



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

ALLEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
None

Counsel for Respondent:
Ivan Koulov, HRMS/UNOG

The issues

1. In an appeal submitted on 21 November 2008 to the Geneva Joint Appeals Board (JAB) and transferred to the United Nations Dispute Tribunal (UNDT) as of 1st July 2009, the Applicant contests the decision of the Acting Deputy Secretary-General, United Nations Conference on Trade and Development (UNCTAD), to reassign him from the post of Officer-in-Charge (O-i-C), Human Resources Management Section (HRMS), UNCTAD, to that of Chief, General Services and Travel Unit (GSU), UNCTAD, effective 6 October 2008.

Facts

2. The Applicant entered the service of the United Nations on 14 August 1989, as a Clerk in New York.

3. The Applicant served from May 1992 to December 1995 in the Procurement Division. He was then redeployed to the Staff Development Service until December 2001.

4. After successfully passing the G to P competitive examination, the Applicant was granted a permanent appointment with the Secretariat and was transferred, within the framework of a Managed Reassignment Programme for Junior Professional Staff, to the Economic and Social Commission for Asia and the Pacific (ESCAP), in Bangkok, from 1 January 2002 to February 2005. He served first as Associate Recruitment Officer (January 2002 to July 2003) and later as Human Resources Officer (July 2003 to February 2005), both functions at the P-2 level.

5. Effective 1 March 2005, the Applicant was transferred to the United Nations Office at Geneva (UNOG), within the United Nations Economic Commission for Europe (UNECE) as Associate Administrative Officer, at the P-2 level, step 4.

6. In April 2007, he was appointed as Human Resources Officer in UNCTAD and promoted to the P-3 level, step 1.

7. Effective 2 October 2007, the Applicant was designated O-i-C against the post of Chief, HRMS, UNCTAD. This was a P-5 position temporarily vacant as

its regular incumbent was provisionally assigned to the Department of Peacekeeping Operations (DPKO). On 12 February 2008, the Applicant was granted a Special Post Allowance (SPA) to the P-4 level retroactively effective from 2 October 2007.

8. On 19 September 2008, the Acting Deputy Secretary-General of UNCTAD sent, by an all UNCTAD staff e-mail, a memorandum announcing “further staff redeployment” carried out on behalf of the Secretary-General of UNCTAD. Four staff members were concerned, among them, the Applicant, who was reassigned, with his P-3 post, to the position of Chief, GSU, UNCTAD, at the P-3 level, effective 6 October 2008. In the above-mentioned memorandum, reference was made to a series of previous staffing redeployments announced by memoranda dated 26 June, 16 July and 23 July 2008. It was specified that those redeployments were “designed to ensure the effective implementation of the Accra Accord”. It was also stated that the arrangements regarding the post of Chief, GSU, were “in line with audit observations and recommendations”.

9. By email dated 22 September 2008, the Director, Division of Management, UNCTAD, who was the Applicant’s supervisor until he retired on 30 September 2008, objected to the decision to reassign the Applicant, underlining that had never been consulted thereon. The Secretary-General of UNCTAD replied to this message, first personally by email dated 22 September 2008 and, on 29 September 2008, through a letter sent by the Chief of his Office, expressing disappointment with the attitude of the Director and pointing out a number of managerial shortcomings on his side.

10. On 22 September 2008, the Applicant wrote to the Secretary-General of UNCTAD questioning and requesting reversal of the decision to reassign him on the grounds that it constituted retaliation for not complying with requests from members of senior staff management which were contrary to the Organization’s human resources procedures.

11. On 25 September 2008, the Applicant wrote to the Secretary-General requesting administrative review of the decision to reassign him to the post of Chief, GSU, as notified by memorandum dated 19 September 2008 to all UNCTAD staff.

12. By memorandum dated 26 September 2008, the Chief, Office of the Secretary-General of UNCTAD, replied to the Applicant's memorandum dated 22 September 2008, pointing out that his redeployment was "undertaken in the interests of the Organization" and that it was not in any way an act of "retaliation" against him by the Acting Deputy Secretary-General of UNCTAD.

13. On 28 September 2008, the Applicant wrote to the Secretary of the Geneva JAB to request a suspension of action of "the decision to reassign [him] to the post of Chief, General Services and Travel Unit" as notified to all UNCTAD staff by memorandum dated 19 September 2008. This request was rejected by decision of the Deputy Secretary-General dated 3 October 2008.

14. On 3 October 2008, the Applicant sent a request to the Director, Division of Administration, UNOG, for an investigation to be conducted into an unauthorized access to his e-mail account that he detected to have occurred while he was on mission in mid-September 2008. The Information and Communication Technology Service (ICTS) launched an investigation into the issue.

15. On 14 October 2008 the Applicant wrote to the Investigations Division, Office of Internal Oversight Services (OIOS), to report allegations of misconduct, abuse of authority and mismanagement against senior management of UNCTAD and complain about his arbitrary reassignment. He also reported a breach of his e-mail account.

16. By memorandum dated 18 December 2008, the Acting Director, Investigations Division, OIOS, informed the Secretary-General of UNCTAD of the Applicant's allegations and stated that they were considered to be within the purview of UNCTAD. The matter was referred to the Office of the Secretary-General of UNCTAD.

17. By memorandum dated 3 April 2009, the O-i-C, Division of Management, UNCTAD, informed the Acting Director, Investigations Division, OIOS, that a review of the issues raised by the Applicant had been conducted, which had "yielded no evidence to support [his] allegations". He further summarized their conclusions.

18. By letter dated 22 October 2008, the Administrative Law Unit (ALU) of the UN Secretariat informed the Applicant that following his request for review,

the contested decision was found to be in conformity with the Organization's rules.

19. On 21 November 2008, the Applicant filed an appeal before the JAB against the decision to reassign him and his post without prior consultation or notification.

20. The Respondent served his reply to this appeal on 9 February 2009, followed by the Applicant's observations thereon, dated 3 March 2009. After being granted an extension of the applicable deadline, the Respondent filed his final comments on 3 April 2009. The Applicant submitted his final observations on 23 April 2009.

21. The Respondent provided additional documents and information on 15 May 2009 at the JAB's request, on 2 November 2009 at the Tribunal's request, and finally, on 7 December 2009 on his own initiative.

22. By memoranda dated 16 October 2009, the O-i-C, Investigations Division, OIOS, informed the Secretary-General of UNCTAD that based on the clarifications provided, he considered closed the case regarding unfair appointment practices at UNCTAD (ID Case No. 0498/08) and the case regarding possible misconduct, abuse of authority and mismanagement at UNCTAD (ID Case No. 0581/08).

23. On 17 November 2009, the parties were convoked to a hearing held on 10 December 2009.

Parties' Contentions

24. The Applicant's main contentions are as follows:

- a. The decision to reassign him was made without prior consultation or notification, whereas he believes that a staff member has the right to be informed in person and in advance of such a decision, especially when it has a significant impact on his/her career path. The Applicant's supervisor was not informed either. In response to the Administration's claim that the issue was raised in a town hall,

it is noted that a town hall is neither appropriate nor sufficient as a means of informing the affected staff members of such measures;

- b. The reasons put forward by the Administration for the contested reassignment, i.e. that this measure is in line with the Accra Accord and with the recommendations of an OIOS audit, are disingenuous and misleading. The Accra Accord, reached at UNCTAD XII Conference, was mainly meant to strengthen areas of substantive work of UNCTAD. There is no correlation with the Applicant's reassignment. The OIOS audit in question was concluded on 11 March 2004 and the resulting report did recommend that structural positions not be filled by 200-series staff. However, the report makes a broad recommendation with no specific reference to the Applicant's post. Hence, it should be explained why it became so critical to take the contested measure precisely at this juncture and why the post of Chief, GSU, is the only one targeted for compliance;
- c. The timing of the Applicant's reassignment is very coincidental and leads him to question the underlying reasons. The contested decision constitutes retaliation for exchanges he had with several members of the Office of the Secretary-General of UNCTAD, where he was forced to refuse to accommodate their wishes/requests for they were contrary to the applicable rules. He provides examples of incidents allegedly showing a pattern of abuse of authority and mismanagement;
- d. Regarding the Administration's assertion that the Applicant's appointment as O-i-C, HRMS, UNCTAD, was not sustainable longer than necessary, the Applicant is aware that his appointment could only be temporary (until the return of the post's incumbent at the most). However, the position was still to be filled at the time of the filing of the present appeal and the vacancy announcement issued for this purpose was misleading as to the duration of the subsequent appointment. Moreover, there have been two

replacements on this position since the Applicant's departure. The above shows that he was removed for retaliatory reasons;

- e. Section 2.4 of ST/AI/2006/3, which has been repeatedly invoked by the Administration, is not applicable to his case, since he was not transferred to a vacant post at the same level. Instead, he was moved, along with his post, to functions performed until then by a staff member at the L-4 level. Accessorily, the history of this post has been highly irregular;
- f. Contrary to what the Administration claims, the Applicant's reassignment was not in the best interest of the Organization. It resulted in a weakening of the section, which was left with insufficient staff, particularly professional staff. Furthermore, the staff member who initially replaced the Applicant for one month as Chief, HRMS, UNCTAD, has a record of misconduct, and another staff assigned to assist of the latter seems to have been irregularly appointed;
- g. The contested reassignment has been decided three months after the Accra Accord. If some staff restructuring had to be carried out as a result of the Accord, it would have been reasonable to do it as a coherent action and not on a piecemeal basis;
- h. The claim that this reassignment will be positive for his career in light of the mobility policy is to be rejected, since he had already fulfilled all mobility requirements. It cannot be claimed accordingly that due consideration was given to his interests;
- i. Also, the manner in which the decision was notified was very unprofessional and failed to respect the Applicant's dignity. It is untrue that attempts were made to contact the Applicant's direct supervisor before the decision was taken, as the latter expressly denied it in writing. Moreover, it is very coincidental and convenient that the reassignment was decided while the Applicant was attending a professional meeting abroad (a three-day mission). Yet, he had returned the day before the announcement of the

decision. Furthermore, the argumentation that neither he nor his supervisor were available for prior consultation conflicts with the contention that the decision under review did not require their consent;

- j. It was premature for the Administration to state in the Respondent's reply that no direct link existed between the Applicant's reassignment and the allegations of abuse of authority that he reported to OIOS. The Applicant underscored at the hearing that OIOS undertook no investigation, inferring that this office was therefore not well placed to draw reliable conclusions on the matter;
- k. Based on the above considerations, the Applicant requests the Tribunal to reverse the decision to reassign him from his previous appointment as O-i-C, HRMS, UNCTAD, to another position; to award him compensation for the personal and professional prejudice and lost earnings.

25. The Respondent's main contentions are as follows:

- a. The contested decision is a legitimate exercise of the discretionary power vested in the Secretary-General, in accordance with staff regulation 1.2 (c), staff rule 101.2 (b) and section 2.4 of ST/AI/2006/3. Regarding the objections expressed by the Applicant concerning the application of section 2.4 of ST/AI/2006/3 to his case, the authority of the secretary-General to reassign staff members covers any of the activities or offices of the United Nations, and is not limited to the transfer of staff members to vacant posts only;
- b. In the present case, the Applicant's reassignment was warranted by organizational restructuring and due consideration was given to his competencies, qualifications and career prospects. The interests of the Applicant were taken into account, even though the interest of the Organization must prevail when taking this kind of decisions. Moreover, it should be noted that a P-3 staff appointed against a P-

- 5 position is an unusual situation; prolonging it more than necessary would have run contrary to good management;
- c. While the Applicant leveled allegations of improper motivation within UNCTAD, there is no established link between his transfer and the alleged pattern of abuse of authority and mismanagement. The Applicant's reassignment was in the interest of the Organization. He did not sustain his burden of proving his contentions that his transfer was arbitrary and amounted to retaliation. The Applicant's allegations must have been based on an erroneous perception of the surrounding circumstances;
 - d. The Accra Accord was mentioned simply to identify the political context in which the measures were taken, but the main reason has always been the implementation of the audit recommendations;
 - e. The allegations of unfair practices in human resources-related procedures reported to OIOS by the Applicant were referred to the Office of the Secretary-General of UNCTAD, which carried out a careful review but found no evidence in support of these allegations. OIOS mandate under ST/SGB/273 does not require it to investigate every report it receives and in fact it is bound to undertake some filtering. It was considered that the Applicant's allegations did not warrant an investigation and could be properly handled within UNCTAD. In any event, the Applicant's complaints against members of UNCTAD senior management were finally dismissed;
 - f. There were consultations at the senior level within UNCTAD regarding the redeployments in question. A town hall was furthermore held on 7 May 2007 during which the adoption of measures of the kind was announced;
 - g. It has to be recognized that the Applicant was not consulted prior to his redeployment. In addition, the way in which the decision was conveyed to him was indeed not adequate and is likely to have reinforced his impression of being improperly and unfairly treated.

This does not change, however, the fact that the decision as such was properly motivated;

- h. With reference to the claim that the previous Chief, GSU, UNCTAD, served at the L-4 level, it must be noted that the functions of the post were classified at the P-3 level;
- i. In light of the foregoing, the Respondent requests that the present application be rejected and that no further action be taken on this case.

Considerations

26. At the outset, it is appropriate to recall that the scope of the present case is limited to the contested decision, i.e. the Applicant's reassignment. The Tribunal's considerations shall accordingly be confined to this issue. In particular, the Tribunal will not address the issue of the handling by OIOS of the Applicant's complaints.

27. It is widely recognized that the Organization enjoys broad discretion in assigning its employees to different functions as deemed appropriate. In accordance with former staff regulation 1.2 (c), former staff rule 101.2 (b) and section 2.4 of ST/AI/2006/3, *Staff selection system*, staff members are subject to the authority of the Secretary-General, who may assign them to any of the activities or offices of the Organization. There is no requirement to obtain the consent of the concerned staff member or his/her direct supervisor. The obligation of staff to accept such assignments in the interest of the Organization has been consistently upheld by UNAT, provided the decision was not improperly motivated. In general, it is for the Organization to determine whether a measure of this nature is in its interest or is not. Nonetheless, this broad discretion should not be abused, such as in cases where a decision is arbitrary or based on improper motives, or taken in violation of mandatory procedures.

28. While the Applicant holds that the challenged decision was part of a pattern of harassment and abuse of authority by members of UNCTAD senior management, a careful review of the material submitted in support of this contention does not reveal sufficient evidence thereof. As a matter of principle, an applicant alleging improper motivation of a given decision bears the burden of

proving such allegation (see UNDT/2009/083, *Bye*). In the present case, the Applicant describes a series of incidents and disagreements with UNCTAD management. However, this falls short of satisfying the standard of proof required to demonstrate that his hierarchy manifested bias or prejudice against the Applicant, and even more of establishing that the alleged bias or prejudice would have motivated the decision under review. The conclusion would be the same should the preponderance of evidence test be applied. In this case, the preponderance of evidence does not demonstrate bad faith with respect to the motivation for the contested redeployment (see UNDT/2009/95, *Sefraoui*).

29. Moreover, it appears that the Applicant was redeployed to a position commensurate with his qualifications and skills. As outlined in judgment UNDT/2009/083, *Bye*, for a position to be said “adequate”, it must be in line with the grade, qualifications and professional experience of the concerned staff member. The position of Chief, GSU, which is classified at the P-3 level, matches the Applicant’s personal grade. The fact that he had been exceptionally discharging responsibilities above his own grade, i.e. those of Chief, HRMS, (P-5), for a certain period of time, has no bearing on this matter. Furthermore, the tasks entrusted to him fit the Applicant’s knowledge of administrative procedures and were not at odds with his United Nations experience, particularly since he had worked in the past on procurement-related matters.

30. In view of the foregoing, it is appropriate at this point to ascertain whether the relevant procedural requirements were respected in reaching the decision at stake.

31. According to section 3 of ST/SGB/172 of 19 April 1979, *Decentralization of consultation procedure*, heads of departments or offices “will hold consultations with the appropriate unit representative regarding matters that affect the conditions of work or interests of the particular unit ... Consultation at the departmental level may include such questions as the administrative arrangements in implementation of decisions involving major organizational changes or relocation of groups of staff”. In addition, section 5 of ST/SGB/274 of 28 September 1994, *Procedures and terms of reference of the staff management consultation machinery at the departmental or office level*, identifies several

situations that should be subject to such consultations, in particular, whenever “[t]he issue or policy should affect the entire department or office or at least a significant number of staff in a particular unit or service of the department or office”. It follows from these Secretary-General’s bulletins that staff-management consultations are not only a preferable form of communication but, in relation to the above-mentioned situations, an indispensable element of due process.

32. With respect to the case at hand, it must be stated that the Applicant’s redeployment, as per the memorandum dated 19 September 2008, was part of “a series of staffing redeployments designed to ensure the effective implementation of the Accra Accord”. According to the Respondent’s statement in the memorandum dated 29 September 2008 from the Chief, Office of the Secretary-General of UNCTAD, to the Applicant’s supervisor, as well as in the memorandum to ALU, dated 20 October 2008, in total more than 30 staff members were affected by that series of redeployments. There can be no doubt that 30 persons represent a significant number of staff members within the meaning of ST/SGB/274. Likewise, the connection to the effective implementation of the Accra Accord indicates that in the Respondent’s view, major organizational changes were involved. Therefore the issue should have been subject to staff-management consultations in accordance with ST/SGB/172.

33. Such legally required consultations were not carried out. Although, the former Staff Regulations and Rules contain no definition of the concept of consultation, the UNAT considered that “an essential element [of it] is that each party to the consultation must have the opportunity to make the other party aware of its views”. (see judgement No. 518, *Brewster* (1991)). It is obvious that no such exchange of views took place during the town hall meeting held on 7 May 2008 during which the Secretary-General of UNCTAD merely delivered a speech on the Accra Accord. Thus the town hall meeting cannot be regarded as the kind of consultation required by the bulletins cited above.

34. Notwithstanding the fact that UNCTAD staff members had no unit representatives of their own between 2007 and 2009, it would have been possible to hold consultations with competent staff representatives. Indeed, the UNOG Staff Coordinating Council could have been consulted by default, as the Office of

the High Commissioner for Human Rights had done when faced with a similar situation.

35. The Tribunal has already emphasized the Respondent's general obligation to abide by all pertinent legal instruments (see judgment UNDT/2009/084, *Wu*; UNDT/2009/095, *Sefraoui*). In the same vein, the former UNAT held that "formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own rules, the adherence of which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant's right to due process" (judgement No. 1122, *Lopes Braga* (2003), quoting judgement No. 1047, *Helke* (2002)). UNAT also stated "that the Organization has to respect and follow its procedures in keeping with what the world expects of the United Nations" (judgement No. 1371 (2008) quoting judgement No. 1058, *Ch'ng* (2002)).

36. Furthermore, as the Tribunal held in judgment UNDT/2009/025, *James*, "it is a universal obligation of both employee and employer to act in good faith towards each other. Good faith includes acting rationally, fairly, honestly and in accordance with the obligations of due process". By notifying the Applicant of his redeployment by the memorandum dated 19 September 2008, addressed and sent by e-mail to all UNCTAD staff without any prior personal consultation, the Respondent failed to treat the Applicant in a manner befitting his status as an international civil servant. To learn from a public announcement about a major change affecting one's professional status harms the reputation of the concerned staff member, as much as the unwillingness of management to communicate in an appropriate way does. The approach chosen by the Respondent shows disrespect and is inconsistent with the general aims of an Organization that prizes "faith in fundamental human rights, in the dignity and worth of the human person" (UN Charter, preamble). It is also not compatible with any concept of "sound administration". On the contrary, it stands as an example of what UNAT called "wrong administrative treatment" or simply "poor administration" (see judgements No. 305, *Jabbour* (1983), No. 1052, *Bonder* (2002)).

37. With regard to the deplorable procedural irregularities pointed out above, the question of the appropriate remedy may be answered in various ways. In cases concerning non-renewal of appointments, UNAT held that:

“Depending on the extent to which proper procedures have been ignored and on the existence of solid prospects for renewal, the Tribunal may conclude that the procedural irregularities do not fundamentally vitiate the decision and that the applicant is entitled only to a limited compensation for the inadequate treatment of his or her case; or it may conclude that, although the applicant does not have a right of renewal, the procedural irregularities were so serious or so relevant to the decision not to renew that the non-renewal decision should be considered illegal and the staff member entitled either to renewal of his or her contract or to compensation in lieu thereof if the Administration refuses to comply. The latter conclusion applies in principle only in cases where there have been serious and manifest violations of the rights of the staff member and also where the likelihood that the staff member’s contract would be renewed was particularly strong for general and/or specific reasons.” (judgement No. 1052, *Bonder* (2002), quoted in judgement No. 1371 (2008)).

38. Applying these principles to the present case of redeployment would necessarily entail evaluating the extent of non-compliance with proper procedures and deciding whether procedural irregularities fundamentally vitiated the decision to redeploy the Applicant and were so serious or so relevant to this decision that it should be considered illegal. Thus the crucial question of legality of the administrative decision would mainly depend on the Tribunal’s assessment of the seriousness or relevance of the procedural irregularities.

39. This approach is not consistent with the Tribunal’s mandate as formulated in article 2.1 of the UNDT statute. According to this provision, the Tribunal is competent to hear and pass judgement on applications to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment, including "all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance". It follows from this mandate that the Tribunal’s task is to determine whether the administrative decision under review does comply or not with the set of legal provisions specified above. If it does, it is legal. If not, it has to be regarded as illegal. *Tertium non datur*. Contrary to what UNAT stated in judgement No. 1052, *Bonder* (2002), relevance or seriousness of the non-compliance are not

valid criteria with regard to the concept of legality implied by the statute, which is, of course, binding for the Tribunal.

40. According to article 10.5 (a) of the UNDT statute, the Tribunal may order the rescission of the contested decision or the award of compensation or both, if the illegality of the concerned administrative decision has been established. The Tribunal has already held that, in general, illegal administrative decisions cannot stand. “To allow a decision to stand in spite of it being shown to be unlawful turns the law on its head” (UNDT/2009/033, *Onana*). Therefore, as a general rule it is necessary to rescind the contested decision once the Tribunal has established its illegality. There is no reason in the case at hand that may justify making an exception to this rule.

41. Article 10.5 (a) of the UNDT statute prescribes the obligation of the Tribunal to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision, where the latter “concerns appointment, promotion or termination”. The Applicant’s case, however, does not relate to any of these categories. The memorandum dated 19 September 2009 characterizes the decision in question as part of “further staff redeployment”. It is clear that a redeployment or reassignment is neither a promotion nor a termination.

42. The redeployment of the Applicant cannot be considered as an appointment either. This term has both a broad and a narrow meaning. On the one hand, it may include any movement to a new position. On the other hand, a narrow interpretation of the term would refer exclusively to the initial conclusion of a contract between the employee and the Organization under the UN Staff Regulations and Rules. Notwithstanding the lack of a legal definition of appointment, it should be noted that Article IV of the Staff Regulations, *Appointment and Promotions*, and more specifically staff regulation 4.2, makes a clear distinction between “appointment”, “transfer” and “promotion”, thereby indicating that the terms of “appointment” and “transfer” cover distinct notions. The Applicant’s redeployment in the present case may thus very well be considered as a “transfer” as opposed to an “appointment”.

43. In addition, article 10.5 (a) of the UNDT statute is to be read restrictively, in keeping with a well-known principle which requires that exceptions shall be interpreted in a restrictive manner. The main purpose of article 10.5 (a) of the statute is to allow the Tribunal to order the rescission of a contested administrative decision. Offering the Administration the choice to pay compensation in lieu of implementing such order constitutes an exception to the Tribunal's prerogative to rescind a decision.

44. According to article 10.5 (b) of the UNDT statute, the Tribunal may order "compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant ..." Article 10.7 of the UNDT statute further provides that the Dispute Tribunal shall not award exemplary or punitive damages. In the Applicant's case, compensation has to cover two different kinds of damages, i.e. the financial loss resulting from the Applicant's reassignment and the moral damage resulting from the violation of his due process rights.

45. The Applicant, whose personal grade is P-3, had been granted a SPA to the P-4 level while serving as O-i-C, HRMS, a position classified at the P-5 level. After his redeployment to a position at the P-3 level, the SPA was discontinued effective October 2008. Considering that the Applicant's temporary assignment to the position of Chief, HRMS, had been approved only until 1 January 2009, the Applicant's financial loss resulting from his redeployment is equivalent to the amount of SPA he would have received from October to December 2008.

46. The Tribunal has already pointed out that the provisions of the statute cited above mainly rely on the idea of "compensation" rather than that of "material damage". Whenever an infringement of a person's rights has been established, compensation for this breach has to be considered. Otherwise judicial remedy carries the risk of becoming ineffective (see UNDT/2009/084, *Wu*). Also, the former UNAT held that "failure of the Respondent to adhere to its own rules represents an irregularity which amounts to a violation of the Applicant's right to due process, for which the Applicant should be compensated" (judgement No. 1122, *Lopes Braga* (2003), quoting judgement No. 1047, *Helke* (2002)). There are no indications that the new system of administration of justice intended to depart from this approach provided that the boundaries between compensation and

exemplary or punitive damages are not crossed, in accordance with by article 10.7 of the UNDT statute.

47. Since the quantification of moral damages is an “inexact science”, the Dispute Tribunal in its judgment UNDT/2009/028, *Crichlow*, has established some guiding principles for the calculation of compensatory damages; these include that damages may only be awarded to compensate for negative effects of a proven breach and that an award should be proportionate to the established damage suffered by the Applicant.

48. The application of the universal principle of proportionality in the determination of financial award for a proven breach requires due consideration of all elements of the specific case at hand. Essential elements to be considered are for example the number of breaches and their gravity as well as the impact such breaches have on its victim.

49. With respect to the Applicant, first and foremost, there is the breach of section 3 of ST/SGB/172 and section 5 of ST/SGB/274. In addition, the fact that the Administration failed to notify the Applicant of his reassignment in an appropriate manner – even though not constituting in itself a violation of the applicable rules – demonstrates a lack of good faith in the Administration’s dealings with the Applicant. As the Tribunal held in judgment UNDT/2009/025, *James*, “it is a universal obligation of both employee and employer to act in good faith towards each other. Good faith includes acting rationally, fairly, honestly and in accordance with the obligations of due process”. By notifying the Applicant of his redeployment only by means of an all staff e-mail the Administration damaged the Applicant’s reputation and his dignity.

50. With respect to the determination of the level of financial compensation, it is also noteworthy to recall the parameters developed by UNAT jurisprudence in appointment and promotion cases under the former internal justice system. In the above-quoted judgement *Lopes Braga*, UNAT considered that due to the Respondent’s failure to follow its own procedures - i.e. to apply objective criteria of evaluation in a promotion exercise in a consistent manner - the Applicant should be compensated with six months’ net base salary for the violation of his due process rights stemming from these procedural irregularities. However, it

must be recalled that those decisions pertained to non-promotion cases, whereas the Applicant's case concerns a mere reassignment. The foregoing notwithstanding, it has to be noted that the Organization committed a breach of procedural law and did not act in good faith in conveying the contested decision. With respect to these circumstances, the Tribunal finds that two months' net base salary (P-3 level, step 2), i.e. approximately USD 9,000, would be an appropriate amount to compensate the moral injury suffered by the Applicant.

51. Putting together both the financial loss and the moral damage suffered by the Applicant, the Tribunal is convinced that - considering all relevant circumstances of this case - a sum of USD 12,000 is adequate to compensate the Applicant.

Conclusion

52. In view of the foregoing, the Tribunal ORDERS that:

- 1) The decision to redeploy the Applicant as per the memorandum of the Acting Deputy Secretary-General of UNCTAD dated 19 September 2008 be rescinded.
- 2) The Applicant be paid a sum of USD 12,000 within 45 calendar days of receipt of this judgment.

53. All other pleas are rejected.

(Signed)

Judge Thomas Laker

Dated this 22nd day of January 2010

Entered in the Register on this 22nd day of January 2009

(Signed)

Victor Rodríguez, Registrar, UNDT, Geneva