



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Jean-Pelé Fomété

DZUVEROVIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Mik Magnusson

Counsel for Respondent:

Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM

Elizabeth Gall, Nairobi Appeals Unit, ALS/OHRM

Introduction

1. The Applicant joined the Technical Co-operation Division (TCD) of the United Nations Centre for Human Settlements (UNCHS presently known as UN-Habitat) in Nairobi on a two year fixed-term appointment as a Programme Management Officer (PMO) at the P-3 level on 13 November 1994. Her appointment was extended until 31 January 1997 and subsequently thereafter until 4 June 1999 when she was separated from service.

2. The Applicant is contesting the decision of the Office of Internal Oversight Services (OIOS) dated 26 August 2010 not to take action on her request to investigate allegations of irregularities in UN-Habitat, which she first reported in 1995.

Background Facts

3. On 13 November 1994, the Applicant joined the TCD in UNCHS in Nairobi on a two year fixed-term appointment as a PMO at the P-3 level. Her appointment was extended until 31 January 1997. It was again extended to 1998 and finally to 4 June 1999 when she was separated from service.

4. On 7 November 1995, whilst still in service, the Applicant had written to OIOS alleging irregularities within her unit, particularly with regard to recruitment and procurement. Her supervisor at the time was Mr. Daniel Biau, with whom she was allegedly facing difficulties with on a daily basis. Her supervisor later became the Acting Chief of UNCHS three years after the applicant filed her report to OIOS. On 15 November 1995, the Applicant's supervisor responded to her allegations and requested her immediate transfer.

5. On 30 November 1995, the Applicant's Performance Evaluation Report (PER) covering the period 13 November 1994 - 30 November 1995 was completed. The Applicant's overall performance was rated as "D", "Fair". The Applicant successfully rebutted this report and consequently her overall performance was upgraded to "B", "Very Good".

6. On 26 February 1996, the Applicant was informed that she was to be reassigned to the Information and Audio-Visual Department (IAVD). On 7 March 1996, the Applicant wrote to the Executive Director of UNCHS (now UN-Habitat) protesting her transfer.

7. On 1 August 1996, the Applicant wrote to OIOS requesting an investigation as to the circumstances of the preparation of her PER and her transfer from her unit following her visit to OIOS in November 1995. On 28 August 1996, the Chief of Investigation Section of OIOS informed the Applicant that due to financial constraints and limited resources, they would not be able to take action.

8. On 1 February 1997, the Applicant was reassigned from IAVD to the Office of the Executive Director (OED) as a Special Assistant to the Executive Director of UNCHS.

9. On 27 July 1998, the Applicant was informed that, as of 1 August 1998, she would be transferred to the Meeting, Planning and Services Section, Conference Services, United Nations Office at Nairobi (UNON). The Applicant contested this transfer and requested that the decision be reconsidered on 30 July 1998. On 1 September 1998, the Applicant had filed a complaint with the Panel on Discrimination and Other Grievances.

10. On 7 September 1998, she was informed that her fixed-term appointment would not be extended beyond its expiry date of 31 December 1998. The Applicant wrote to the OIOS on 9 September 1998 requesting their intervention in her case. On 17 September 1998, she wrote to the Secretary-General requesting administrative review of the decision not to renew her fixed-term appointment.

11. The Panel on Discrimination and Other Grievances issued its report on 10 November 1998 recommending the extension of the Applicant's contract "in an appropriate job, for some time...to give her a chance and to appraise her performance correctly."

12. On 25 November 1998, the Applicant submitted an appeal to the Joint Appeals Board (JAB) requesting suspension of the administrative decision not to extend her

appointment. On 18 December 1998, a summary hearing was held on the Applicant's request for suspension of action and, on the same day, the JAB produced its report in which it noted that the non-extension of the Applicant's contract would be an obstacle to due process and would result in irreparable injury to her. Accordingly the JAB recommended that the request for suspension of action be approved.

13. On 22 December 1998, the Chairperson of UNCHS Staff Association addressed a Memorandum to Mr Biau stating that

In view of the facts presented by [the Applicant]: the report of the Panel on Discrimination and other Grievances: the report of her last supervisor in Habitat and the criteria mentioned by you in our meeting on 27 November 1998 for non-extension of contract of staff, [the Applicant] qualifies for the extension of her contract, as other staff of Habitat, beyond December 1998.

I, therefore, request you to reconsider her case in light of facts presented by her for extension of her contract beyond December 1998.

14. On 23 December 1998, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had decided to approve her request and to extend her appointment for three months in order for the merits of the case to be determined.

15. On 13 January 1999, the Applicant lodged an appeal on the merits with the JAB. The JAB issued its report on 9 April 1999 in which it was held that

The [Acting Executive Director, UNCHS] duly exercised his authority and prerogative as vested in him through his mandate.

The transfer of the Appellant from the TCD Unit to several units....without proper job description cannot be described as being a sound personnel management practice in the United Nations. The failure or reluctance to conclusively see through the investigations regarding the allegations made (sic) by the Applicant cannot but give the impression that the report she submitted to the OIOS must have caused some bad feeling.

The Panel found it difficult to understand why the OIOS argued that due to resource constraints, it was unable to act on the report submitted by the [Applicant]. In doing so, the OIOS did not only raise questions about its role, but most importantly due process and justice might not have

been seen to be done. The Panel recommends that the necessary measures be taken by the OIOS to act on the report submitted to it by the [Applicant].

16. On 20 January 1999, the Chief of Division of Administrative Services (DAS) addressed a Memorandum to Mr Biau (the then Officer in Charge of UNCHS) in which he was informed that “the decision to extend [the Applicant]’s contract was taken by the USG for Management on behalf of the Secretary-General. If you refuse to implement this decision you will have to be held accountable for this action regardless of the reasons for refusal.” The Chief of DAS further commented that Mr Biau’s statement that there was no post corresponding to the Applicant’s qualification was not fully credible as a number of PMO’s posts had become vacant.

17. On 2 June 1999, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her that

With regard to the subject matter of your appeal, the Secretary-General...agrees with the Board’s conclusion and further notes that there were no defects or lack of due process or improper procedures in the decision not to extend your fixed-term appointment. He has therefore decided to accept the Boards’ unanimous recommendation and to take no further action on your appeal.”

18. On 3 October 2000, the Applicant filed an Application with the former UN Administrative Tribunal in which it held in its Judgment No. 1048, rendered on 23 July 2002, as follows:

The Tribunal, after careful consideration of the record in this case, finds that the Respondent acted within his authority when deciding not to renew the Applicant’s appointment and, therefore, the Applicant’s plea to rescind this decision is rejected.

The above notwithstanding, the Tribunal is satisfied that throughout the Applicant’s career in the Organization, decisions were taken which proved to be to the detriment of her career opportunities and which raise serious questions regarding management practices. The Tribunal finds that these actions warrant compensation.

19. The former UN Administrative Tribunal ordered the Respondent to pay the Applicant compensation of three months’ net base salary.

Procedural History

20. Having been made to leave the services with the Organisation following her complaints to the OIOS alleging irregularities particularly with regard to recruitment and procurement, which were never addressed in her department, the Applicant was then informed by OIOS on 26 August 2010 of its decision not to take action on her report made 15 years earlier.

21. The Applicant then filed a request for management evaluation on 13 September 2011 with regard to the said OIOS decision. On 4 November 2011, the Management Evaluation Unit (MEU) refused the Applicant's request on the grounds that it was not receivable. The MEU pointed out that her request exceeded the statutory deadline for management evaluation and that in the absence of exceptional circumstances, the request was refused for being out of time.

22. The Applicant filed an Application with the United Nations Dispute Tribunal ("the Tribunal") on 3 February 2012. By a Motion dated 23 February 2012, the Respondent challenged the receivability of the case and the jurisdiction of the Tribunal.

23. The Applicant filed remarks on the Respondent's Motion on receivability on 9 March 2012 as directed by the Tribunal. On 12 March 2012, the Respondent filed his Consolidated Reply on receivability and on the merits of the Application. On 4 April 2012, the Applicant responded to the Consolidated Reply with leave of the Tribunal.

24. On 11 April 2012, the Tribunal issued Order No. 056 (NBI/2012) setting the matter down for hearing on 12 June 2012.

25. On 11 May 2012, the Respondent filed a Motion for further directions stating that the Applicant's submissions did not clearly show the contentious administrative decision(s) and the legal issues involved. Consequently, the Respondent requested the Tribunal to issue case management directions to clarify the legal issues to be addressed

at the hearing, additional case management orders and to vary paragraph 6 of Order No. 056 (NBI/2012).¹

26. The Applicant filed her witness list and a motion for production of evidence as per art.18 of the UNDT Rules of Procedure on 21 May 2012. She also notified the Tribunal that she was no longer representing herself as she had obtained Counsel, Mr Mik Magnusson.

27. On 28 May 2012, the Tribunal issued Order No. 074 (NBI/2012) confirming that the hearing on 12 June 2012 would proceed as scheduled, citing that the legal issues to be determined in this case arise from the contested decision pleaded in the Application; namely the decision taken by OIOS not to take further action in her matter dated 26 August 2010.

Receivability as a preliminary issue

The Respondent's case

28. The Respondent argued that the Application was not receivable.

The Application was time-barred

29. The Application is time-barred as the Applicant had failed to request management evaluation of the contested decision within the prescribed period under staff rule 11.2(c). The Applicant requested management evaluation on 15 September 2011 challenging the decision of which she was notified on 26 August 2010. Under staff rule 11.2 (a), the Applicant was required to submit her request for management evaluation within 60 days of the receipt of the contested decision. She filed her request on 13 November 2011, almost a year after the 60 day time limit had expired.

The Applicant has no locus standi

30. Under art 2.1, 3.1 (b) and 8.1 (b) of the UNDT Statute, the Tribunal does not have jurisdiction to hear and pass judgment in this case because the Applicant lost her

¹ Paragraph 6 of Order No. 056 (NBI/2012) ordered Parties to provide witness information in advance for the hearing set down for 12 June 2012.

status as a staff member when she was separated from service on 4 June 1999. There are no grounds upon which the Applicant can claim that her contractual rights as a staff member up until 4 June 1999 were breached by a decision taken over 11 years later, on 26 August 2010.

The Application is res judicata

31. The Applicant sets out a number of claims related to her previous employment with UNCHS. Those claims have been resubmitted in her Application to the UNDT. Those matters were already addressed in the former UN Administrative Tribunal Judgment No. 1048 dated 23 July 2002. In that Judgment, the Applicant was awarded 3 months' net base salary, of which she has already been paid. In her Application, she contends that this award was a symbolic compensation. The Applicant cannot invoke the Tribunal's jurisdiction simply because she is not satisfied with the compensation awarded.

The contested decision is not an administrative decision

32. OIOS' decision not to investigate the Applicant's complaint is not an administrative decision under art.2.1 (a) of the UNDT Statute. Therefore, the Dispute Tribunal does not have the jurisdiction to review the decision.

The Applicant's case

The Respondent's arguments on receivability are merely procedural

33. The Respondent's submissions, both on receivability and on the merits, are strictly procedural and formal, and no attempt has been made to look into the substance of the matter. The substance here deals with a case of a staff-member who was a victim of abuse of power and mismanagement. However, the Respondent does not even try to take a balanced approach but acts instead by ignoring the possibility that the management could have erred in his decisions taken by any part of the UN administration against the staff-member.

The principle of locus standi is irrelevant

34. The length of time that elapsed since the Applicant's separation which the Respondent uses to show that the Applicant has no *locus standi* to appeal to the UNDT seems to be of no relevance according to the UNDT Statute articles 2.1, 3.1(b) and 8.1(b), where former staff members can show that their contractual rights at the time of their employment were breached.

Decision not to investigate her allegations was a breach of her rights as a former staff member

35. The OIOS decision taken in August 2010 not to take any further action regarding the Applicant's request to investigate her allegations was a breach of her terms of appointment as a former staff member, given that those terms included the staff member's right of participation in the Joint UN Pension System. The Applicant was rightfully expecting to enjoy a UN pension upon separation one day after 10 years of UN service, bearing in mind her absence (due to that UN service) from the local pension system in her home country over that period.

36. The reluctance of OIOS to investigate the Applicant's claims was met with disapproval not only from the Applicant herself, but also from the JAB that dealt with this case and the former UN Administrative Tribunal. The appeal to OIOS to investigate the Applicant's case remains an unfulfilled obligation from 1995 to 1998 and from 2002 to 2010. Therefore, the decision taken by OIOS in 2010 not to take any further action regarding the Applicant's case, should be seen in context of the fact that the JAB strongly recommended that such an action be taken by OIOS and was supported by the former UN Administrative Tribunal in its Judgment No. 1048 (2002).

37. Therefore, OIOS has not only harmed the Applicant by deciding not to undertake an investigation into her claims of prolonged discrimination but has further aggravated the situation by sending her file to the ICTY (an entity that is not mandated to look into staff administrative complaints) instead of carefully determining another UN entity that might have been adequately equipped to deal with her case and assist her.

The failure of OIOS to investigate her claims was responsible for her loss of entitlements

38. Because of the reluctance of OIOS to investigate the claims that she had lawfully made in 1995, responding to the appeal by the UN administration and as advised by the local UN Ombudsman in Nairobi, she had lost all her entitlements including the right to enjoy the UN pension for which she was only five months short on the day of separation.

39. Had the OIOS undertaken such an investigation, it would have established that there existed improper and extraneous motives behind these interrelated developments that covered a long period of time and her situation would have been redressed as a consequence. The Applicant's future would have been secured, at least in basic financial terms, by means of a new UN temporary assignment that would have enabled her to complete the five months missing for her UN pension.

Applicant's cause of action is not res judicata

40. The Applicant's complaint from 1995 might be *res judicata*, but it represents just a small part of the Applicant's overall complaint. Apart from the interval between 1995 and 1999 covered by the former UN Administrative Tribunal Judgment No. 1048 (2002), the complaint also refers to a long period of 10 years that followed, characterized by "institutional prejudice" against the Applicant. Upon the publication of the former UN Administrative Tribunal Judgment No. 1048 (2002) and in the period that ensued, this prejudice remained unchanged and in fact became more accentuated, although in a silent way, expressing itself mostly through the Administration ignoring all of the Applicant's attempts to address and redress the situation.

41. The rationale of the Applicant's request filed to the OIOS in 2010 originates from the fact that the recommendation made by the JAB and endorsed in the former UN Administrative Tribunal Judgment No. 1048 (2002) never materialized, and on the premise that a recommendation, similar to an order given in a judgment, cannot become time barred. The Applicant believes that the obligation to implement the JAB recommendation, which has never been fulfilled, and that pending on OIOS, was not

quashed by the former UN Administrative Tribunal Judgment No. 1048 (2002) and did not cease by 2010.

The Application is not time-barred

42. The Applicant argues that she had established regular communication with the Ombudsman's office to find an informal way to resolve the issue of her re-employment with the UN. She further states that the UN Ombudsman had undertaken various attempts, specifically in relation to her employment with the ICTY, proposing a solution in 2004 and repeating the same attempt in 2010.

43. These attempts, although proven unviable, had confirmed her conviction that the UN Ombudsman's office was mediating with the UN Administration in order to remedy the consequences of mismanagement during her UN employment in view of fulfilling the JAB recommendation regarding OHRM. She also states that despite the fact that the administrative decision for which she had requested management evaluation in 2011, dated 26 August 2010, her communication with the Ombudsman's office lasted until November 2010.

44. The Applicant could not define the date of any non-selection decision regarding hundreds of posts that she had applied for, because she was never advised that she was not selected or that someone else had been selected. As a consequence, she could not have questioned the non-selection and requested management evaluation of the non-selection administrative decision within the 60 day time limit from the date of non-selection which, according to the Respondent's interpretation of UNDT Statute's art. 3.1(b) is not an option for external candidates or former staff-members.

45. When the Applicant re-sent her request to OIOS in 2010, after several previous attempts, the idea was that OIOS would first investigate the case based on information it already possessed. OIOS would then, in cooperation with the UN Ombudsman, approach the ICTY to explain the situation regarding the Applicant and ask the ICTY to treat the Applicant as an internal candidate or to increase in a similar way her chances of being selected for a post of an English to Bosnian/Croatian/Serbian translator or

interpreter since the Applicant fulfilled all the requirements for such a post for which she had passed the selective ICTY specialized examination.

Consideration

Issue of Receivability

46. The Respondent argued that the Application was not receivable *ratione temporis* under art. 8(1)(c) of the UNDT Statute as the Applicant had failed to request management evaluation of the contested decision within the time limit set out in staff rule 11.2(c).

47. The Applicant, on her part, contended that her failure to meet the 60-day deadline for requesting management evaluation was not due to her neglect, but rather due to the intense mediation efforts which were on-going between the period she received the notification of the administrative decision and the date on which she filed a request for management evaluation. She requests therefore that these circumstances be taken into consideration when decisions are made in respect of time limits.

48. Art. 8.1(d)(i) of the UNDT Statute states that

The Application is filed within the following deadlines:

In cases where a management evaluation of the contested decision is required:

- a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or
- b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

49. Furthermore, art. 8.2 of the UNDT Statute states that

The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time

and only in exceptional cases. The Dispute Tribunal shall *not suspend or waive* the deadlines for management evaluation. [Emphasis added]

50. Staff rule 11.2(a) and (c) state respectively that

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

A request for management evaluation shall not be receivable by the Secretary-General unless it is sent *within sixty calendar days* from the date on which the staff member received notification of the administrative decision to be contested. *This deadline may be extended by the Secretary-General* pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General. [Emphasis added]

51. In the present case, the Applicant was in receipt of the contested decision on 26 August 2010. As per the rules cited above, the Applicant was to file her request for management evaluation 60 days from the date of receipt of the contested decision, on 25 October 2010. She filed her request for management evaluation on 13 September 2011; exactly one year and 18 days after the contested decision was conveyed to her.

52. The Applicant claims that exceptional circumstances (mediation efforts) existed warranting the waiver of the time limits by the Tribunal. It is clear from the provisions above and the Dispute Tribunal's jurisprudence that a request for an administrative review or management evaluation is mandatory in the present case. The Applicant cannot be considered to have satisfied the requirement to submit a request for management evaluation as provided for in the above provisions.

53. It has been established in the UNDT and the United Nations Appeals Tribunal (UNAT) jurisprudence, as well in the provisions of the UNDT Statute, that the UNDT does not have the power to suspend or waive deadlines regarding time limits for management evaluation. In *Shetto*², J Shaw found that in that particular case

² UNDT/2010/177 dated 11 October 2010 at paras 13-17.

There is no evidence that the parties submitted the matter to the office of the Ombudsman for mediation within the deadlines for filing a management evaluation. There was no request of the Secretary-General to extend the time limit for this purpose. The applicant was therefore bound by the 60 day limit. The UNDT has previously held, pursuant to Article 8(3), that the Tribunal has no power to suspend or waive time limits for management evaluation. This judgment was upheld by the Appeals Tribunal.³

54. In *Samardzic*⁴ the UNAT upheld the decision of the UNDT judgment in that case where it was concluded, based on the interpretation of art. 8 of the UNDT Statute, that the Tribunal was precluded from suspending or waiving the deadlines for management evaluation. The application in that case was not receivable and was rejected on the basis that the applicant had failed to submit her initial request for administrative review within the time limits prescribed in the former staff rule 111.2(f). Furthermore, in *Ajdini et al*⁵ the UNAT further affirmed, in what has been termed as settled jurisprudence, that the UNDT has no jurisdiction to waive the deadline for management evaluation. The UNAT affirmed the pronouncement by J Adams in *Trajanovska*⁶ in which it was stated

The legal position which emerges is that time limits prescribed for administrative review (and management evaluation under the new system), which could be waived under the previous system, cannot be waived under Article 8(3) of the UNDT Statute, due to a specific prohibition in this respect contained in Article 8(3). We are aware that under Article 8(4) of the UNDT Statute, an application is not receivable if it is filed more than three years after the receipt of the contested administrative decision. But this provision will not help Trajanovska. This is a general provision which must yield to the specific provision under Article 8(3) of the UNDT Statute as interpreted by the UNDT in *Costa* and affirmed by this Tribunal.

In view of the above, we hold that Trajanovska's application was time-barred, and the delay in filing it could not be condoned. The Judgment of the Dispute Tribunal is affirmed.

³ *Costa* UNDT/2009/051 and *Costa* 2010-UNAT-036.

⁴ 2010-UNAT-072 dated 29 October 2010 at para 21.

⁵ 2011-UNAT-108 dated 11 March 2011 at paras 27-29.

⁶ 2011-UNAT-074 dated 27 October 2011 at paras 19-24. Also see *Muratore* 2012-UNAT-191 at para 38 as well as *Barned* 2011-TANU-169 dated 21 October 2011 at para 9.

55. In the case of *Wu*⁷, the Applicant argued that his request for management evaluation was not time-barred because he had engaged the Ombudsman's office in an attempt to resolve the matter informally. On the basis of staff rule 11.2(c) where the Secretary-General may extend the deadline and by virtue of the fact that the matter being seized of the Ombudsman, such a deadline had been extended, J Izuako held that

This is because during the period that the Ombudsman was seized of the matter, time would cease to run. ...The Ombudsman is appointed by the Secretary-General to represent him for the purposes of facilitating conflict resolution...During the two day period that the Ombudsman was seized of the matter, that is, 15 to 17 June 2011, the deadline was effectively extended for the purposes of staff rule 11.2 (c).

The 60-day timeline in this case should have begun to run from 17 June 2011, the date when the attempt at informal resolution of the dispute by the Ombudsman failed.⁸

56. The Applicant in this case had argued that the delay was caused, not by her neglect, but due to mediation efforts. If there was concrete evidence to show that the Ombudsman was seized of the matter within the stipulated time limits and if there was evidence showing the date on which the Ombudsman acknowledged receipt of the matter and the period for which he worked on it for purposes of mediation, the Tribunal would be in a position to consider, not whether it can waive deadlines for management evaluation, but whether indeed the relevant period had effectively extended the deadline for management evaluation and consequently for approaching the Tribunal.

57. Based on the foregoing, the Tribunal in this instance cannot but apply art.8 of the UNDT Statute and hold that the Applicant was bound by the 60-day time limit and that she had filed her management evaluation request and application before the Tribunal out of time.

58. Whatever the substantive issues for determination were and however morally compelling these appear, the Tribunal is constrained by the applicable time limits under art.8 of its Statute. There is always a specified time in which an aggrieved staff member or persons representing the estate of a former staff member may bring a case to the

⁷ UNDT/2012/074.

⁸ *Wu* UNDT/2012/074 at paras 24-25.

formal system of the internal justice system. The Tribunal, being a creature of statutory law, cannot go beyond its mandate. In view of the above, the Applicant having failed to meet the statutory time limits, the Tribunal finds the Application time-barred and not receivable.

Conclusion

59. The Application in this case is not receivable and the Tribunal consequently lacks the jurisdiction to entertain it.

Recommendation

60. It goes without saying that justice in certain cases cannot always be fully and effectively served through the formal system of the administration of justice. It is partly for this reason that the General Assembly of the United Nations saw to it that an informal system of internal justice was in place side by side with the formal system. Due to the fact that even the informal system might sometimes be constrained by the applicable rules of engagement, it could find itself unable to bring a proper settlement or closure to a case.

61. In the instant case, certain troubling issues stand out in bold relief. So much so that although it appears that substantive justice for the Applicant may have fallen through the cracks in the formal and informal justice systems and consequently eluded her for more than a decade, it has become necessary for the Secretary-General in his good offices to take a compassionate view to these issues.

62. The procedural history of this case already set out in the opening pages of this judgment does not bear repeating. What is clear is that the Applicant had in 1995, before the end of her first year as a staff member of the UNCHS (having served as a UN Volunteer previously for five years), reported certain irregularities she had observed within UNCHS offices to OIOS with regards to recruitment and procurement.

63. While OIOS refused to carry out any investigations on her report, the Applicant's supervisor and head of her unit, one Mr. Biau, who was implicated in the report, demanded her immediate transfer out of the TCD unit where she was working.

The Applicant had commenced work at UNHCS with a two-year fixed-term contract in late 1994 and in spite of her protests, was immediately transferred to another unit without funds for her new post and without a proper job description.

64. The same supervisor gave her a very low "D" rating in her performance evaluation soon after but, upon rebuttal, the Applicant's performance was replaced with a "B" rating. It appears that Mr. Biau opposed a two-year extension of the Applicant's contract and as a result the UNCHS Personnel office began giving her only short-term extensions.

65. Convinced that her former supervisor was on a retaliation path, the Applicant applied for a vacancy at the United Nations Economic Commission for Africa (UNECA) but was not appointed probably because the UNCHS Personnel office forwarded the PER with the low performance rating initially awarded to the Applicant which she had successfully rebutted.

66. The Applicant was thereafter shunted to several different posts within and outside UNCHS and was informed that her contract would not be renewed after its expiry on 31 December 1998. She wrote to OIOS seeking its intervention and also to the Secretary-General for administrative review of the said decision. On 1 September 1998 she complained to the Panel on Discrimination and Other Grievances. The said Panel in its 10 November 1998 report recommended the extension of the Applicant's contract.

67. On 22 December 1998, the Staff Association of Habitat wrote to Mr. Biau, who was then Officer in Charge (OIC) of UNCHS, stating a number of reasons why her contract should be extended but without success. The Applicant appealed to the former JAB for a suspension of the decision not to extend her contract. Following a favourable recommendation by the JAB, the Secretary-General extended her appointment by three months for the merits of the case to be determined.

68. The records filed by the Applicant show that Mr. Biau, who in 1998 had become the Deputy Acting Director of UNCHS and effectively its head, had actually refused to implement the decision of the Secretary-General for the three-month

extension of the Applicant's contract on the unfounded excuse that there were no posts corresponding to her qualifications. It took the efforts of UNON's Chief of Division of Administrative Services and the intervention of the Director-General of UNON for the Secretary-General's decision to be implemented.

69. On 9 April 1999 the JAB decided inter alia that:

- a. The Acting Executive Director of UNCHS had duly exercised his authority in deciding not to extend the Applicant's contract.
- b. The various transfers of the Applicant to several units without a proper job description was not sound personnel management practice and had some relationship with her report to OIOS.
- c. The failure or reluctance to investigate the allegations made to OIOS by the Applicant gave the impression that her report caused some bad feeling.
- d. OIOS, by arguing that it could not investigate the Applicant's report regarding certain irregularities in her unit due to resource constraints, had raised questions as to its role, due process and justice.

70. Curiously, the same JAB Panel concluded that Mr. Biau had decided not to extend the contract of the Applicant due to on-going reforms requiring staff cuts and recommended that the decision be upheld. The Secretary-General in turn upheld the JAB decision, stating in a 2 June 1999 letter to the Applicant that her several reassignments within a short period at UNCHS and UNON, although wrong, were not the subject of her appeal and had become time-barred. The relevant parts of the said letter are hereunder reproduced

...with respect to the Board's observation that your transfer in 1995 out of the unit you were working in did not uphold sound personnel management practices, the Secretary-General points out that this matter is not the subject of your appeal and is in any event long time-barred. With respect to the subject matter of your appeal, the Secretary-General...agrees with the Board's conclusion and further notes that there were no defects or lack of due process or improper procedures in the decision not to extend your fixed-term appointment. He has therefore

decided to accept the Board's unanimous recommendation and to take no further action on your appeal.

71. The Secretary-General in the above-reproduced reasoning appeared not to have known that the retaliatory acts of Mr. Biau had continued beyond 1995 and was still live in 1999 when the said Mr. Biau had refused to implement the Secretary-General's decision that the Applicant be given an extension for three months to enable her to prosecute her appeal to the JAB. The Secretary-General appeared to be ignorant of the true circumstances of the case including correspondence from Mr. Barabanov, Chief, Division of Administrative Services at UNON dated 20 January 1999 to Mr. Biau reminding him, among other things, that his refusal to implement the Secretary-General's decision on the matter would make him accountable, whatever his reasons.

72. The Applicant in October 2000 then took her case to the former United Nations Administrative Tribunal which held in its Judgment No. 1048 (2002) that:

a. Throughout the Applicant's career in the Organization, decisions were taken which proved to be to the detriment of her career opportunities and which raised serious questions regarding management practices.

b. The Respondent acted within his authority when deciding not to renew the Applicant's appointment, and therefore the Applicant's plea to rescind this decision was rejected.

c. Because of the mismanagement suffered by the Applicant with respect to her career opportunities and the reluctance of OIOS to investigate her complaints which caused her problems, the Tribunal awarded her compensation in the amount of three months net base salary.

73. Since leaving the Organization in 1999 and only five months before she would qualify for a UN pension, the Applicant has applied to scores of jobs within the Organization for which she is qualified, without success. She is convinced that her role as a whistle-blower has largely served to prevent her further recruitment.

74. While this Tribunal has no capacity to review the judgment of the former UNAT or indeed the decisions of the JAB made about ten years before the new internal

justice system came into being, it is compelled, bearing in mind the special circumstances in this matter, to **RECOMMEND** it to the Secretary-General for sympathetic review with a view to bringing substantive justice and closure to it.

75. This recommendation is made bearing in mind the special measures that have been put in place with regards to the protection of whistle-blowers who risk their jobs, professional lives and livelihoods by courageously seeking to expose wrong-doings within the Organization.

76. The United Nations, being the foremost international Organization for setting standards for governments and other organizations, needs to review the case of this Applicant as this will serve not only the ends of justice but also to reassure whistle-blowers that they are indeed protected.

(Signed)

Judge Nkemdilim Izuako

Dated this 12th day of July 2012

Entered in the Register on this 12th day of July 2012

(Signed)

For:
Jean-Pelé Fomété, Registrar, Nairobi