



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/061

Judgment No.: UNDT/2013/069

Date: 19 April 2013

Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

FERNANDEZ DE CORDOBA BRIZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Bettina Gerber, HRMS/UNOG

Introduction

1. The Applicant, an Economic Affairs Officer at the P-3 level with the United Nations Conference on Trade and Development (“UNCTAD”), contests UNCTAD’s senior management’s decision to transfer him laterally from its liaison office in New York to the Trade Information Section in the Trade Analysis Branch (“TAB”) in Geneva.

2. In essence, the Applicant contends that the transfer decision was unlawful in that it was arbitrary and adopted and implemented in breach of mandatory procedures and that senior management acted in bad faith and with ulterior motives when doing so. The Respondent submits that the UNCTAD senior management acted within its margin of discretion and on properly reasoned grounds based on the Applicant’s qualifications, skills and experience and the operational needs of UNCTAD both in New York and Geneva.

Procedural history

Proceedings leading up to the substantive hearing

3. On 21 May 2010, the Applicant filed his substantive application with the Dispute Tribunal. On the same date, he filed an application for interim measures under art. 10.2 of the Tribunal’s Statute. Following a hearing on 27 May 2010, by Order No. 135 (NY/2010) of the same date, the Tribunal dismissed the application for interim measures with reasons to follow.

4. On 23 July 2010, the Applicant filed a second application for interim measures, which was later withdrawn subsequent to a hearing held on 29 July 2010.

5. On 28 July 2010, the Tribunal issued Order No. 186 (NY/2010) in which it provided the reasons for dismissal of the application for interim measures finding that, on the evidence available, the Applicant had failed to establish that

the administrative decision to transfer him from New York to Geneva was *prima facie* unlawful, as required by art. 10.2 of the Statute of the Dispute Tribunal.

The substantive hearing

6. After allowing the parties to update their written submissions, and the Tribunal requesting additional written submissions necessary to appropriately manage the case, followed by two case management discussions (“CMD”), a substantive hearing was held in New York on 11, 14, 15 and 16 January 2013.

7. At this hearing, the Applicant gave testimony and both parties also called witnesses, who are referred to as follows:

a. For the Applicant:

- i. Mr. AA, the former Chief of UNCTAD’s liaison office in New York (the Applicant’s former supervisor, now retired);
- ii. Mr. BB, former Chief of Trade Information Section in the TAB (the Applicant’s former supervisor in Geneva, now retired).

b. For the Respondent:

- i. Mr. CC, the former Special Adviser to the Secretary-General of UNCTAD (also retired);
- ii. Ms. DD, the then Officer-in-Charge of the Human Resources Division of UNCTAD in Geneva;
- iii. Mr. EE, the then Chief of the Global and Regional Analysis Section in the TAB;
- iv. Mr. FF, who was then the Chief de Cabinet of the Secretary-General of UNCTAD, also based in Geneva.

(Other persons mentioned in this Judgment but who did not testify include Mr. HH, Head of TAB, and Mr. GG, discussed below.)

8. The Applicant had also requested that the Respondent call Mr. GG, the then Special Assistant to the Secretary-General of UNCTAD (also a recent retiree), who Counsel for the Respondent initially stated was unavailable for a hearing in December 2012, but available in early 2013. However, despite several attempts by Respondent's Counsel requesting his attendance for the hearing in January 2013, this witness failed to respond and did not testify. After initially requesting the attendance of the Secretary-General of UNCTAD to give testimony, the Applicant subsequently withdrew this request.

9. Due to one witness being in Thailand, some in New York, and several others in Geneva, and due to the time differences and other logistical challenges, the Tribunal informed the parties from the outset that the usual order of witnesses would not be strictly followed and that witnesses could be recalled if the Tribunal deemed it fit. As a result, Mr. CC opened the proceedings and gave evidence by telephone from Bangkok, and the Applicant, who initially gave *viva voce* evidence in New York, was recalled to the stand at the conclusion of the proceedings by video connection on his return to Geneva. Mr. AA testified in person before the Tribunal in New York, while all the other witnesses testified by video link from Geneva. The Tribunal must express its appreciation to both Counsel for their professional conduct and cooperation in the proceedings, including an early start for New York (and late finish for Geneva) throughout four days.

10. In the interest of judicial economy, upon the direction of the Tribunal, the parties had filed summaries of their respective witnesses' statements prior to the hearing, with the caveat that these were not testimony but simply statements prepared in advance to expedite the proceedings and narrow the issues upon which evidence was to be tendered. As it transpired, all the witnesses confirmed these summaries, under oath, in addition to giving oral evidence. This procedure not

only expedited the hearing, but also avoided, in large part, either party being taken by surprise.

11. Nevertheless, despite vigorous prior case management, both sides tendered new documentation during the substantive hearing without any prior disclosure, primarily with a view to challenging the credibility of witnesses. Late disclosure of documents results in delay of proceedings. However, due to the particular circumstances of these proceedings and in the interest of justice, the Tribunal allowed both parties to submit documents not previously disclosed.

Facts

The Tribunal's assessment of the oral evidence produced before it

12. The Tribunal would like to comment from the outset on the quality of the oral evidence heard. As the Applicant and his former supervisor in New York, Mr. AA, gave evidence in court, the Tribunal was able to easily observe their demeanour and assess their credibility. The Tribunal found both the Applicant and Mr. AA to be reliable and competent witnesses. As Mr. EE and Ms. DD gave evidence via video link, the Tribunal could visually observe them and found both to be forthright and candid in their evidence, although neither had any close or first-hand knowledge about many of the relevant events. Mr. CC, who was closely involved in the entire case, gave evidence by telephone from Bangkok. The Tribunal found that, in some material parts, his oral evidence was unsupported by the documentary evidence and the evidence of the other witnesses. Mr. BB, who also participated via video link, came across as a very candid and well-informed witness with no special interest in the case. Mr. FF, who also testified via video link, painted an overall picture, since he could not actually testify to the material events that unfolded as he had no personal knowledge of the same.

The Applicant's employment history

13. The following chronology of facts is based on the agreed main facts provided by the parties to the Tribunal and which have, wherever necessary, been supplemented by the relevant written and oral evidence provided by the parties and their witnesses.

14. The Applicant joined the service of the United Nations in 2000 as an Associate Economist at the P-2 level at UNCTAD, Geneva, having successfully passed the Competitive Examination for Ecuador in 1995. During the first three months of his service with UNCTAD, he worked with the TAB, although not in the Trade Information Section.

15. In February 2005, the Applicant was appointed as an “Economist” at the P-3 level and relocated to the UNCTAD’s liaison office in New York. In his testimony, the Applicant explained that his primary function was to liaise with Member States of UNCTAD, the General Assembly, the Economic and Social Council, the Secretariat, and other institutions in New York and Washington D.C. in order to promote UNCTAD’s work and undertake outreach activities. This also involved financial issues. During his years in this job, the Applicant stated that his electronic performance appraisal (“e-PAS”) ratings were that he “consistently exceeded expectations”, as confirmed by his 2004–2005 e-PAS report, which was admitted in evidence. On 1 July 2009, the Applicant was placed on the roster of candidates preapproved for positions of “Economic Affairs Officer” at the P-4 level.

16. On 27 November 2009, the then Special Advisor to the Secretary-General of UNCTAD, Mr. GG, requested Ms. DD to implement the UNCTAD Secretary-General’s selection of the incumbent of the post of Economic Affairs Officer at the P-3 level based in Geneva in the Trade Information Section, TAB, to a P-4 level position in the same section. The position at the P-3 level in the Trade Information Section therefore became vacant. The email was copied, *inter alia*, to Mr. EE and Mr. BB.

17. On the same day, Mr. GG emailed Mr. EE—without copying the Chief of the Trade Information Section, Mr. BB, or the Chief of the New York liaison office, Mr. AA—in connection with the Applicant’s lateral assignment to the now vacant Geneva post and stated that (emphasis added):

As already agreed with you, the P-3 trickle-down vacancy will be earmarked for the lateral assignment ... of [the Applicant] with target date ... 1 March 2010. The [Office of the Secretary-General] is in the process of identifying a suitably qualified replacement for [the New York liaison office] ...

...

In order not to undermine the objectivity of the lateral assignments (mentioned above), knowing that this mad house thrives on false and self-serving gossips worse than infantile chatting fish vendors, [please] do not make the proposed lateral arrangements public. This is to allow us to do proper notification to staff members concerned and to initiate the related administrative actions.

18. Ms. DD testified that she unsuccessfully attempted to contact the Applicant in December 2009 to inform him that the Secretary-General of UNCTAD was considering reassigning him to the position as Economic Affairs Officer in the Trade Information Section, TAB, in Geneva as of 1 April 2010. She finally reached him by telephone on 4 January 2010.

19. The same day, by email, Ms. DD informed the Applicant that:

Further to our conversation, I would like to let you know that you are considered for the lateral move as P-3, Economic Affairs Officer in Trade and Analysis Branch in [Geneva] under the supervision of [Mr. EE]. Your qualifications and experience were taken into account when considering this move. The targeted day for this lateral move would be 1 April 2010. The post is a regular budget vacant position.

20. On 12 January 2010, the Applicant advised Ms. DD that, due to his mother’s difficult health situation, it would be difficult for him to move from New York and further that he had never applied for such lateral move. She agreed to convey his concerns to UNCTAD’s senior management. On 20 January 2010, Ms. DD

officially confirmed the Applicant's reassignment to Geneva informing him that the UNCTAD Secretary-General had been appraised of his "personal situation and it [had] been carefully considered. As mentioned earlier, your qualifications and experience were primary factors in reaching this decision".

21. On 24 February 2010, Mr. AA sent an email to Ms. DD querying the lack of consultation regarding the Applicant's transfer and requesting that the Applicant's reassignment to Geneva be reconsidered in the light of work that needed to be done in UNCTAD liaison office in New York. She replied on 1 March 2010 that "it was unfortunate that [they] missed each other prior to [his] leaving on home leave. It was decided to go ahead with the decision to give advance notice to [the Applicant]". Furthermore, she informed Mr. AA that his request to reconsider the decision regarding the lateral transfer had been conveyed to the senior management of UNCTAD. Ms. DD testified that she had unsuccessfully tried to contact Mr. AA to inform him about the transfer, but he was on a six week home leave in Bhutan. The latter information was confirmed by Mr. AA in his oral evidence.

22. On 4 March 2010, the Applicant requested a management evaluation of the decision to laterally reassign him to Geneva, and filed a motion for suspension of action.

23. Sometime during March 2010, Mr. GG, the then Special Advisor to the UNCTAD Secretary-General, travelled to New York and met with the Applicant and Mr. AA to explain the reasons for the Applicant's forthcoming transfer to Geneva. According to the Applicant, the atmosphere at the meeting was very unfriendly and Mr. GG was infuriated by the Applicant's request for management evaluation, stating that he would make sure that the Applicant would go to Geneva the next month. This evidence stands unrebutted.

24. By letter dated 7 April 2010, the Officer-in-Charge of the Department of Management of the United Nations Secretariat informed the Applicant that his request for management evaluation had been reviewed and that it was determined that

the decision to reassign him from New York to Geneva was a proper exercise of administrative discretion. As for the reasons for his transfer, the letter stated as follows:

[The Management Evaluation Unit (“MEU”)] noted that the decision to re-assign you to Geneva was based on your qualifications and experience, which had previously been regularly requested and utilized by TAB, even while you were on your current assignment in New York. Further, the MEU noted that your current post in New York has been redefined and as such may not make full use of your skills and experience. On the other hand, there is a clear need for those skills and experience in TAB, Geneva, where a post requiring them is vacant as a result of the promotion of the incumbent. In respect of your contention that a person holding a P-3 post in Geneva is to be transferred to New York to replace you, the MEU noted that your current post is to be advertised and filled by virtue of a competitive process, consistent with ST/AI/2006/3/Rev.1 [(Staff selection system)].

25. On 6 April 2010, the Applicant’s post in the New York liaison office was advertised as a “Liaison Officer” post at the P-3 level, UNCTAD, New York, on Galaxy (an online United Nations job-site). During his testimony, the Applicant explained that, as he was contesting the propriety of the transfer decision, and following the advice of his Counsel from the Office of Staff Legal Assistance at that time, he decided not to apply for the post and instead traveled to Ecuador to take care of his ailing mother.

26. By email dated 17 May 2010, Mr. AA protested, *inter alia*, to Mr. FF and Ms. DD the failure to consult him regarding the reclassification of the Applicant’s post in New York.

27. On 8 June 2010, Ms. DD forwarded to the Applicant, with copies to Mr. EE and his superior, Mr. HH, the job description of the post of “Economic Affairs Officer” at the P-3 level to which he was to be transferred in the Trade Information Section, TAB. She underlined that “it might be necessary to update [the job

description]” as the post was classified in 2001 and the description had not been updated since then. She requested Mr. EE to update the job description as required.

28. On 17 September 2010, Mr. BB (the Applicant’s receiving supervisor in Geneva) informed Mr. HH that:

... I have pointed out to [Ms. DD] that the profile of [the Applicant] does not match the [terms of reference (“TOR”)] of the [P-3] post in my Section. Assigning [the Applicant] to TAB will put at risk our program on [non-tariff barriers]. I do not know why UNCTAD management continues to insist on doing something that is detrimental to our program implementation.

29. By email of the same date, Mr. HH replied that “I have sympathy with your point that [the Applicant’s] [Personal History Profile] does not meet the TOR for the post in your section”.

30. At the time of the substantive hearing in January 2013, the Applicant had still not received a job description for the TAB job although he has been in Geneva since 18 January 2011, the effective date of his transfer (which was postponed because of his undergoing surgery for a wrist injury, assisting the New York liaison office during the General Assembly’s session period and taking leave).

Additional facts regarding UNCTAD’s alleged ill-motivation for transferring the Applicant

31. The Applicant points to an alleged pattern of factual circumstances, which he contends demonstrates the ill-motivation of the decision-makers who were, according to the Applicant, in effect, Mr. CC, Mr. GG and Mr. FF, although the Secretary-General of UNCTAD is said to have taken the final decision. These circumstances were:

- a. Mr. CC’s request that the Applicant report to him about the activities of Mr. AA and the Applicant’s refusal to do so;

- b. The Applicant's increasingly strained relationship with Mr. CC;
- c. The decision to reassign the Applicant from New York against his will;
- d. The lack of consultation with both the Applicant and his immediate superiors about the reassignment;
- e. The Applicant's lack of skills and qualification for the position to which he was transferred in Geneva;
- f. The Applicant not being provided with a job description for his new position in Geneva; and
- g. The reclassification of the Applicant's former post in New York.

Mr. CC's relationship with Mr. AA and the Applicant, respectively

32. A key aspect of the Applicant's case is how the relationship between Mr. CC, Special Advisor to the Secretary-General of UNCTAD in Geneva, and the Applicant and his then supervisor, Mr. AA in the New York liaison office, deteriorated over the years; from allegedly very amicable to directly hostile. In essence, the Applicant contends that this, together with his refusal to allegedly "spy" and report on Mr. AA's activities and interactions with UNCTAD Member States upon the instruction of Mr. CC, was the underlying reason for his transfer from New York to Geneva.

33. Mr. CC testified that he previously worked for the World Trade Organization ("WTO") when he first met Mr. AA at a conference in 1996 following which they remained in close friendly contact. After he and the Secretary-General joined UNCTAD in 2005 from WTO, whenever Mr. CC travelled to New York, two to three times a year, his primary relations were with Mr. AA whom he considered a "contemporary".

34. Mr. CC stated that he met the Applicant in 2005 as part of a large group of young UNCTAD staff with whom, as the then Special Adviser to the Secretary-General, he occasionally had lunch or coffee. He said he knew the Applicant “in passing” and their relations were peripheral, even though the UNCTAD liaison office, at the professional level, only consisted of Mr. AA, the Applicant and one other staff member. He said he was very busy when in New York and did not have time to socialise and never had one-on-one business or social meetings with the Applicant.

35. This evidence was contradicted by the Applicant, who explained that they had a close professional and personal relationship, including many bilateral business and social meetings, since it was expected of him to entertain Mr. CC outside work hours whenever he was in New York. The Applicant would buy advance tickets for shows on Broadway and in the Lincoln Centre, and they dined and often went for drinks together. When this was denied by Mr. CC, the Applicant produced a photograph with Mr. CC and a companion, Mr. and Mrs. AA, and the Applicant and his former girlfriend enjoying a weekend brunch in a restaurant. Mr. CC responded that the brunch must have been at Mr. AA’s initiative. Mr. AA, however, confirmed the Applicant’s evidence that Mr. CC initially shared a very close relationship with the Applicant.

36. However, according to both the Applicant and Mr. AA, the New York liaison office’s relations with UNCTAD’s senior management in Geneva, in particular with Mr. CC, became strained following events surrounding the appointment of an official from a United Nations Member State as Special Representative of UNCTAD in New York in July 2007.

37. The Applicant explained that, while other agencies and similar institutions based in other places would have representatives at the D-1 or D-2 level, UNCTAD’s most senior staff member in New York was Mr. AA at the P-5 level. Before the appointment of the official, Mr. AA would, at times, be referred to as “the Special

Representative of UNCTAD”. The New York liaison office only found out about the appointment of the Special Representative through a posting on iSeek (the United Nations Secretariat’s intranet site). According to the Applicant, this infuriated Mr. AA who, in the Applicant’s presence, phoned Mr. CC and an irate discussion ensued. When asked about this telephone call, Mr. AA confirmed it, while Mr. CC said that he did not recall it at all.

38. In July 2007, a Permanent Representative of one of the Member States to the United Nations, on behalf of a group of Member States, addressed a letter to the Secretary-General of the United Nations, expressing concern “at the decision ... to place the UNCTAD Liaison Office in New York under the authority of [the aforesaid official, as Special Representative of UNCTAD in New York]”.

39. The Applicant explained that, in his opinion, the UNCTAD senior management suspected that Mr. AA had orchestrated, and indeed authored, a portion of the letter. The Applicant stated that Mr. CC was always enquiring about Mr. AA’s associations and meetings, and on this occasion called him by telephone and specifically requested him to report on Mr. AA’s possible involvement with UNCTAD Member States in the drafting of the letter from the Permanent Representative. When the Applicant replied that he knew nothing about this and further that he was not prepared to report or “spy” on Mr. AA on the alleged or other activities, Mr. CC then retorted that the Applicant was “useless” to him.

40. In an email dated 20 July 2007 regarding the letter from the Member States (it is not clear who the recipient was), produced in evidence by the Applicant during the substantive hearing and admitted by the Tribunal, Mr. CC stated that:

The phraseology of the two UNCTAD [paragraphs] differs from the rest of the letter. In a letter without any typo errors, the only typo error to be found is in one of the two UNCTAD [paragraphs] ... The impression given is that ... two [paragraphs] were inserted or “imported” from another source and was not part of the original drafting or even typing of the letter. The parochialism of the concerns about the liaison office gives the impressions that the wordings and

line of thinking on this particular point came from a source internal to UNCTAD (not of the first time in history).

41. In his evidence, Mr. CC admitted having drafted this email, which he described as “weekend reading”, and confirmed its contents, also testifying that Mr. AA was not a strong drafter, implying that he contributed to the letter from the Permanent Representative with the two paragraphs that included bad grammar and a typographical error. However, Mr. CC denied that he ever requested the Applicant to inform him about, or “spy” on, Mr. AA.

42. When the Applicant informed him about the telephone call (see para. 39 above), Mr. AA advised him to avoid Mr. CC whenever he was in New York. Thereafter, relations with Mr. CC became so strained that, whenever in New York, he would no longer come to the offices of the New York liaison office; instead, he would work out of the Delegates’ Lounge in the United Nations Secretariat Building, even bringing some of his own staff from Geneva. In addition, according to the Applicant, Mr. CC would exclude the Applicant from meetings specifically requesting that he did not attend.

43. Subsequently, in 2007, Mr. CC and the Applicant had a personal confrontation at an UNCTAD promotional event at the Vienna Café at the United Nations Secretariat building in New York. Mr. CC downplayed the incident as minor and forgotten about afterwards. The Applicant, on the other hand, testified that Mr. CC screamed loudly at him about his failure to bring some pamphlets, physically pushed him, and then advanced towards him in a very aggressive manner until he was head to head with the Applicant. This caused another staff member to pull Mr. CC away as it appeared that he was going to attack the Applicant. The Applicant’s version was generally affirmed by Mr. AA in his written statement and oral testimony, who testified that he was also present at the Vienna Café when the incident occurred. Relations between the New York liaison office and the UNCTAD Administration in Geneva thereafter became further strained with Mr. CC completely avoiding contact with, or using, the New York liaison office at

all. Although Mr. CC contended that this was because the New York liaison office was providing unsatisfactory support, in response to a question from the Tribunal, he conceded that this was possibly bad management practice on hindsight, and that perhaps attention should have been focused on making the New York liaison office more effective rather than avoiding it.

Testimony regarding the reason for transferring the Applicant

44. Mr. FF explained that the UNCTAD Secretary-General took the decision to transfer the Applicant with a view to strengthening the New York liaison office on budgetary issues, as UNCTAD officials from Geneva often had to travel to New York to cover these issues, which was very costly.

45. The Applicant stated that the transfer decision was in reality made by Mr. CC, Mr. GG and Mr. FF, although the UNCTAD Secretary-General may have made the final decision on the incorrect information that he received. The Applicant testified that he was transferred because the relationship between the UNCTAD senior management and Mr. AA had broken down and they therefore wanted someone in the New York liaison office who they could trust would report back to them. Mr. BB explained that, although he did not know the details, it was his feeling that the Applicant was transferred to his Section in Geneva because someone wanted to remove him from New York and that he was forced into the new post.

The alleged lack of consultation in connection with the Applicant's transfer

46. It was clear from the evidence before the Tribunal that neither of the Applicant's supervisors—Mr. AA in the New York liaison office and Mr. BB in the Trade Information Section, TAB, Geneva—nor Mr. HH, the Head of TAB, were consulted on the Applicant's proposed lateral transfer; only Mr. EE, who occasionally served as Officer-in-Charge for TAB in Mr. HH's absence, was informed about it (see paras. 17, 21 and 26 above).

The Applicant's suitability for the post as Economic Affairs Officer in the Trade Information Section, TAB

47. The Applicant explained that the job as Economic Affairs Officer in the Trade Information Section, TAB, to which he was to be transferred in Geneva, was that of a statistician dealing with a database, that he was a microeconomist, and that he had never worked on databases or any such related processes before. He therefore did not believe that he was competent to do the job.

48. This was confirmed by the testimony of Mr. BB, the then Chief of the Trade Information Section, TAB. Mr. BB, when asked about the Applicant's transfer to his Section, informed Mr. EE that he did not believe the Applicant was suitable for the job. Mr. BB explained that the Applicant's predecessor had been a statistician and that handling the relevant database was a very complicated task, which the Applicant, even if he received the proper training, would not be able to undertake. When, in the past, the Applicant had assisted the Trade Information Section, it had been with different tasks, such as workshops reports and presentations in Latin America as he was a native Spanish speaker and an economist. When the Applicant was transferred to the Trade Information Section, Mr. BB therefore outsourced him to other offices of TAB for 90 percent of the time; consequently, the Applicant only worked for the Trade Information Section 10 percent of the time. Mr. BB said he specifically outlined the Applicant's tasks in his e-PAS report to reflect his actual work, meaning that they did not relate to the job description for the post. Had he done so, the Applicant would likely have received a much lower rating in his e-PAS report for 2011–2012 than the one he was given, namely "exceeds performance expectation", as he simply would not have been able to perform the functions. Rather than his own views alone, the rating of the Applicant's performance therefore reflected the feedback that Mr. BB had received from others.

49. Mr. EE testified that he believed that the Applicant had the qualifications, skills and experience to undertake the job of Economic Affairs Officer in Geneva.

The Applicant was not expected to undertake the same functions as his predecessor, and the tasks of the post were adjusted in light of a multiagency initiative. He stated that the Applicant likely spends around 50 percent of his time in the Trade Information Section, TAB, and that his latest e-PAS rating was a common evaluation as the Sections in TAB tried to work as much as possible as a team. However, under cross-examination, he was constrained to admit that, in his written statement, he had described the Applicant's qualifications, research and drafting skills as matching the position in Geneva "to a large extent", and that adjustments had to be made for him to work with the database management. He said, because of the Applicant's high professional potential and skills, he has shown his capacity to learn new issues and acquire new skills, especially as he was working under the Section Chief, Mr. BB.

The job description for the Applicant's new post in Geneva

50. Mr. BB explained that, around the time of the Applicant's transfer, Mr. EE requested him to update the job description for the Geneva post. On providing his initial draft to Ms. DD, she asked whether the Applicant would fit the job description. When Mr. BB responded in the negative, Ms. DD said she had hoped the job description would be adapted to suit the Applicant, and that she would need to report this to the Secretary-General of UNCTAD.

51. Ms. DD stated that the decision to update the job description was taken *after* the decision to transfer the Applicant to the post, but before the actual transfer took place and attempts were made to have Mr. BB finalize it. She denied ever having threatened to report Mr. BB to the Secretary-General of UNCTAD for not complying with her instructions. Mr. EE explained that he had contributed to the job description prepared by Mr. BB, that it had been presented to "Personnel" and that he did not know why it had disappeared and not been presented to the Tribunal.

The reclassification of the Applicant's former post in New York

52. On 15 February 2010, a “Classification Notice” was signed whereby the job description of the post at the P-3 level, then held by the Applicant in the liaison office in New York, was redesignated as “Liaison Officer”. The original job description was not adduced in evidence. This notice was signed by various officials, including Mr. FF, but not by Mr. AA, although his name and title appear in typed print as a requirement for certifying the correctness of the job description at a place marked: “SIGNATURE OF SUPERVISOR: (Certification Of Correctness of job description)”. Mr. CC explained that this reclassification was undertaken in response to a request from some UNCTAD Member States. Although Mr. FF admitted that the New York liaison office had not been consulted regarding the reclassification, no explanation was tendered for this.

53. From what is apparently discernable on the classification notice, (which is unreadable in parts as the adduced copy is missing some of the text), amongst the duties and responsibilities of the post, the Liaison Officer would dedicate 40 percent of her/his time to “Liaison support”, 35 percent to “Intergovernmental support”, 15 percent to “areas of economic analysis and technical cooperation”, 10 percent to “[unreadable] and Collaboration”. However, in his oral evidence, Mr. FF emphasised that these latter areas were the ones, which UNCTAD’s senior management resolved to strengthen at the New York liaison office by transferring the Applicant to Geneva. In his testimony, the Applicant indicated that, because of his extensive network of contacts, skills and experience, he believed he could easily have been able to undertake these new functions in New York, if required, and that he was performing most of them anyway. This was corroborated by Mr. FF, who stated that, with appropriate training, the Applicant, as an economist, could have done so.

The general atmosphere in UNCTAD

54. As evidence of the general malaise in UNCTAD at the time, the Applicant produced the 2012 Report of the Joint Inspection Unit (“JIU”) of the United Nations System on the management and administration of UNCTAD. Amongst JIU’s findings was that “[t]he UNCTAD secretariat lacks a clear corporate strategy to successfully carry out its mandate” and that “a perceived lack of leadership from top management negatively impacts on the coordination of work in the secretariat ... [contributing] to the creation of a silo structure and a weak communication culture between the top management and staff”. Regarding human resources management, the report stated that “[t]he JIU staff survey reveals that staff members are highly dissatisfied, frustrated and demotivated with the functioning of human resources management” and that “[r]ecruitment and selection process are considered non-transparent and career development needs strong links to individual performance”. The report’s findings were confirmed by Mr. CC, who stated that 72 percent of international staff felt that staff movements were not based on merit and performance. He described the atmosphere in UNCTAD as tainted by “some uncertainty”, because it was a highly politicised organisation.

Applicant’s submissions

55. The Applicant’s contentions may be summarised as follows:

a. While UNCTAD had a margin of discretion when deciding on transferring the Applicant, this discretion was not unfettered. The decision may not be arbitrary or taken against mandatory procedures, nor ill-motivated or in bad faith. In this case, it was arbitrary, against procedures and tainted by improper motives and bad faith;

b. Pursuant to *Islam* 2010-UNAT-115, when a justification is given by the Administration, it must be supported by facts. The Respondent states that there was a need to reclassify the post in New York, that this required his

transfer, and that a suitable post was found for him in Geneva matching his skills and qualifications. However, this account is not supported by the facts;

c. The report of the JIU demonstrates that the atmosphere of UNCTAD at the relevant time was unpleasant and that procedures were not being followed. Furthermore, the evidence demonstrates that Mr. CC tried to downplay his close and cordial relations with the Applicant and tried to cover up for the real motivation behind the Applicant's transfer, namely his refusal to provide information to him about Mr. AA's activities and alleged relations with UNCTAD Member States;

d. The reclassification of the Applicant's former post in the New York liaison office was simply a pretext for getting rid of the Applicant and was uncertified as to its correctness by Mr. AA. Even if the reclassification was lawful, it does not follow that the Applicant had to be transferred as he would have been able to undertake the new functions;

e. Furthermore, the Applicant was unqualified for the job to which he was transferred in Geneva and no input was sought from neither Mr. BB nor Mr. HH. Mr. GG would have been able to testify to this information, but deliberately chose not to participate in the proceedings. Furthermore, the evidence clearly shows that the Applicant was not qualified for the post;

f. In addition to the harm done to his professional career, the Applicant suffered from considerable stress over a long period of time, which should be compensated with six months' net base salary.

Respondent's submissions

56. The Respondent's contentions may be summarised as follows:

a. While there is no legal requirement for the Administration to consult before a transfer decision is made, consultations did take place in the case of

the Applicant. However, such consultations do not equal negotiations and no consent needs to be obtained. Moreover, consultation does not prevent the Administration from making future plans insofar as the consultations are conducted in good faith. The Applicant had a chance to present his views both by telephone and email and these were taken into account when making the decision, as demonstrated by the testimony of Ms. DD and Mr. FF. Attempts were also made to contact Mr. AA. Nevertheless, it was decided to transfer the Applicant, although some flexibility was shown in that the transfer was only executed one year later;

b. The decision to reclassify the New York position was taken by UNCTAD's senior management, and the Applicant's transfer was done for genuine operational needs. The Administration has broad discretion to do so and the transfer was carried out within the scope of the Staff Rules as the Applicant's skills were not at odds. Under *Allen* UNDT/2010/212 (as affirmed by the United Nations Appeals Tribunal ("UNAT") in *Allen* 2011-UNAT-187), the Administration is not bound by the staff member's preference; otherwise, the Organization would not be functional;

c. While it is for the Administration to decide on a transfer, it may not abuse its discretion or violate the relevant procedures. However, it is for the Applicant to prove ill will and retaliation, which he has not been able to do;

d. There was a need to strengthen the New York liaison office in dealing with international bodies on budgetary issues. UNCTAD officials from Geneva had to travel to New York to handle these matters which was very costly. In addition to the New York liaison office not functioning well, it was considered that the Applicant was not able to fulfill these new functions and a suitable replacement had to be found. Although tensions existed and the Applicant may have gotten caught in some high-level political issues, he

has not been able to establish a causal link between this and the decision regarding his transfer, which was taken much later. Also, it has not been suggested by any witnesses that the proposed transfer of the Applicant came from Mr. CC; rather, it came from Mr. FF and Mr. GG;

e. It is not a requirement that, when being transferred, a staff member's skills and qualifications exactly match the job description, and Mr. EE explained that the Applicant met most requirements. Although Mr. HH was the Head of TAB, he was often absent due to missions and illness, and Mr. EE would perform the functions of Officer-in-Charge. Therefore, Mr. EE was in a good position to decide whether the Applicant was a match for the post. Also, the Applicant had the educational background to undertake the functions of the job and has proven to be a valuable and highly evaluated staff member. Mr. BB did not see the larger picture, but solely focused on the work of his former section, the Trade Information Section, TAB. When asked, Mr. BB could not recall names of other sections in TAB and had, some years previous to the event of the present case, signed the Applicant's e-PAS report without knowing the details. Mr. BB should have updated the job description for the post as Economic Affairs Officer in the Trade Information Section years ago. After the Applicant arrived at the Trade Information Section, it continued to function perfectly well;

f. The Applicant exaggerated his suffering in respect to his transfer from New York to Geneva, where 300 UNCTAD staff members work. This did not harm his career and the Applicant may still apply for other positions.

Consideration

Scope of the case

57. On 25 October 2011, the parties jointly filed the following agreed issues:

- a. Whether proper consultation in good faith took place with the Applicant prior to the decision to transfer him to Geneva?
- b. Who within the UNCTAD management took the decision to transfer the Applicant from New York to Geneva?
- c. Whether the decision to transfer the Applicant from New York to Geneva was motivated by lawful operational reasons?
- d. Whether the decision to reclassify the Applicant's post in New York was made for genuine operational reasons?
- e. Whether the Applicant's skills and qualifications matched the post in Geneva to which he was transferred?

58. Based on the parties' submissions, including these previously agreed issues, the principal matter in this case, namely the propriety of the Applicant's lateral transfer within UNCTAD from New York to Geneva, may properly be determined by examining the following three sub-questions:

- a. Were all relevant consultation procedures followed prior to deciding to transfer the Applicant to Geneva?
- b. Was the Applicant properly informed about the reasons for his transfer?
- c. Was the transfer decision arbitrary and tainted by improper motives?

Did the Administration follow proper consultation procedures when deciding to transfer the Applicant?

59. In his application dated 21 May 2010, one of the Applicant's principal arguments was that the Administration had failed to follow mandatory consultation procedures before taking the decision to laterally transfer him from New York to

Geneva. In his closing statement to the Tribunal, however, the Applicant's Counsel did not reiterate this contention, but rather stated that the lack of consultation was demonstrative evidence of UNCTAD's ill-motivation behind the transfer.

60. Therefore; suffice to note that the email of 27 November 2009 from Mr. GG to Mr. EE implies that the transfer of the Applicant was a *fait accompli* not to be made public, was already decided upon before the Applicant was consulted, and that the Respondent's own witnesses acknowledged that it would have been prudent to consult both supervisors; the Tribunal need not make any further comment on this aspect.

Was the Applicant properly informed about the reason for his transfer?

61. Any administrative decision entails a reasoned determination arrived at after consideration of relevant facts since there is a duty and requirement on institutions to act fairly, transparently, and justly in their dealings with staff members; and a decision taken without reasons would be arbitrary, capricious and therefore unlawful (para. 33 in *Obdeijn* UNDT/2011/032, as affirmed by the United Nations Appeals Tribunal in *Obdeijn* 2012-UNAT-201). Furthermore, in *Gehr* 2012-UNAT-236, the Appeals Tribunal ruled that the Administration must inform a staff member, if s/he is to be transferred, about the reasons for this administrative decision, and cited the Administrative Tribunal of the International Labour Organisation ("ILOAT") in its Judgment No. 3084:

[T]he staff member is entitled to be informed of the reasons for the reassignment. In addition to ensuring transparency in decision making, providing the reasons for the reassignment permits a staff member to assess the courses of action that may be taken, including the lodging of an appeal, and it also permits a review of the lawfulness of the decision on appeal.

62. When providing the reasons for an administrative decision, the Appeals Tribunal has further stated that these reasons must be justified by the facts (*Islam* 2011-UNAT-115).

63. In the present case, although some explanation, namely his qualifications and experience, was provided in Ms. DD's email of 20 January 2010, the Applicant was not provided with particulars for his transfer up until the management evaluation of his appeal. In this management evaluation it was stated that he was being transferred for the following reasons:

- a. The Applicant's "qualifications and experience [had] previously been regularly requested and utilized by TAB, even while [he] were on [his] current assignment in New York";
- b. The Applicant's post in New York had been "redefined and as such may not make full use of [his] skills and experience"; and
- c. There was "a clear need for [the Applicant's] skills and experience in TAB, Geneva".

64. The Tribunal finds that none of these reasons are credible based on the evidence before it:

- a. While working for the New York liaison office, the Applicant's previous work for TAB was mainly to assist with workshops and presentations in Spanish in Latin America, preparing reports, and collating information for publications. This is quite dissimilar to that of an Economic Affairs Officer in the Trade Information Section in TAB, whose work primarily is to manage a database which, according to Mr. BB, is a statistician's job and not an economist's job;
- b. Regarding the Applicant's redefined, or reclassified, post in New York, the reclassification was made *post facto*, long after the decision to transfer the Applicant and after he had commenced litigation, casting doubt on the motivation behind the same. Furthermore, Ms. DD said good managerial practice would have been to first make the reclassification, and then to decide

on the transfer. In any event, the post remained as a P-3 level post and the functions appeared largely to remain the same although the emphasis on budget matters was to be strengthened. By all accounts, the Applicant was well-suited to perform these tasks and even Mr. FF, the Respondent's own witness, admitted that the Applicant could, possibly even quite easily, have undertaken the new additional functions with the appropriate training; a view shared by the Applicant. It is therefore improbable that the Applicant, who had consistently received excellent performance ratings, would no longer make "full use" of his "skills and experience" in the post;

c. As regards the "clear need" for the Applicant's skills and experience in TAB, Geneva, his supervisor, Mr. BB, as also confirmed by Mr. HH, the Head of TAB, in his email dated 17 September 2010, unambiguously stated that the Applicant was not qualified nor skilled for the position of Economic Affairs Officer in the Trade Information Section, TAB. Mr. EE too conceded that adjustments had to be made to accommodate the Applicant and that it was his high professional skill and dedication that ensured a beneficial input. Thus, it is implausible that there was "a clear need" for his skills and experience in a post with no updated job description in TAB, Geneva.

65. In accordance with *Islam*, the Tribunal therefore finds that the reasons provided by MEU to the Applicant for his transfer were not supported by the facts. In light of the decision to first transfer the Applicant to a post with no job description, thereafter followed by a decision to reclassify his previous post in the New York office to include budgetary matters, the provided justifications appear tenuous at best. Furthermore, contrary to the reasoning in *Gehr* (and the ILOAT in its Judgment No. 3084 and *Obdeijn* 2012-UNAT-201), the Tribunal finds that the Applicant was provided with these, although flawed, reasons so late in the process, thus not only impeding him from properly presenting his case before the MEU, but also—particularly in light of the totality of credible evidence—leaving the Tribunal with

the distinct impression that they were furnished *post facto* to provide a justification for the transfer.

Was the decision to transfer the Applicant arbitrary and tainted by improper motivation?

66. With regard to UNCTAD's senior management's power to laterally transfer the Applicant from New York to Geneva, sec. 2.4 of ST/AI/2006/3/Rev.1 (Staff selection system), which was the relevant administrative instruction applicable at the time of the transfer decision, stipulates that "Heads of departments/offices retain the authority to transfer staff members within their departments or offices to vacant posts at the same level". In line herewith, the Appeals Tribunal in *Gehr*, at para. 2, ruled that "[a]n international organization necessarily has the power to restructure some or all of its departments or units, including ... the redeployment of staff" (referring also to ILOAT in its Judgment No. 2967 (2011)).

67. UNCTAD senior management therefore had a broad margin of discretion in deciding to transfer the Applicant internally within UNCTAD, from the New York liaison office to the Trade Information Section, TAB, in Geneva. Nevertheless, as with any other administrative decision, the authority to transfer a staff member is not unfettered. On the specific issue of transfer, the former United Nations Administrative Tribunal stated in Judgment No. 954, *Saaf* (2000) that it is:

... the established law ... that, while the Administration has a discretion to transfer (cf. Judgements No. 167, *Fernandez Rodriguez* (1973) and No. 189, *Ho* (1974)), the discretion must not be abused. The discretion to transfer may have been abused, inter alia, if an appropriate procedure was not followed, or the decision was implemented in an arbitrary manner which resulted, for example, in injury to the good name and dignity of the staff member, or undue harm and injury was caused to the staff member.

68. In line herewith, the Dispute and Appeals Tribunals have consistently upheld that an administrative decision must not be arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation (see, for instance, *Assad*

2010-UNAT-021, *de Kermel* 2012-UNAT-239 and *Badawi* 2012-UNAT-261). The onus of proving such ill-motivation or extraneous factors rests with the Applicant (*Parker* 2010-UNAT-012) who has to discharge his burden on a preponderance of evidence (*Azzouni* 2010-UNAT-081). However, in *Obdeijn* 2012-UNAT-201, paras. 38 and 39, the Appeals Tribunal stated that “whereas, normally, the staff member bears the burden of proof of showing that a decision is arbitrary or tainted by improper motives”, if the Administration refuses to disclose its reasons for a contested decision, the burden of proof shifts so that it is for “the Administration to establish that its decision was neither arbitrary nor tainted by improper motives.” The Tribunal finds that the test from *Obdeijn* may be similarly applied to situations where staff members are provided with faulty and belated reasons, such as in the present case. While the Administration’s failure to provide substantiated reasons does not automatically render the contested decision arbitrary, the Tribunal may draw an adverse inference from it. In the final outcome, no proper (or for that matter true) reasons for the contested decision were disclosed by the Respondent to the Applicant or to the Tribunal. In the circumstances of this case, taking into account the lack of any substantiated reasons for the contested decision, and the surrounding circumstances as explained below, the Tribunal is bound to draw an adverse inference that no proper reasons existed and find that the decision was, if not tainted by improper motives, at least arbitrary.

69. It is evident from the JIU report and the evidence of some of the witnesses that there were severe human resources mismanagement issues at UNCTAD, at the material time, creating a general sense of discontent within the Organization. The evidence presented to the Tribunal forms a picture of a highly fragmented institution headed by a senior management that appeared much distanced both physically and psychologically, not only from the New York liaison office, but also generally from a large portion of its staff.

70. From the evidence of the Applicant, Mr. AA and Mr. CC, it is clear that the relationship between the two latter personalities, and thereafter the two duty stations,

became strained and laden with mistrust. In particular, Mr. CC suspected Mr. AA's close involvement with UNCTAD Member States in many of the activities of UNCTAD, particularly in their objection to the selected UNCTAD Special Representative in New York and the drafting of the letter protesting this selection.

71. The gravity of the encounter between the Applicant and Mr. CC in the Vienna Café clearly establishes that their previously cordial relationship had deteriorated to an unacceptable level. Also, by staying away from the New York liaison office, Mr. CC, and therefore the Geneva office, no longer had any insight as to the activities in the New York liaison office. Taking the totality of the evidence, the Tribunal finds, on balance, that the Applicant has with sufficient probability established that his formerly cordial relationship with Mr. CC was seriously strained as a result of Mr. AA and Mr. CC's disagreements and the increasing level of mistrust between them, fueled by the Applicant's refusal to report, or "spy", on activities in the New York office. Having heard the evidence, and having observed the witnesses, the Tribunal was able to assess their credibility and finds that the Applicant's refusal to monitor the activities of Mr. AA was of grave concern to Mr. CC, who thereafter excluded the Applicant from meetings, and found him to be "useless". At this stage, the Applicant said he knew he was a "dead" man.

72. In sum, the circumstances surrounding the decision to transfer the Applicant from New York to Geneva were peculiar and unsatisfactory. The decision appeared to have been taken with undue haste and with bad timing during Mr. AA's prolonged six weeks' leave to his home country, Bhutan. Neither of the immediate supervisors, Mr. AA nor Mr. BB, was consulted before the secretive transfer was decided upon, as would have been expected, even if not lawfully necessitated, if indeed the transfer was undertaken for operational reasons. Considering that UNCTAD was an institution with a poor record of human resource management, which Mr. CC described as highly politicized and Mr. GG as a "mad house [that] thrives on false and self-serving gossips worse than infantile chatting fish vendors", it would hardly be justifiable to exclude these persons from the decision-making process and instead

present them with a *fait accompli* unless, as was testified to and which the Tribunal accepts, it was done to avoid any resistance or opposition from them.

73. Furthermore, considering the justifications provided by MEU that the transfer decision was based on the Applicant's qualifications, skills and experience and the operational needs of UNCTAD in New York and Geneva, it is most peculiar that the process of reclassifying the post in New York had not even been initiated at the time the transfer was decided upon, nor was there a job description for the post in Geneva to which the Applicant was being transferred. Ms. DD admitted that it would have been good managerial practice to first make the reclassification and then to decide on the transfer. This impression is further enhanced by Mr. BB's unequivocal explanation that the Applicant lacked the necessary qualifications, skills and experience for the job as Economic Affairs Officer in his Section, the Trade Information Section in TAB, which was basically the job of a statistician and not an economist such as the Applicant. Mr. BB, a statistician himself and a long-standing expert in his field, did not believe the Applicant would be able to obtain these skills and qualifications with the appropriate training. The occasional Officer-in-Charge of TAB, Mr. EE, believed that Mr. BB did not see the full picture of TAB's needs, but this statement is contradicted by Mr. EE's own supervisor, the regular Head of TAB, Mr. HH, who in his email dated 17 September 2010 expressed his "sympathy" with Mr. BB's view that the Applicant would not be suited for the job. Indeed, Mr. EE acknowledged that adaptations had to be made to accommodate the Applicant.

74. By far the most glaring of omissions is the fact that the Applicant has to date not been provided with a job description. Ms. DD's request that Mr. BB adapt the job description to the Applicant's skills and qualifications must surely be a blatant disregard for the job evaluation and job description procedures and clear evidence that the Applicant was not suited for the position in Geneva.

75. The circumstances surrounding the reclassification of the Applicant's former post in New York were also highly unconventional. The process was initiated in

Mr. AA's absence and appears to have been rushed through to be completed before his return from his vacation. It is noticeable that Mr. AA did not sign the "Classification Notice" even though his signature was required in order to confirm the correctness of the job description. Furthermore, Mr. FF's oral evidence was that the Applicant could relatively easily have been trained to undertake the additional tasks regarding budget matters.

76. Perhaps by far the most damaging piece of evidence were the comments by Mr. EE, whom the Tribunal found to be a very reliable and independent witness, that the Applicant's transfer was not conducted under "normal conditions" and that the circumstances under which the Applicant was transferred were "quite extraordinary" with regard to someone in a P-3 position. He stated that in all his 24 years of service with UNCTAD, he had not previously seen such a case, which he deemed to be something "exceptional or rare".

77. The above findings and observations leave some crucial questions unanswered. If indeed it was necessary to strengthen the budgetary capacities in the New York liaison office on reclassifying the Applicant's former post at the P-3 level, why was the Applicant not simply offered the necessary training to do the job which he was competent to do by all accounts, including those of the Respondent's witnesses? Why reassign the Applicant, a long-serving staff member with an excellent performance record, against his will, to a job for which he did not possess the necessary qualifications, skills and experience; a transfer coupled with the transfer of the Geneva staff member to New York, which must have been very costly for UNCTAD? Why were the Applicant's immediate supervisors, the two most affected UNCTAD senior officers, not involved in the decision-making process? Why were the alleged operational requirements not disclosed to the supervisors or the Applicant previously? What was the genuine motivation behind the Applicant's transfer as it was clearly not the operational needs of UNCTAD and the Applicant's qualifications, skills and experience as referred to in the management evaluation?

78. In summary, the Tribunal finds that the circumstances surrounding the decision to transfer the Applicant were highly irregular and irrational in that:

- a. The reasons provided to the Applicant by MEU were obviously flawed and given to him excessively late in the process;
- b. Neither the Applicant nor any of his immediate supervisors were, to all intents and purposes, consulted about the transfer, which was not to be made public, thus lacking in transparency;
- c. The process of reclassifying the Applicant's post in the New York liaison office was initiated *after* the decision to transfer the Applicant away from the office was taken and appears to have been rushed through to avoid the involvement of the Chief of the New York liaison office, Mr. AA;
- d. There is no job description for the post in Geneva to which the Applicant was transferred, a job for which the Applicant was clearly not qualified;
- e. The Respondent's own witnesses admit that the process was extremely unusual and not handled in accordance with good managerial practices.

79. Applying the test of *Obdeijn*, considering the lack of any substantiated reasons by the Respondent for the contested decision, and the surrounding circumstances, the Tribunal is bound to draw an adverse inference that no proper reasons existed and find that the decision to transfer the Applicant was, if not tainted by improper motives, at least arbitrary. Alternatively, even on application of the *Azzuni* test, on a preponderance of evidence, by the Administration acting so exceptionally irrationally and being disingenuous about its reasons, the Tribunal finds that the Applicant has succeeded in demonstrating the decision was, if not tainted by improper motives, at least arbitrary. Consequently, the Tribunal is left with no other possibility than to find the transfer unlawful.

Compensation

80. The only relief, which the Applicant claims, is for the mental suffering he endured as a result of his lateral transfer from New York to Geneva.

81. Pursuant to the United Nations Appeals Tribunal's judgment in *Antaki* 2010-UNAT-095, for the Tribunal to award compensation for such non-pecuniary damages under art. 10.5 of its Statute, the Applicant must be able to substantiate his losses. The purpose of such compensation would be to place the Applicant in a position as had the Administration complied with its obligations (*Warren* 2010-UNAT-059 and *Ianelli* 2010-UNAT-093) and the quantification of this compensation therefore depends on the specific harm that he suffered (*Solanki* 2010-UNAT-044). In accordance with art. 10.7 of the Statute, such compensation may not amount to an award of punitive damages.

82. From June 2012 until January 2013 the Applicant was on leave (30 days of which was his accrued leave but the rest unpaid) to restore his mental health and due to family commitments in his home country, Ecuador. Despite his excellent record and his being rostered for a P-4 position, he says his career has come to a standstill at the P-3 level for 12 years. Indeed, the candid evidence of Mr. EE was that the Applicant was hard-working, adaptable with highly professional skills, very competent, an asset to UNCTAD, and more than ready for promotion. The Applicant said he wants his job description and to revert to doing substantive work for the United Nations although not necessarily for UNCTAD.

83. When providing testimony about his injuries, the Applicant stated that his primary objective was to be vindicated from all the intrigue to which he was exposed during the transfer process. He feels that he is still viewed as someone who refused to collaborate and hopes that it is understood why he refused to do so. The entire process caused him tremendous mental suffering, which resulted in him being depressed and unable to sleep. At the time, he consulted the United Nations psychiatrist, but he now felt well. His transfer also led to the break-up of his

relationship with his girlfriend in New York as she would not give up a promising career in New York. While the Respondent did not rebut or deny any of this, he stated that the Applicant exaggerated his sufferings.

84. During his testimony, the Tribunal closely observed the Applicant who was visibly and genuinely traumatised and upset by his experiences in connection with his transfer. The Tribunal finds that there was a clear causal link between these significant psychological sufferings and the circumstances surrounding his transfer. However, despite his suffering, the Applicant told the Tribunal that he simply wants to move on with his life, he wants his job description and he desires to continue to serve the Organization he so believes in with dedication. The Tribunal finds that this Judgment has in part vindicated the Applicant for taking a principled stand.

85. In *Obdeijn* UNDT/2011/032, the applicant was awarded USD8,000 for the emotional distress and injury, which he suffered as a result of the Respondent's failure to disclose the reasons for his non-renewal. The Appeal Tribunal subsequently affirmed this award (*Obdeijn* 2012-UNAT-201). In the present case, the Applicant also incurred emotional distress and injury in relation to being provided with no proper but flawed and belated reasons for an important employment decision. However, in the present case, the Applicant's suffering was exacerbated by the arbitrariness of his employer's decision and the secrecy and disingenuity surrounding it, which caused the Applicant significant additional anxiety.

86. In light of the above, the Tribunal finds that the Applicant is to be awarded USD15,000 for the non-pecuniary damages which he suffered as a result of UNCTAD's breaches of his rights.

Conclusion

87. Pursuant to arts. 10.5 and 10.6 of the Statute of the Dispute Tribunal, the Tribunal orders the Respondent to pay to the Applicant USD15,000 as compensation for non-pecuniary damage which he suffered.

88. The total sum of compensation and costs as detailed above in para. 87 is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Ebrahim-Carstens

Dated this 19th day of April 2013

Entered in the Register on this 19th day of April 2013

(Signed)

Hafida Lahiouel, Registrar, New York