complained of affects an individual even though not exclusively, it is my view that the individual has *locus standi* and can bring an action. In other words, an administrative decision must not necessarily be of individual application for an Applicant to have a cause of action.

37. In the case of *Lopes Braga* decided by the same UNAT (Judgment No. 1122), the Tribunal found that by advertising a position as one requiring an undergraduate degree and then going ahead to select a candidate who did not possess such a degree, the Applicant who was misled by the requirements enumerated in the vacancy announcement had been injured. In that case, although the Applicant had not applied in response to the vacancy advertisements and was not therefore a candidate in the appointment exercise, it was held that he could contest the recruitment process in question on the basis of the misleading vacancy announcement.

38. I therefore find that this application is receivable and that this Tribunal has jurisdiction to entertain it.

Discovery of Documents

39. On 1 October 2009 Applicant's Counsel filed a Notice for discovery of documents which he would argue at the hearing. He sought the disclosure of the following documents:

- i) Investigation Report showing disclosure of the actual number of seven vacant GS-6 posts would not have made a difference in the total number of applicants;
- ii) Report showing that all eligible candidates who qualified for the seven vacant GS-6 posts did apply;
- iii) Report of the Panel that was constituted to review the "error of omission" in the offensive vacancy announcement;
- iv) Applicant's application in response to the advertised posts;
- v) Rules governing Convocation for pre-hearing meeting to be disclosed to the Applicant.

40. Disclosure in civil litigation is the process which enables the parties to discover and inspect documentary evidence relevant to the issues between them which is or has been in the control of the other party. Such evidence can be crucial in assisting a party to prove or resist a claim or to reveal the strength in the case of the party seeking discovery of the document. A party applying for disclosure of documents must serve on the other a concise list of the documents he seeks to inspect. A party may inspect a document mentioned in the statement of case or application before the Tribunal or in the reply to such application. Witness statements or the relevant reports of experts or Panels among others may also be inspected.

41. In this application out of all the documents requested for disclosure by the Applicant only one existed, that is, the report of the Panel constituted by the Director-General of UNON to look into the complaints made by the Applicant. There were no investigation reports as requested by the Applicant in (i) and (ii)

above. There were no applications submitted by the Applicant for the advertised positions of Security Lieutenant and Security Inspector. In fact, part of the case of the Applicant is that because the vacancy announcements for these positions were not properly made, he did not apply for any of the positions. **Why then would the Applicant or his Counsel request the disclosure of documents which in their knowledge did not exist?** Counsel for the Applicant, told the Tribunal that he applied to inspect the said non-existent documents because some officers on the Respondent's side had mentioned orally that their investigations showed that all eligible candidates for the advertised posts of Security Lieutenant and Security Inspector had applied for the positions. In other words, the discovery application of the non-existent documents was made for the sole reason of ridiculing the Respondent. This is clearly not acceptable and is definitely in very bad taste. It is pertinent to observe that oral hearings before the Tribunal must be treated with all the seriousness that must attend any legally constituted tribunal. The Tribunal is not the forum for such jokes as requesting the discovery of non-existent documents. All Counsel appearing before this Tribunal are expected to make adequate preparations for their cases including looking at the relevant principles of law and procedures that would apply to their cases.

42. In the said Notice of Discovery of Documents, Applicant's Counsel additionally sought to discover the rules governing convocation of a pre-hearing meeting. The UNDT Rules of Procedure provide under Article 19 for Case Management: *The Tribunal may at any time, either on an application of a party or on its own initiative make any order or give any direction which appears to the judge to be appropriate for a fair and expeditious disposal of the case and to do justice to the parties.*

43. The Tribunal had on 14 September 2009 and before the first hearing date of the application invited the parties to identify the issues and contentions on both sides and to direct them to tailor oral evidence and submissions to the issues in order to save time, energy and expense. The Tribunal had observed in going through the pleadings and annexes filed, that several seemingly irrelevant other matters had been raised and that these threatened to obscure the substantive application. These included allegations of forgery, impunity, gambling and fraud

among others. The Tribunal clearly has a duty to properly direct the parties as to what the real issues that form the substance of the application are and further direct them to focus on those issues while refraining from the unnecessary resort to inappropriate language which may tend to unduly infer criminal conduct on the part of other staff members in the course of the proceedings.

REVIEW OF THE CASE BY THE TRIBUNAL

44. In reviewing the case on both sides, I shall raise questions which to my mind are pertinent to deciding the merits of this application.

45. *Was the vacancy announcement an administrative act directed at the Applicant?*

46. I have observed elsewhere that this application is receivable because the vacancy announcement concerned the Applicant by virtue of the fact that he is an eligible staff member within DSS/UNON who was qualified to apply for some of the advertised vacancies. However, the said announcement was directed to and concerned an entire class of eligible staff members and other persons, of which the Applicant is a part. To that extent, the said vacancy announcement can be described as an action *in rem* rather than one *in personam*. In other words, it was not directed or targeted solely at the Applicant. Whatever errors, imperfections or technical glitches that existed in the advertisements complained of in this application would necessarily concern or impact on every member of the entire class of those qualified to aspire to the positions advertised, and not the Applicant alone.

47. *Allegations of discrimination and favouritism; were officers who never applied in response to the vacancy announcements promoted? Was the discretion in granting special post allowances abused?*

48. Both in the pleadings and written submissions of the Applicant, it is alleged that two Senior Security Officers and five Security Sergeants were selected and promoted to the level of Security Lieutenants and that these seven officers did not apply for the said positions. Three of these officers were

personally named by the Applicant and said to be considered to be the blue-eyed officers of the Chief of DSS/ UNON.

49. This is a most serious allegation. The truthfulness of a claim such as this questions the integrity of not only the Respondent but of the entire institution of the United Nations and strikes at the foundation of a principal value on which the Organization is established and ought therefore to be viewed most seriously by the Tribunal.

50. The burden of proof is on the one making the allegation. No evidence of any sort was offered however by the Applicant in support.

51. The allegation of acts perpetrated by the managers of DSS/UNON and DSS/New York to settle personal vendetta against the Applicant remain not only without supporting evidence but are also at cross purposes with the Applicant's oral evidence that he had a cordial relationship with the head of his department.

52. *Allegations of corruption, forgery, gambling, impunity and lack of transparency.*

53. The Applicant's case is that the selection process within DSS/UNON of which he complains was tainted by corruption perpetrated against him. In his oral evidence, he stated that the corruption was characterised by hiding information from him. His case also was that what happened was a gamble on his career prospects on the part of the Respondent in disregard of Sections 5.1 and 5.2 of ST/AI/2006/3.

54. Corruption can be defined as the use of a position of trust for dishonest gain or as a *quid pro quo* in which private gain is secured at public expense. Evidence before the Tribunal is that the vacancy announcements were not properly made in that they did not show the number of posts to be filled. In his oral address, Counsel for the Applicant submitted that what has been described by the Respondent as an error or technical glitch in the advertisement of the vacancy announcements not showing the total number of posts to be filled amounts to corruption. He continued that the Respondent has set up rules and regulations for

such exercises and failed to follow them in this instance. According to him, the provisions of ST/AI/2006/3 have not been followed and the promotion exercise was actually a hand-picked one. Aside of address by Counsel and the contents of Applicant's pleadings, no evidence of corruption has been presented to the Tribunal. In other words, the Tribunal has not been shown how the Respondent used the position of trust for dishonest gain. I find the allegation of corruption therefore not proved.

55. Again in the Applicant's pleadings and oral address of his Counsel, the element of forgery is actively canvassed. According to the Applicant's Counsel, the person who makes a document with the intent to defraud or deceive is involved in forgery. He continued that documents tendered at his request by the Respondent on the promotion exercise are forgeries and that the vacancy announcements were forgeries also for not disclosing the total number of posts in the advertisement. He further contended that the re-advertisement of the vacancy announcements for the post of Security Inspector were used to deceive all putative candidates (including the Applicant) who applied or did not apply for the posts and that this amounted to forgery.

56. Forgery, which is a criminal offence, is the making of a false document with the intention that the maker or another shall use it to induce another party into accepting it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other persons prejudice. The standard of proof for forgery is proof beyond reasonable doubt. In the light of this, no any evidence of forgery has been tendered before the Tribunal nor has forgery been proved. No document has been shown to be made and tendered by the Respondent with the intention that anyone should act upon it to his detriment.

57. On the question of gambling on the Applicant's career prospects, the Tribunal has been told that the entire vacancy announcement leading to promotion exercises amounted to gambling. Nothing more has been placed before the Tribunal on this score. To the extent that gambling is merely a game of chance, the Tribunal finds that the use of the word "gambling" in this context is only in a manner of speaking and that gambling is not here canvassed as an issue.

58. Impunity was alleged by the Applicant in his pleadings but no evidence was offered on this point.

59. The Counsel for the Applicant submitted that the entire process starting with the vacancy announcement and leading up to the promotion exercise lacked transparency in the way the Applicant was treated. He added that it is a general practice of the United Nations that the Respondent should show the actual total number of posts that would be filled. No evidence was presented before the Tribunal on this. None of the staff rules cited required that vacancy announcements must carry the number of posts to be filled.

60. *Were the Applicant's protestations ignored?*

61. Part of the Applicant's case is that he complained on several levels about the vacancy announcements not being properly done but was ignored and that his protestations were not addressed. There is evidence before the Tribunal that the Applicant's complaints were raised at a staff meeting with supervisors from his department and HRMS of UNON. It is also in evidence that the Applicant wrote to the Chief of HRMS, the Chief of his Unit, the Director-General of UNON and the Secretary-General on different dates. At all the times material to these complaints, the promotion exercises were still on-going.

62. In response to this and another complaint received on the said promotions exercise by one Lieutenant [XXX] also of DSS/UNON, the Director-General suspended the promotions exercise and raised a Panel in February 2008 to look into the allegations made by the Applicant and [XXX]. The Committee invited the Applicant to provide documentation in support of his complaint. According to the Applicant, he was informed of the panel on the phone whilst on leave in Kitale by the Deputy Chief of his unit who also told him that he was required to send documentation to verify his claims of malpractice in the promotions exercise. The Applicant said he then told her that he would not come to Nairobi until he had finished his leave. On returning from his leave, the Applicant said that he emailed his Deputy Chief to say that he concurred with [XXX]'s presentations to the panel and that he could now send additional material to support the complaint but received no reply. According to him, the panel did not notify him of its findings.

63. The Tribunal finds as a fact that the Applicant's complaints were not ignored and that they were taken seriously enough to constitute a panel to inquire into the said complaints. It is unfortunate that the Applicant decided not to make any representations to the panel and to stay on in Kitale until he had exhausted his leave.

64. *Was the failure to include the number of vacant posts to be filled in the vacancy announcement a material error ?*

65. This entire application is predicated on the materiality of the failure to publish the number of posts to be filled in the vacancy announcement. The Respondent has submitted that due to a technical glitch the vacancy announcement did not show what was actually advertised in *Galaxy*, that is, the number of posts to be filled. In his testimony, the Applicant told the Tribunal that he raised the matter of the vacancy announcement not showing the total number of posts at a lower level with the understanding that this was a minor issue that could be rectified.

66. While none of the staff rules, regulations or issuances cited before this Tribunal requires that a vacancy announcement must show the total number of posts to be filled, the Applicant in his written submission stated that this was a fatal error. I have earlier mentioned that while leading his client in evidence, the Applicant's Counsel stated from the Bar that the standard practice in the UN is to publish the number of vacant posts in any vacancy advertisement. He did not call any evidence in this regard or offer any proof thereto.

67. In the case of *Lopes Braga*, the UNAT rightly found that the information that candidates must have a first degree contained in the vacancy announcement complained of was material and actually misled the Applicant in that case into not applying for the position in question. The said case of *Lopes Braga* can be distinguished from this instant case in that while the error in *Lopes Braga* was in the needed requirements for persons aspiring to the post, the error here was in showing less number of vacant posts to be filled. This error to my mind was not material. No law requires that the number of posts to be filled be advertised.

68. *In not stating the number of posts to be filled, have the vacancy announcements violated any rights of the Applicant?*

69. In his testimony, the Applicant stated that he was injured in his rights for not having had a fair chance in participating in the promotions process and that this inability to participate hindered his career progression. He said he did not apply when the posts were advertised because the vacancy announcements were, in his view, not properly done. His basic rights to work in an environment free of intimidation and discrimination were adversely affected, he added. In being denied participation to a fair promotion process, the Applicant claimed further injury in the consequential denial of the financial and other gains that would have come with a promotion.

70. The Applicant also testified that he did not apply when he saw the vacancy announcement because he raised an objection to the advertisement. Under cross-examination, the Applicant stated that he would apply for an advertised position in which he is interested if there were no bottlenecks. He continued that the bottlenecks in this case were the technical glitches or mistakes in the vacancy announcement.

71. On their part, the Respondent argued that there is no violation of the Applicant's rights to due process where the Applicant had decided by himself not to take part in the promotions exercise. The Respondent submitted further that the allegations of sinister plots to deliberately exclude the Applicant from proper consideration were baseless and unfounded and that the Applicant had not provided evidence to show how his decision not to apply was influenced by the vacancy announcement.

72. In answer to the question whether the manner of the vacancy announcement constituted a violation of any of the Applicant's rights, I would like to apply the universally recognized test of reasonableness.

73. In this context, I ask the question; would a reasonable, prudent and vigilant staff member who desires advancement in his career, see a vacancy announcement to a higher position for which he is eligible and refuse to apply because the said

vacancy announcement fails to declare the actual total number of posts to be filled?

74. In his pleadings, the Applicant claims that the Respondent has thwarted every effort made by him in pursuit of this promotion exercise within the facts, the UN regulations, rules, administrative issuances, and the general principles of law and equity. No rules, regulations, administrative issuances and law have been shown to have been violated by the Respondent. In fact, it is a well-established principle that equity aids the vigilant.

75. In the course of his oral testimony, the Applicant stated that he was aware that the Chief of DSS/UNON had sent a proposal to New York and that eleven positions for Security Lieutenants, eighteen positions for Security Sergeants, and three positions for Security Inspectors were approved by UN DSS at Headquarters. He continued that there was a promise in writing that when the advertisements would be placed on *Galaxy* all the posts would be advertised and competitively applied for by everybody. When he saw the nature of the vacancy announcement, he raised the matter first with the Deputy Chief and then the Chief of DSS/UNON believing that it was a minor issue that could be rectified. Additionally, the Applicant testified that word flew around the corridors that there were very many posts so that everybody could apply.

76. **Why then did the Applicant not apply?** The Applicant told the Tribunal that if the vacancy announcement had shown that many posts were to be filled, he would be certain that his chances of success would be brighter and so would be inclined to apply. **Was it due to a lack of confidence on his part that his chances would be slim with only one post advertised?** Even when he had confronted his supervisors on the multiplicity of vacant posts which were not published in the vacancy announcement and had got assurances that this was an error, the Applicant still did not apply. Instead, he consistently raised and reported the failure of the advertisement to publish the number of posts to be filled at different levels and insisted on the cancellation and re-advertisement of the vacancy announcements.

77. I find that the **decision** not to apply for an advertised post in his department for which he was qualified was entirely that of the Applicant. Every information, formal or informal, at the disposal of the Applicant in respect of the promotions in his department showed that there were many posts to be filled. Even his head of department gave that information. It was only the vacancy announcements that did not publish the number of posts to be filled. Yet, the Applicant decided that the contents of the vacancy announcements constituted “bottlenecks that” would stop him from sending in an application.

78. The Applicant mentioned the loss of dignity he suffered when a junior officer was promoted above him quite apart from the loss of higher financial remuneration and benefits. It is difficult therefore to understand why the vacancy announcements, which the Applicant had initially perceived as containing a minor error that could be rectified, had misled him into missing an opportunity to present himself as a candidate for elevation and snowballed in time into a complaint large enough to sustain an action at this Tribunal.

79. My finding is that the **decision on the part of the Applicant** not to be part of the promotion process in his department was neither reasonable nor prudent. I find also that he was neither misled nor deceived by the vacancy announcement he complains of. *The Applicant had exercised his options to apply or not to apply in response to the vacancy announcements fully knowing that there were several posts to be filled in his department.*

Remarks on the tendering of certain documents.

80. In the course of his evidence, the Applicant tendered Personnel Action forms of three other officers within his department. While it was evident that he could not properly have custody of such documents, the Respondent did not object to the fact that the said Personnel Action forms were not coming from proper custody. Instead, days after the hearing, the Respondent’s Counsel sent copies of memoranda and emails to the Tribunal in which one of the affected officers had complained about the disclosure of his personal details at the Tribunal. The Respondent’s Counsel ought to appreciate that the Tribunal does not entertain ex-parte communications and that if he wished to have the said

documents expunged from the records of the trial due to their source, he ought to come properly by way of an application on notice before judgment is given. In any event, it behoves Counsels appearing before the Tribunal to know the procedures for proper tendering of documentary evidence.

81. The documents that were improperly tendered by the Applicant have not been shown to be relevant to the application and have not been considered or their contents referred to in this judgment. They will however not be expunged from the records as there was no motion before the Tribunal for that purpose. Considering that these documents embody personal data of the persons mentioned therein, they will be sealed in an envelope and kept in the file for perusal or use by this Tribunal or a higher Tribunal if this is deemed imperative in the future.

Decision.

82. It is the finding of this Tribunal that:

- a. No rights of the Applicant were breached by the vacancy announcements, the subject-matter of this application;
- b. The various allegations of discrimination, favouritism, corruption, lack of transparency, forgery, gambling, impunity and abuse of authority have not been proved;
- c. This application fails and the Applicant is not entitled to any of the reliefs he seeks.

(Signed)

Judge Nkemdilim Izuako

Dated this 16th day of November 2009

Entered in the Register on this 16th day of November 2009

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi