



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/044
UNDT/NBI/2010/045
UNDT/NBI/2010/077
Judgment No.: UNDT/2013/157
Date: 4 December 2013
Original: English

Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

NWUKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Bérengère Neyroud, ALS/OHRM

Introduction

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA). He has seven substantive applications¹ before the Tribunal in which he contests administrative decisions taken between August 2008 and July 2011. He alleges that the challenged administrative decisions are unlawful because they are in breach of specific regulations or rules. In addition he alleges that each of the decisions is an example of a continuing pattern of discrimination, harassment and abuse of authority against him by the Executive Secretary of the Economic Commission for Africa (ES/ECA).

2. This judgment decides three of these Applications, UNDT/NBI/2009/044, UNDT/NBI/2010/045 and UNDT/NBI/2010/077 (the Trio), which were consolidated and heard together.

3. In Case No. UNDT/NBI/2009/044 the Applicant alleged: a) that his 2008 and 2009 requests for an investigation into his complaints of discrimination were not investigated; and b) that he was unlawfully required to be interviewed for a post for which he had applied.

4. In Case No. UNDT/NBI/2010/045 he challenged: a) the selection of another candidate for the post of Director, Trade, Finance & Economic Development (D/TFED); b) the changes to the management structure of ECA; c) the transfer of responsibility for the Millennium Development Goals/ Poverty Analysis and Monitoring Section (MDGs/PAMS) to the Economic Development & NEPAD Division (EDND); and d) his transfer or redeployment to EDND.

5. In Case No. UNDT/NBI/2010/077 he alleged that the Assistant Secretary-General of the Office of Human Resources Management (ASG/OHRM) had initiated disciplinary proceedings against him and failed to provide him with a copy of an investigation report about his 2010 complaint.

¹ UNDT/NBI/2009/044, UNDT/NBI/2010/045, UNDT/NBI/2010/077, UNDT/NBI/2011/001, UNDT/NBI/2011/008, UNDT/NBI/2011/060 and UNDT/NBI/2011/082.

Procedural Matters

6. The Applicant has represented himself in all of his cases since February 2010. Before the hearing of the substantive applications the Tribunal heard and decided a number of interlocutory matters. These included applications for suspension of action², challenges to receivability, and numerous motions on admissibility of documents and confidentiality.

7. Hearings were held in the seven cases over eight consecutive working days in September 2013. The Trio was heard from 9-11 September 2013. In preparation for these hearings the Tribunal made several case management orders, which included the consolidation of the Trio of cases.³

8. In accordance with these orders, the Tribunal received oral and documentary evidence in each case on the clear understanding of both parties that, to avoid duplication of documents and evidence, the Tribunal would make its determination in the Trio first and refer to any relevant findings of fact and law made in the Trio in the subsequent judgments.

9. The background to all of the cases is set out in full in this judgment. Where relevant they are repeated in summary form in the four other cases. This judgment outlines the facts relating to the Trio in a single narrative. The submissions of the parties, the law, and the considerations for each individual case follow. All posts referred to are ECA posts unless otherwise stated.

10. In his closing submissions the Applicant made the point that no Secretary-General's Bulletin (SGB) had been promulgated concerning the restructuring of ECA since 2005. At the request of the Tribunal the Respondent provided additional written submissions on the legal status of the structural changes in the absence of a corresponding SGB.

² See also 2010-UNAT-099, 2012-UNAT-230, and 2013-UNAT-330.

³ Order Nos. 094 (NBI/2013); 126 (NBI/2013); 129 (NBI/2013); 146 (NBI/2013); 155 (NBI/2013); 165 (NBI/2013); 171 (NBI/2013); 172 (NBI/2013); 193 (NBI/2013) and 199 (NBI/2013).

11. The Applicant was given time to respond in writing. His opposing submissions were considered by the Tribunal.

Issues

12. The Tribunal identified the issues to be determined based on the pleadings of the parties, the Tribunal's previous rulings and the orders made by UNAT in *Nwuke* 2010-UNAT-099. The parties agreed on the issues at a case management hearing. Following the hearings the wording and sequences of some of the issues have been slightly modified by the Tribunal for consistency of expression and to reflect the chronology of events.

13. The issues in Case No. UNDT/NBI/2009/044:

- a. Was there a failure by ECA to investigate the complaints against the Advisory Selection Panel (ASP) made by the Applicant on 4 August 2008;
- b. Was there a failure by ECA to investigate the Applicant's 29 June 2009 and 12 March 2010 complaints against the ES/ECA to the SG?
- c. If there were failures were they lawful?
- d. Was the decision of 15 June 2009 to require the Applicant to be interviewed for the post of D/TFED lawful?

14. The issues in Case No. UNDT/NBI/2010/045:

- a. Did the October 2009 selection decision for the post of D/TFED amount to harassment and discrimination against the Applicant.
- b. Did the changes to the management structure of ECA in September 2009 have a legislative mandate?
- c. Was the transfer of responsibility for the MDGs to EDND lawful?
- d. Was the transfer or redeployment of the Applicant to EDND lawful?

15. The issues in Case No. UNDT/NBI/2010/077:

- a. Did the ASG/OHRM decide to initiate disciplinary proceedings against the Applicant without duly informing him and if so was it lawful?
- b. Was the decision of the ASG/OHRM of 12 August 2010 not to declassify her letter of 30 July summarizing the conclusions and recommendations of the Investigation Panel lawful?
- c. Was the decision of the ASG/OHRM not to provide him with a copy of the investigation report lawful?
- d. Was the appointment of a non-United Nations staff member (Ssekandi) to membership of the Investigation Panel lawful?

The Evidence

16. The Parties produced a bundle of all documents referred to by the witnesses or in submissions for the hearing. The witnesses in the Trio of cases were: the Applicant, Mr. Abraham Azubuike, the then President of the ECA Staff Union, Mr. Hachim Koumare, former Director of the ECA Sub-regional Office in Central Africa and Dr. Monique Rakotomalala, former Director of the African Centre for Gender & Social Development (ACGSD). Some of the evidence given by Ms. Doreen Bongoy-Mawala in Case No. UNDT/NBI/2011/001 was relevant to Case No. UNDT/NBI/2010/045. The Applicant's evidence comprised his sworn confirmation of the facts alleged by him in his applications and subsequent documentation supplemented by his oral testimony.

17. The Respondent called Mr. Adeyemi Dipeolu, Chief of Staff, Office of the ES, ECA.

The Facts

Background

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

19. Until March 2003 he worked as a Senior Economist in the Economic and Social Policy Division (ESPD) of ECA. His duties included the management of the activities of the African Learning group as well as preparing reports, policy and position papers for the ES. From April to December 2003 he worked in the Office of Policy and Programme Coordination performing similar functions. In January 2004, he was transferred to the Trade and Regional Integration Division (TRID) where he worked at the P-5 level under the then Director, Mr. HH.

20. From March to June 2005 he was seconded from ECA as a Special Adviser to the Nigerian Minister of Finance. On his return to ECA he resumed working at TRID where his relationship with Mr. HH had deteriorated.

21. The ES who is relevant to this case was appointed in early 2006. Until then the Applicant had applied for one D-1 post at ECA. After the arrival of the ES a large number of vacancies became available over a short period of time. The Applicant applied unsuccessfully for six or seven D-1 posts up to August 2008.

22. In 2006 as part of an ECA repositioning exercise all P-5 staff members were appointed Chiefs of Sections. The Applicant became the Chief of the Millennium Development Goals and Poverty Analysis and Monitoring Section (MDGs and PAMS) which was moved from TRID to ACGSD. The Officer-in-Charge (OIC) of ACGSD was Ms. TR.

23. In 2007, the Applicant applied for the D-1 post of Director of NEPAD and Regional Integration Division (NRID). In two emails to the Chief of the Human Resources Services Section (HRSS) dated 17 December 2007, copied to Mr.

Dipeolu and others, he requested that Mr. HH not be on the panel to interview him for this post. He set out full reasons for this which included Mr. HH's "malignant prejudice" towards him. The Chief of HRSS replied that the ES handled the appointment of members of the ASP and she could not discuss the issue until after the interview which she advised him to attend. She told him that if he felt he was not handled properly in the interview he could bring his concerns to the attention of the ES.

24. The Applicant attended the interview. Mr. HH was on the panel. The Applicant was not appointed but did not formally challenge the selection process at this time.

25. Up to November 2008 the Applicant's relationship with the ES was cordial. This was substantiated by other witnesses who noted that up to this time the ES often relied on the Applicant's abilities as a speech writer and policy analyst. While on mission in Copenhagen the Applicant informed the ES of his intention to apply for the D-1 post of Director, Office of the ES of the ECA (Chief of Staff). The ES told him not to apply as the position should be left for Mr. Dipeolu who was then his Special Assistant.

26. The ES called the Applicant to his house late on 28 July to help prepare some urgent submissions. At that time the ES informed him of his intention to create an L-6/MDGs and Senior Policy Advisor Post in the Executive Office and appoint him to it. The Applicant said that the ES offered this as an acknowledgment of his high level of performance and high quality of work and the fact that the ASPs for promotion to D-1 posts had not been objective and fair towards him because of differences between them. The Applicant told the ES he could not accept the L-6 post as he did not want to change his present 100 series contract to a less secure 200 series one although the ES assured him that from the following year all contracts would be treated the same.

27. On 4 August 2008 the Applicant made a formal written complaint to the ES. The letter was headed "Complaint of victimisation by the ECA ASPs." In the

complaint he made two requests: a review of his performance at interviews for D-1 posts and an independent investigation of the workings of the recent D-1 ASPs.

He stated:

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

28. He enclosed his December 2007 correspondence with HRSS about the membership of the interview panel for the NRID post in which he conveyed his concerns about the presence of Mr. HH on the ASP. He described him as “a man whose adverse feelings towards me are no secret”.

29. The letter ended:

... Any hint of victimisation should not, in my view, be tolerated at ECA.

It is my hope that my request for an independent review of the workings of the recent D1 ASPs will be granted.

30. At an informal meeting in New York in September 2008 the ES advised him to accept the L-6 position and not make a decision he would regret. The Applicant said that the ES told him that as long as he was ES of ECA he would not promote him. This evidence was not challenged or refuted by the Respondent.

31. To the best of the Applicant’s knowledge no L-6 post was ever created. Following this, the relationship between the Applicant and the ES changed.

32. In October 2008, having been interviewed for a D-1 position at UNHQ for Chief, Policy Development and Coordination, Monitoring and Reporting Unit, in the Office of the High Representative for the Least Developed Countries,

Landlocked Developing Countries and Small Island Developing States (OHRLLS), the Applicant was placed on the roster for D-1 posts.

33. On 27 November 2008, the ES called the Applicant to his office to inform him of a written complaint made against him from a member of his section. He was not shown the complaint or told the identity of the complainant. The Applicant says that the ES told him to move with his P-5 to the executive floor under the ES' direct supervision or he would set up an investigation panel including an OIOS investigator to investigate the allegations. The Applicant chose to be fully investigated. He said he was deeply humiliated at this meeting.

34. On 20 December 2008, the Applicant asked the Chief of HRSS for a copy of the complaint referred to by the ES. He was given it. In his response he said he rejected the allegations and asked for an investigation into them. No investigation ever took place.

35. The Applicant said from then his relationship with the ES "went into the freezer".

Trio Facts

TFED post selection

36. A vacancy for the D/TFED position was announced with a closing date of 7 December 2008. On 8 October 2008 the Applicant was advised by OHRM that he had been rostered against that post. In answer to his query, the Chief of Staff told him that as a roster candidate he did not have to apply.

37. On 6 January 2009, the Applicant was advised that on completion of the selection process for a D-1 post with ESCWA in Beirut for which he had applied, he had been placed on the roster of candidates as set out in ST/AI/2006/3 (Staff selection system) for one year.

38. In early January 2009, the Applicant wrote to OHRM regarding utilizing pre-approved rosters for recruitment and his status as a rostered candidate in

particular. On 13 January the Chief of Staffing Service, Strategic Planning and Staffing Division, OHRM replied. He quoted from section 7 of ST/AI/2006/3 and added:

As recent as last month, OHRM has been discussing the issue of how to enhance the use of rosters. A proposal for roster based recruitment was made to the GA, which was not approved but deferred for future consideration. Nonetheless we continue to highlight the advantages of selecting candidates from the roster whenever possible.

39. On 31 March 2009 the Chief of HRSS took action on the Applicant's 4 August 2008 complaint. She sent a note to the ES which described the complaint as a "Request for review of performance at interviews: [the Applicant]". The note said that the Applicant had requested an independent panel to look at his performance at the several interviews for D-1 positions that he had applied for. She proposed the establishment of a three person independent panel to review his complaint and "to submit a report following their findings on his interview performance". There was no reference to his request for an independent review of the ASPs. The proposal was endorsed "Approved" by the ES.

40. On 9 April 2009, the Applicant was advised that he had been shortlisted for interview for the D-1 post of Director ECA Sub-Regional Office for West Africa and was told that the review of candidates for the TFED post was ongoing.

41. In May 2009, Dr. Rakotomalala was appointed the Director of ACGSD of which the Applicant was Chief of MDGs and PAMs. She testified to the Tribunal that when she took up her post the ES gave her a briefing in which he told her of staffing problems. He said that the Applicant was difficult to manage and he did not want him in his office.

42. Dr. Rakotomalala said that she found the Applicant to be very bright and his work was excellent. In her opinion there was tension and jealousy about him in ECA because staff regarded him as brilliant. She said that the Applicant was "blocked at the Director's Office".

43. In May 2009, a staff member was appointed to the D-1 post of Director ECA Sub-Regional office for Eastern Africa from the roster without any advertisement on Galaxy.

44. In May 2009, after he returned from a mission, the Applicant learned that only two internal candidates had been interviewed for the TFED post. When the Applicant enquired of Mr. Dipeolu about this and pointed out that Mr. HH was on the ASP, Mr. Dipeolu said he would talk to the ASP to see if the interviews had been concluded. The Applicant wanted to talk about his non-invitation to the interview with the ES or the Deputy ES, but could not get a meeting. The Applicant spoke to the then President of the ECA Staff Union, Mr. Azubuike who was in Nairobi at a Staff Management meeting with senior officials from OHRM. Shortly after that the Under-Secretary-General for Management (USG/DM) visited ECA and had a town hall meeting with staff. The Applicant did not want to complain to her believing he could sort this out with the ES directly.

45. The Applicant told the Tribunal that in later discussions with a staff member of MEU, he was told that OHRM had spoken to the ES about the issue of his interview for the TFED post who agreed that he should be interviewed.

46. Mr. Dipeolu told the Tribunal that the ES made the decision to conduct the interviews and to invite the Applicant.

47. On 12 June 2009, the Applicant, as a rostered candidate, and other internal candidates received an invitation from HRSS ECA to an interview on 15 June for the TFED post.

48. The Applicant immediately wrote to the ES about the invitation. He referred to his 4 August 2008 letter in which he questioned the presence of Mr. HH on the ASP. He described this as a burning issue with him. He gave notice that he was seeking guidance from OHRM in New York. On the same day he wrote a comprehensive email to HRSS copied to a number of senior ECA officials including the ES. He explained that he believed he did not need to be interviewed again for the TFED post since he had already been evaluated by the central review

body (CRB) as “appointable” to the post. He also gave his analysis of the relevant administrative instruction. He referred to two appointments to senior ECA posts directly from the roster without advertisement in 2008 and 2009.

49. By email of 13 June 2009 the Applicant formally advised ECA and Chief of the Staffing Service Strategic Planning and staffing Division in OHRM of his decision not to attend the interview since his interpretation was that as a roster candidate he did not need to appear before an ASP again. He would not attend the interview unless New York advised him otherwise. He received no response from OHRM.

50. In the meantime on the directions of OHRM, HRSS was directed to discuss the matter with the Applicant and the chairman of the selection panel but this did not occur. On 16 June the Chief HRSS stated in an internal email that the problem to be addressed was that the Applicant had not been given clarification on his query.

51. The Applicant was in New York on 24 June 2009. He met with the ES and Mr. Dipeolu in the cafeteria in the Secretariat Building to discuss his concerns about the selection process for the TFED post. There are differing versions of the meeting but it is sufficient to note that no resolution was reached. The ES told him that the interview process was closed and that he would now look at the candidates. He also told the Applicant that he could refer his concerns to responsible officers of the organisation and he would not hold that against him.

52. The Applicant sent a memorandum dated 24 June 2009 to the Secretary-General under the subject heading “Lack of due process, merit based consideration and discrimination in the UNECA”. He asked for relief in the nature of restraints on the recruitment process for the TFED post until a decision could be made on his complaint of 4 August 2008 and “that due process, respect, precedence and equal treatment of all staff be ensured”. He also asked that ECA management be restrained from punishing him directly or indirectly for filing this petition.

53. The Applicant told the Tribunal that this letter was the only way for him to protect himself. At that stage he did not know about the internal justice system that was to commence on 1 July 2009 and had not intended to go through an adversarial process. He said in his evidence that he made it clear that his issue was not about the decision requiring him to submit to an interview but about the disparate treatment between him and the other colleagues who had been appointed from the roster to positions that were significantly different from ones they had been rostered to. He was complaining about general discrimination of which this was one example.

54. OHRM sent the Applicant's letter to the Secretary-General to MEU for consideration. HRSS ECA was invited by MEU to make comments on the allegations. On 26 June 2009, the USG/DM advised him in writing that a programme manager has the discretion to decide whether to select a candidate directly from the roster or to conduct competency based interviews.

55. Mr. Dipeolu told the Tribunal that after the intervention of MEU management was guided by MEU. The ES gave him instructions to keep Mr. HH out of the selection process for the additional applicants who included rostered candidates. The Applicant was not informed of this by ECA administration and he was not invited to the second round of interviews.

56. On 27 July 2009, in response to the Applicant's request for management evaluation, the Chief of HRSS advised MEU that in some cases candidates were selected directly from the roster because the vacancies for which they were selected were "largely similar to the vacancies against which they had been rostered". The ASP had decided that in the case of the TFED vacancy there were major differences between the current vacancy and the one for which the Applicant had been rostered. As at 27 July, the selection process was not closed as the CRB had referred this case back to the ASP so that another two applicants could be interviewed. These interviews took place on 14 and 31 August 2009.

57. In response to the MEU's query about the Applicant's 4 August 2008 complaint, the Chief of HRSS also explained that the proposed chair of the panel to investigate it had been selected for another D-1 ASP for which the Applicant had applied. For this reason no action was taken due to lack of capacity at the right level to undertake the review of the complaint. The Applicant is sceptical of these reasons but the fact remains that no investigation was made into his complaints of victimisation by the ASPs.

58. On 29 July 2009, MEU contacted the Applicant to ascertain if he would be willing to be interviewed. He indicated orally and in writing that he had no intention of doing so because the fundamental issues that concerned him about the composition and behaviour of the ASPs, including the presence of Mr. HH on the panel, had not been resolved.

59. In its decision on 3 August 2009 MEU stated that, based on its conclusions, the Secretary-General found that the decision requiring the Applicant to undergo a competency-based interview was properly taken and that the Secretary-General had upheld the decision.

60. However MEU did note the Applicant's concerns about the composition of the ASP and that the selection panel (for the TFED post) included a staff member he had named in his 4 August 2008 complaint, which was yet to be investigated. The Secretary-General considered that ECA should take appropriate action to ensure the integrity of the selection panels.

61. Through September 2009, the Applicant corresponded inconclusively with the Chief of HRSS advising her of his travel plans and asking for information on the TFED post. He reminded her that he had been rostered against the TFED post in October 2008.

62. On 8 September 2009, the Applicant filed a substantive application with the UNDT⁴ requesting, *inter alia*, that the Respondent be restrained from continuing

⁴ Case No. UNDT/NBI/2009/044.

to fill the TFED post or taking such actions that could vitiate or extinguish his case before the Tribunal.

63. On 5 October 2009, it was announced that Mr. EN, the Officer-in-Charge of NEPAD who was a rostered candidate, had been promoted to the position of Director of TFED and the reassignment of two other staff members, including Mr. A-M, to NEPAD and RIITD.

64. On 15 October 2009, the USG/DM wrote to the ES enclosing a management support plan for ECA based on her earlier visit. She announced that an OHRM support mission led by Mr. Bruce Frank would visit in late October to provide advice on a broad range of HR issues with emphasis on matters identified by ECA as priorities. These included recruitment, staff selection, vacancy management, performance management, career development and training. The letter referred to the inadequate implementation of recommendations from oversight bodies that had conducted previous reviews.

Restructuring of ECA

65. On 24 March 2009, the Secretary-General presented to the General Assembly a proposed programme budget for the new biennium of which section 17A concerned the Regional Commission.⁵ It set out the programme of work for which the ECA was responsible. The document referred to the 2006 repositioning of the ECA. It spoke of continuing to improve its work methods, developing a markedly stronger sub-regional presence and conducting its work through 10 sub programmes based on certain themes. The budget document also stated that the programme contained a number of salient new features and detailed programmes of work for each of the sub programmes.

66. On 28 and 29 September 2009, the ES held a programme performance management review meeting with the ECA Senior Management Team (SMT) at which he referred to people with complaints as detractors.

⁵ A/64/6 (Proposed programme budget for the biennium 2010-2011).

67. That meeting was presented with the recommendations of a consultant who had been re-engaged to make an assessment of the changes effected under the 2006 reorganisation. He recommended further organisational changes including the reconfiguration of two current programmes, TFED and NRID, into one division of Regional Integration, Infrastructure and Trade (RIIT) of which the MDGs and PAMS was a section.

68. The SMT set up a working party comprising Mr. Dipeolu, Mr. Koumare, Ms. Bongoy-Mawalla and Mr. Urbain Zadi to examine the recommendations as not all members agreed with them. Their mandate was to work on “operationalizing the new ECA structure” and providing the larger SMT group with more information.

69. The Applicant heard of the proposals “on the grapevine”. He obtained a copy of the consultant’s power point presentation and discussed it with colleagues.

70. On 7 October 2009, Mr. Azubuike was authorised by the Staff Council to write to the ES expressing concerns about the lack of consultation about the proposals and requesting a meeting to discuss these. He received no response.

71. The Applicant sent an email to Mr. Dipeolu on 12 October 2009 expressing his concerns about the proposals and the impact of the new structure on his career. Mr. Dipeolu did not respond to this email.

72. The Applicant filed an application for Suspension of Action of the restructuring proposals on 14 October 2009. This was rejected as he had not sought management evaluation.

73. Mr. Dipeolu referred the Applicant’s concerns about the restructuring to the ES. Ms. Bongoy-Mawalla said that she had several meetings with the Applicant and together with him put suggestions to the ES in an attempt to resolve the

situation. Proposals included moving the Applicant from the then TFED where he would be under the supervision of Mr. EN to another division.

74. On 19 October 2009, the Applicant requested a second management evaluation of the decision of the ES to fill the TFED post and for a review of the decision to transfer the MDGs and PAMs to another division. He also complained about discrimination and harassment.

75. The OHRM Support Mission to ECA led by Mr. Frank was carried out between 29 October and 6 November 2009. Its Terms of Reference included providing advice on a broad range of human resources management issues including recruitment, staff selection, vacancy management, structure, roles, staffing and internal accountability and decision making processes. Mr. Frank was engaged to help in resolving or advising the ES on some staff issues.

76. On 9 November in his responses to MEU on the Applicant's request for management evaluation the ES pointed out that by refusing to be interviewed for the TFED post, the Applicant did not give himself a fair chance. He described the allegation that the restructuring of ECA was intended to foreclose his chances of being appointed Director of his then section as "far-fetched". He denied allegations of systematic and persistent abuse and discrimination.

77. On 16 November 2009, the ES announced the organisational changes to the structure of ECA in a memorandum to all staff. On the same day the ES wrote to the USG/DM attaching a draft Secretary-General's bulletin (SGB) on "Organisation of the secretariat of the Economic Commission for Africa", which reflected the announced changes and asked the USG to cause it to be issued in the usual manner. This did not occur as there were some outstanding issues to resolve. The 2009 SGB remains pending. None was issued in 2006.

78. Mr. Dipeolu told the Tribunal that the structural changes were initiated by the ES as part of the 2006 exercise. They were endorsed by the 2010 ECA Council of Ministers and subsequently went to the General Assembly. He said that the restructuring was not targeted at any staff member or to the Applicant.

79. The Applicant wrote a memo to Mr. Dipeolu on 26 November giving his reasons why the decision to restructure should be reconsidered. He asked that if his proposals were not acceptable he should be left in his present division (ACGSD) with supervisory responsibility.

80. On 1 December 2009, the ES decided the appointments of new Directors. He published an organogram of the new organisational structure which showed that the ACGSD of which the Applicant was part, was transferred to the new Economic and Development and NEPAD division (EDND)⁶ and that he would be deployed to EDND as well. Mr EN, who had recently been appointed Director of TFED, was appointed Director of EDND.

81. MEU gave its decision on 3 December 2009. It did not address the selection process for the position of Director of TFED as that had been the subject of a previous request for management evaluation. It stated that the transfer of the MDGs and PAMs section to another division was a proper exercise of the ES' discretion and advised that the Applicant's claims of discrimination should be addressed in the context of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

82. Notably MEU further recommended that for future vacancies for which the Applicant was a candidate, the ES of the ECA should be urged to ascertain that all ASPs were established in a manner that guaranteed fairness and impartiality of all Panel members.

83. On 4 December 2009, the Applicant, Mr. Azubuike, Ms. Bongoy-Mawalla and Mr. Hachim Koumare had a final meeting to discuss his concerns about the restructuring and the requirement for him to move with his section to the EDND offices. He gave some options of where he could be transferred to. He was told he could not choose but it was a matter of the best interests of the organisation.

⁶ Initially referred to as TFED.

During that meeting the Applicant got an SMS informing him that the new structure was announced.

84. Mr. Azubuiké asked if the Applicant was amenable to mediation. The Applicant says by then physical assaults and threats against him had started. He wanted the matter resolved. He complained formally to the United Nations Department of Security and Safety (UNDSS) at ECA but no investigation was ever conducted or advised to him. Mr. Azubuiké believed an agreement had been reached that the Applicant would be removed from EDND but this was broken and the move took too long. He wrote a letter of complaint to Ms. Bongoy-Mawalla about this but received no response.

85. During this time the Applicant applied to Mr. EN, by now his supervisor, for leave to visit a physician in New York for surgery. This application was refused. His leave was eventually approved by Ms. Bongoy-Mawalla.

86. At the end of December 2009 while the Applicant was in New York, Mr. EN gave directions to have the Applicant's MDGs and PAMs section moved to the 6th floor where EDND was located. Ms. Bongoy-Mawalla told Mr. EN that the Applicant would move when he returned.

87. On 25 January 2010, having received no outcome to the committee's attempt to resolve the issue of his redeployment, the Applicant requested management evaluation of the decision of the ES to redeploy him from ACGSD to EDND.

88. On 28 January 2010, the Tribunal issued Judgment No. UNDT/2010/017 in which it found that the Applicant's Case No. UNDT/NBI/2009/044 was not receivable.⁷

89. On 8 February 2010, the Applicant filed Case No. UNDT/NBI/2010/045 with the Dispute Tribunal.

⁷ The Applicant appealed this decision. The United Nations Appeals Tribunal (UNAT) found in his favour in 2010-UNAT-099.

90. The Report of the OHRM Support Mission was finalised on 8 February 2010. It reported, *inter alia*, that vacancy management and recruitment was chronically deficient. The recruitment processes were viewed by staff members as highly politicized (subject to favoritism), managers were not sufficiently aware and adequately trained to fully perform their people management roles, grievances and staff member claims remained outstanding for too long. It made many recommendations for steps to be taken to improve the unresolved issues in the management of human resources.

91. On 10 February Mr. EN sent an administrative assistant to the Applicant's office with porters to help him move. The Applicant said that on 11 February 2010 he made formal allegations of harassment and abuse of authority against Mr. EN.

92. On 4 March 2010, in Resolution A/RES/64/244 A-C, the General Assembly approved the ECA budget appropriations for the 2010-2011 biennium.

93. The ES called the Applicant to a meeting on 8 March 2010 to discuss and resolve staff moves. When the Applicant arrived, he found the ES and 4 senior managers including Mr. EN and the OIC HRSS. The ES accused him of holding back the restructuring process by refusing to relocate from the third to the sixth floor. The Applicant explained that he had been away on mission in December followed by home leave and leave to see his physician. Also he had meetings with Ms Bongoy-Mawalla who told him there could be a good outcome and he should hold on to see about the outcome. The ES said that if he did not move, UNDSS would be sent to seal his office. The Applicant advised the meeting that none of his complaints about Mr. EN and the ES and his redeployment had been resolved and he was hoping for a good outcome as advised by Ms. Bongoy-Mawalla but agreed he would move as soon as possible. Ms. Bongoy-Malawa denied telling him he did not have to move.

94. At the end of the meeting the ES arranged for the Applicant to meet with Ms. Bongoy-Mawalla and Doretta Miraglia to have parallel negotiations about his redeployment out of EDND.

95. The Applicant told the Tribunal that by this time given the 28 January 2010 UNDT judgment on receivability of his complaint about the investigation and the latest MEU decision of 3 December, he had decided not to take matters any further and was considering leaving the ECA and the United Nations. In his mind it was not a place for someone like him. However, because of the way he was treated at the 8 March meeting he changed his mind and decided he would stay at the United Nations and pursue his grievances.

96. On 12 March 2010, the Applicant updated and resubmitted his 24 June 2009 complaint of discrimination; submitted a formal complaint of prohibited conduct against the ES and filed an appeal against the Tribunal's judgment on receivability.

97. Ms. Bongoy-Mawalla and OIC HRSS met with the Applicant on 19 March. They agreed to the terms of reference proposed by him for the negotiations about the redeployment and the nomination of persons to accompany him to further meetings. There had been another delay to his move to the new office as he was allergic to the fresh paint there. He assured them that he would move by 22 March. He also agreed he would work in the section and would attend meetings with the Director but in light of his allegations of harassment against Mr. EN which were pending investigation, he would not attend a one on one meeting with him.

98. Apart from dealing with these practical matters, the Applicant believed the meeting was to negotiate a solution to his request not to be in EDND and took offence when Ms. Bongoy-Mawalla referred to it as a chitchat or discussion about his career.

99. He attended subsequent meetings with Mr. Azubuike and Mr. Koumare. The Applicant rejected the resulting options. He then came up with options in an email

dated 27 April 2010 in which he sought either a return to RIITD or to ACGS; or assignment to a sub-programme to be created for social development and would comprise of MDGs/LDCs; or assignment to a new section – Strategic Policy Initiatives Section.

100. He also applied for two newly advertised positions of Director of ACGSD and Director of RIITD. The selection processes for these posts are the subject of Case Nos. UNDT/NBI/2011/001 and UNDT/NBI/2011/008, respectively. He continued to work on the third floor on a project that was near completion.

101. The Applicant's e-PAS was to expire on 31 March. His supervisor, Dr. Rakotamala was responsible for finalising it however the administration directed that she could only finalise it up to November and from that date it should be completed by Mr. EN. When Dr. Rakotamala retired on 31 March, his e-PAS was not finalised.

102. The Deputy ES refused to finalise his e-PAS. She later left ECA.

Investigation Panel

103. The ASG/OHRM established a panel on 5 April 2010 to conduct a fact finding investigation into the Applicant's allegations of prohibited conduct made on 12 March 2010. This panel was known as the Ssekandi/Torrey panel (Investigation Panel).

104. On 15 April 2010, the Investigation Panel wrote to the Applicant stating that it would be investigating: a) his allegations of prohibited conduct against the ES; and b) his allegations of prohibited conduct against Mr. EN.

105. The Investigation Panel undertook extensive investigations. It interviewed 17 witnesses including the ES who provided a written response to the Applicant's complaints on 10 May 2010.

106. In that response the ES addressed the Applicant's allegations about the offer of the L-6 post, the selection process for the TFED position and the restructuring of ECA. He also made allegations of misconduct against the Applicant. He began by stating that:

I am confident that your investigation will establish that the Applicant has a track record of behaviour that is antithetical to the norms and values of the United Nations. The staff member is notorious in ECA for sending abusive and harassing emails to colleagues.

107. He gave 8 specific examples in support of his allegations of the Applicant's unacceptable behaviour. He gave the names of 15 individuals who he said should be interviewed including those named in the eight examples.

108. The ES explained that the reason why steps were not taken to address these issues sooner was that he had made personal attempts to seek acceptable solutions and not raise tension. He went on " moreover, given the spate of litigation launched by the Applicant, any formal processes undertaken to address his behaviour would be interpreted as retaliation which is why I particularly welcome the establishment of a fact finding panel to address the whole set of issues".

109. In conclusion, he denied that the Applicant had been harassed or intimidated by anyone at ECA and that rather it was he who had a track record of such behaviour. He described the Applicant's allegations as no more than an attempt to blackmail. He urged the panel to "make a determination regarding the Applicant's own abominable track record of misbehavior which is incompatible with the transparent and accountable culture of behaviour that we are all working so hard to build in the United Nations".

110. On 1 June 2010, the Applicant's fixed term contract expired. On 28 June he was given a two-year fixed term contract as Chief MDGs and PAMs in the EDND.

111. In July 2010 Bruce Frank, having completed his role in the OHRM Support Mission, had joined ECA as Senior Advisor on Strategic Human Resources Management. With his assistance an agreement was reached to reassign the Applicant to OPM as Chief of the Quality Assurance section from 16 August 2010.

112. Although this meant that the Applicant did not have to work under the supervision of Mr. EN, he told the Tribunal there was no work for the quality assurance section because it had no resources. A consultant was appointed to devise guidelines for the department. The ES had meetings with the consultant but would not meet with the Applicant. At the end of the consultancy some resources were given for a pilot from August 2011. Once this was completed he had no productive work to do up to 31 March 2013. He was told he would be given money to do quality assurance for various sections but it never came.

113. The Investigation Panel submitted its report to the ASG/OHRM on 30 June 2010. On 30 July the ASG wrote to the Applicant to advise him of its conclusions and recommendations. The letter was marked "Strictly Confidential". She summarised the report and the Panel's conclusions under each of the heads of complaint and concluded that as no prohibited conduct had taken place she decided to close the case.

114. The Applicant replied to the ASG on 20 August 2010. He thanked her for setting up the Investigation Panel and the work it did but, without reading the full report, he was unable to agree with her decision. He requested to be given a full, unabridged copy of the Panel's report for review and comments if any. He assured the ASG that he would treat the report with the strictest confidentiality.

115. In his next letter to the ASG on 5 September he said he disagreed with her decision based on the report. He repeated his request for a copy of the full report. He also requested the declassification of the letter from "Strictly Confidential" status to "Unclassified" so he could submit it as evidence to MEU. He noted that

litigation is not often the best recourse and affirmed his readiness and willingness to explore an informal resolution of the matter.

116. The ASG replied on 8 September 2010 that if he wished to submit the memorandum informing him of the outcome of the fact finding investigation to MEU it was his prerogative to do so. On 15 September she wrote again reminding the Applicant of his obligation under the Staff Rules to exercise discretion and advising that the administration had complied with its obligations under section 5.18 of ST/SGB/2008/5. She noted that in his proceedings before the UNDT, the Respondent had been required to submit a copy of the investigation report on a confidential basis to the Tribunal following which the Tribunal would make further directions.

117. The Applicant responded that marking the memorandum strictly confidential was not in his interests. He feared that he could be subject to disciplinary measure if the Organization had reason to believe that he did not exercise his discretion by using the memorandum. The ASG responded by noting the contents of his letter.

118. On 8 September 2010, the Applicant requested management evaluation of the decision of 15 September 2010 not to release the report to him. He also sought management evaluation of the alleged procedural irregularities in the establishment and deliberations of the Investigation Panel.

119. MEU responded on 12 November that the Secretary-General had agreed with its findings. There was no evidence of procedural irregularity or violation of the Applicant's due process rights. The decision not to provide him with the entire report of the Investigation Panel was in accordance with the applicable rules. It noted that an aggrieved individual had no right to make any further comments once the case is closed. In relation to his complaint about the ASG's summary of the Investigation Panel report, MEU noted that in spite of the advice from the ASG it was his prerogative to not submit the document to MEU for fear of violating the confidentiality restriction. MEU was therefore not in a position to make any determination in relation to that matter.

120. On 11 December 2010, the Applicant filed another Application with the UNDT.⁸

121. A new ES was appointed and took up his post in September 2012. The Applicant was appointed Chief of the New Technologies and Innovation Section in the Special Initiatives Division at ECA.

Case No. UNDT/NBI/2009/044 and issue 1 of Case No. UNDT/NBI/2010/045

Applicant's submissions

122. The principle submission of the Applicant is that his allegations of discrimination, harassment, abuse of authority and retaliatory actions are evidenced by a series of consistent adverse employment actions which resulted in the consistent and egregious violations of his procedural and substantive rights as provided by the express laws of the Organisation.

Investigations of Complaints

123. The failure to investigate his first formal complaint of 4 August 2008 in which he requested an investigation of the ASPs appointed to evaluate his applications for D-1 positions was a violation of his due process rights and his right to an investigation under ST/SGB/2008/5 as affirmed by *Nwuke* 2010-UNAT-099.

124. OHRM did not take any action as required by section 5.14 of ST/SGB/2008/5 into his second complaint dated 24 June 2009 to the Secretary-General against the ES. The allegations in that letter and his subsequent complaints on 12 March 2010 are yet to be investigated. The Investigation Panel that was set up was not an independent panel as required by the ST/SGB. It conducted a fishing expedition to find something that would justify the non-renewal of his contract. It amounted to an investigation into his conduct.

⁸ Registered as Case No. UNDT/NBI/2010/077.

The decision to interview the Applicant for the TFED post

125. The Applicant submits that, as he was rostered against the post, his name should have been presented to the decision maker without any review of his suitability against the post. It is not his case that he believed he should have been appointed. The requirement for him to be interviewed for the TFED post was unlawful because:

- a. Under ST/AI/2006/3, there was no necessity for him as a rostered candidate to be interviewed at all.
- b. The ES was improperly motivated. He said he did not want to have him in his office. His complaints about the ASPs were probably taken by the ES as a challenge to his authority and explains why they were never investigated.
- c. There is a lack of clarity about whether the ASP or the ES made the decision to interview him. A decision without an author is a nullity.
- d. The ES assumed the roles of both hiring manager and Head of Department which carry separate responsibilities under ST/AI/2006/3.
- e. The Interview Panel included a person who had recently encumbered the vacant post. This is prohibited by the OHRM terms of reference (TOR) for the interview process under the staff selection system. That person was also ill motivated against him.
- f. The “mutating reasons” for the requirement to be interviewed, which ranged from the lack of similarity between the post and the one against which he had been rostered to the key importance of the Division in the ECA work programme.
- g. In view of the way other individuals had been selected for D-1 posts, the requirement for him to be interviewed was discriminatory and an example of the harassment he alleges. He claims he had a legitimate expectation not to be treated in a manner different from other ECA staff members who had been directly selected off the roster.
- h. He was not fully and fairly considered for the post.
- i. It is not possible to say with any certainty that if the 4 August 2008 complaint had been properly investigated that none of his subsequent grievances would have arisen

126. The Applicant reduced these arguments to three main points in his closing submissions: the interpretation of the ST/AI, the doctrine of legitimate expectation and the composition of the ASP for the TFED post.

Claims of Harassment and Discrimination

127. The Applicant submitted that the backdrop to his continuing refusal to be interviewed was the pending investigation he had asked for in August 2008 and the attitude of the ES to him at the meeting in New York. In his submission, the way the TFED post was filled was one more piece of evidence of the disparate treatment and abuse of authority towards him.

Respondent's submissions

Investigation of Complaints

128. The Administration conducted an investigation into the Applicant's complaints. Although ECA did its best to address the 4 August complaint it lacked capacity to have a panel carry out the investigation. It was investigated by the Investigation Panel appointed in 2010 and the Applicant's claims are now moot.

129. The Applicant's 24 June 2009 complaint about the ES did not strictly follow the requirements of ST/SGB/2008/5 and was sent to the Secretary-General. It was not at first construed as a complaint under ST/SGB/2008/5 and had not been investigated at the time the Application for Suspension of Action was filed on 8 September 2009.

130. As soon as the Applicant followed the advice of MEU and resubmitted his complaints through the appropriate channels on 12 March 2010, the Administration took the appropriate action and he was informed of the outcome on 30 July 2010.

The decision to interview the Applicant for the TFED post

131. Pursuant to sections 7.3, 7.5 and 9.4 of ST/AI/2006/3, the ES had the discretion to either select a candidate directly from the roster or have rostered candidates interviewed to determine their suitability for a particular post. The onus is on the Applicant to prove that the decision was unlawful and motivated by

an improper purpose. The applicant bears the burden of proving discrimination. The evidence shows the ES had high esteem for the Applicant. He was not the victim of harassment.

132. The ES/ASP had a legitimate reason to interview all candidates including rostered candidates to determine the most suitable. The Post for which he had been rostered was in the same job family and at the same level as the TFED post but had significantly different functions. This justified the requirement to interview all candidates.

133. The Applicant was invited to interview alongside other candidates. He declined several times to be interviewed in spite of MEUs confirmation that the hiring manger had the power to interview him. He declined the suggestion by MEU that he be interviewed and showed himself to be inflexible and unreasonable. The Applicant did not mitigate his loss.

134. The Applicant's claim that he was not fully and fairly considered for the post was made orally but in any event the records show that he was fully and fairly considered by the ASP which led to his being short-listed and invited for interview.

135. The ASP was constituted in accordance with ST/AI/2006/3. The TORs relied on by the Applicant were not approved by OHRM. There is no prohibition on the inclusion of a person who had recently encumbered the post.

Considerations on Case No. UNDT/NBI/2009/044 and Issue 1 of Case No. UNDT/NBI/2010/045

Investigation of Complaints

The Law

136. ST/SGB/2008/5 was enacted "for the purpose of ensuring that all staff members of the Secretariat are treated with dignity and respect and are aware of

their role and responsibilities in maintaining a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority”.

137. The SGB defines prohibited conduct as discrimination, harassment, sexual harassment and abuse of authority. The latter definition in section 1.4 is relevant to this case.

Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion...

138. The list of general principles in section 2.2 states that:

The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventative measures and the provision of effective remedies when prevention has failed.

139. Managers and supervisors have an obligation to ensure that complaints of prohibited conduct are properly addressed in a fair and impartial manner (section 3). A failure to meet the obligations under the SGB may be considered a breach of duty which may be reflected in a manager’s annual performance appraisal and he/she may be subject to administrative or disciplinary action as appropriate.

140. Section 5 of the SGB concerns corrective measures. Individuals are encouraged to deal with their problems as early as possible after it has occurred and, under section 5.3, managers have a duty to take prompt and concrete action in relation to allegations of prohibited conduct. Failure to take such action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

141. The SGB sets out a system of informal and formal proceedings. Pursuant to section 5.17, the officials appointed to conduct a fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have

ascertained in the process and attaching documentary evidence. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

142. Thus the SGB sets out the duties of the administration and emphasises the serious consequences of a breach of the manager's duty to address complaints in a fair and impartial manner and to take prompt and concrete action. The Head of Department is responsible for holding managers accountable for compliance with the SGB.

143. In *Nwuke* 2010-UNAT-099 (the appeal against the Tribunal's decision on the receivability of the Applicant's claims that there was a failure to investigate his complaints), UNAT stated that the UNDT had competence and must conduct the judicial review of the Administration's decision, actions taken or failure to act and further held that:

...serious and reasonable accusations and requests for investigations constitute important instruments to improve administrative procedures and to ensure that day-to-day actions by the Administration are in compliance with the Organization's law. The Administration must decide within its discretion whether or not to conduct investigations. The Administration may be held accountable if it fails to comply with the principles and laws governing the Organization, and if in a particular situation, a staff member had a right to an investigation and it may be subject to judicial review under Articles 2(1)(a) and 10(5) of the UNDT Statute and Articles 2 and 9 of the Statute of the Appeals Tribunal.

144. The role of the Tribunal in this case is not to investigate the Applicant's claims of prohibited conduct as that was done by the Investigation Panel. Its role is to determine if, in terms of the SGB, the Applicant had made a complaint sufficient to require action by the Administration; if there was a factual basis for the allegations and, if the allegations were well-founded, whether the Administration took any action; and finally, whether action taken was in compliance with the SGB.

2008 Complaint

145. The evidence in this case establishes that the Applicant submitted a complaint dated 4 August 2008 to the ES which, although was not framed in the language of the SGB which had been promulgated in February 2008, contained an allegation of improper use of an ASP position by a person who was in a position to improperly influence the career of the Applicant. That amounted to a complaint of abuse of authority which entitled the Applicant to an investigation into its merits.

146. ECA took no formal or documented steps on this complaint for seven months after receiving it. There was no evidence on or explanation for this delay. After the seven month delay, the ES authorised a panel to look into the complaint but it did not undertake the formal fact-finding investigation delineated in section 5.14 of the SGB because of difficulties in convening a panel. One year later, on 3 August 2009, the MEU recorded that the complaint had yet to be investigated.

147. The Tribunal does not accept the Respondent's submission that the Applicant's claim about the 4 August 2008 complaint is moot as the Investigation Panel set up in 2010 considered it. The Investigation Panel was convened in response to his complaints made in March 2010. The Panel noted that the 4 August complaint had no real follow up due to lack of capacity at the right level but did not deal with the substance of that complaint.

148. The Tribunal finds that there was no prompt and concrete action in relation to the 4 August 2008 complaint. In breach of the duties imposed on the management of ECA by the SGB, it was not investigated by ECA or referred to United Nations Headquarters for investigation. This led to a consequent failure of ECA's duty under section 2.2 of the SGB to take all appropriate measures towards ensuring a harmonious work environment and to protect its staff from exposure to any form of prohibited conduct through preventative measures and the provision of effective remedies when prevention has failed.

149. There were profound consequences of this breach of the SGB. The failure to address the Applicant's fundamental grievance of unfair influence and manipulation of the ASPs and selection processes for the D-1 posts which the Applicant applied for or was rostered against in 2008, significantly contributed to his belief that there was an orchestrated plan to ensure that he would not be promoted to a D-1 position in ECA. His response was to challenge every subsequent decision in lengthy and persistent email exchanges and by invoking the formal system of internal justice. He raised the failure to investigate his complaint in his 24 June 2009 letter to the Secretary-General and referred to that letter in all his subsequent applications.

150. A prompt investigation into the 4 August 2008 complaint would have been a preventative measure in accordance with the SGB and, although it is not possible to say with any certainty that if the 4 August 2008 complaint had been properly investigated that none of the Applicant's subsequent grievances would have arisen, it may have brought some closure to the Applicant's distrust of the ECA administration.

2009 and 2010 Complaints

151. The second allegation of harassment made on 24 June 2009 to the Secretary-General was forwarded to MEU. To that extent it was actioned but the allegations were not recognized as a complaint of protected activity nor treated as such. It was not until the Applicant formulated those allegations into express complaints under ST/SGB/2008/5 on 11 February 2010 and on 12 March 2010 that the Administration properly exercised its discretion and convened an Investigation Panel. In view of MEU's responsibility to conduct impartial and objective evaluations of administrative decisions contested by staff members to assess whether the decision was made in accordance with rules and regulations and to propose appropriate remedies where necessary, MEU should have recognized the Applicant's claim of prohibited conduct even if it was not formulated as such and proposed that it be handled under the auspices of ST/SGB/2008/5.

152. The Tribunal finds that no prompt and concrete action was taken by OHRM in relation to the 24 June 2009 complaint in breach of the SGB. In contrast, the Applicant's March 2010 complaint was promptly and thoroughly investigated.

TFED Post Selection

153. This part of the Application is not a challenge to a selection of a candidate but a challenge to the lawfulness of the decision by the Administration to require the Applicant, as a roster candidate, to undergo an interview for the TFED post.

154. The material facts are that the Applicant believed he was not required to apply for the TFED post as he was rostered against it. The first interviews for the post were concluded in May 2009. The Applicant was not invited to this round of interviews but was invited, with others, to a second round on 15 June. He refused to attend citing his interpretation of ST/AI/2006/3; past ECA selection practices; and the presence of Mr. HH on the ASP in spite of his earlier complaints about this on 4 August 2008.

The Law

155. The applicable Administrative Instruction on the staff selection system at the material time was ST/AI/2006/3 of which the following sections are relevant:

156. In section 1 'Roster' is defined as:

A list of candidates who have been endorsed by a central review body for a particular vacancy but not selected for it, and who have indicated an interest in being considered for selection for a future vacancy with similar functions at the same level. Roster candidates may be selected without referral to a central review body. The roster is valid for one year.

157. Section 2.3 stipulates that:

Selection decisions are made by the Head of Department/office when the central review body is satisfied that the evaluation criteria have been properly applied and that the applicable procedures were followed. If a list of qualified candidates has been approved, the head of department/office may select any one of those candidates

for the advertised vacancy, subject to the provisions contained in section 9.2 below. The other candidates shall be placed on a roster of pre-approved candidates from which they may be considered for future vacancies with similar functions.

158. The Tribunal notes that the language of this section is discretionary but only once a list of candidates has been approved by the CRB.

159. Section 7.4 provides that:

The programme manager shall evaluate new candidates and roster candidates transmitted by OHRM or the local personnel office for consideration at the 15,-30-or 60 day mark on the basis of criteria pre-approved by the central review body (emphasis added).

160. Section 7.5 states:

For candidates identified as meeting all or most of the requirements of the post, interviews and/or other appropriate evaluation mechanisms, such as written tests or other assessment techniques, are required. Competency based interviews must be conducted in all cases of recruitment or promotion. Programme managers must prepare a reasoned and documented record of the evaluation of those candidates against the requirements and competencies set out in the vacancy announcement.

161. Section 7.8 stipulates:

Should an eligible roster candidate be suitable for the vacancy, the programme manager may recommend his or her immediate selection to the head of department/office, without reference to the central review body, as provided in section 9.4.

162. The interpretation of the meaning and intent of section 7.8 is central to this part of the claim. Read in isolation it could be interpreted as a section which enables a programme manager to recommend immediate selection of a rostered candidate without further evaluation. However rules cannot be interpreted in isolation. They are subject to both their internal and external contexts.⁹

⁹ Cross Statutory Interpretation, 2nd Ed (Oxford University Press), p. 48.

163. In the internal context, the placement of section 7.8 at the end of Section 7 is important. The object of section 7 as a whole is the proper and transparent consideration and selection of candidates. The requirements that all candidates, including roster candidates, must be evaluated (section 7.4) and that competency based interviews are required (emphasis added) in cases of recruitment and promotion (section 7.5) all precede section 7.8. To interpret it without reference to the purpose and scheme of the whole of section 7 would be to defeat the object of the section.

164. The Tribunal finds that section 7.8 requires the programme manager to evaluate all candidates, including those from the roster, by way of a competency-based interview in cases of recruitment or promotion. After that, if the successful candidate is from the roster, the central review body (CRB) is not required to re-evaluate the person's candidacy.

Past ECA Selection processes off the rosters.

165. In support of his claim of differential treatment the Applicant relied on the earlier selection off the roster for P-5 and D-1 posts that had not been advertised. The Respondent distinguished those cases from the Applicant's by asserting that the previous candidates held positions that were very similar to the new posts.

166. The Investigation Panel noted that the explanations given for the way the earlier selections were made were not supported by the documents. The Tribunal is unable to rule definitively on the legality of these previous selection processes as they have not been directly challenged but the practice as reported raises some serious questions about whether they were based on the procedures in the ST/AI.

Legitimate expectation

167. The doctrine of legitimate expectation applies to administrative decisions.

A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no

legal right in private law to receive *such* treatment. The expectation may arise from a representation or promise made by the authority including an implied representation or from consistent past practice.¹⁰

168. In *R v. North East Devon Health Authority*, the Court held that:

The court's task... is... limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power.... It is for the court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power.¹¹

169. The doctrine has been applied to the law of international civil servants from at least 1956 when the International Court of Justice gave an Advisory Opinion on Judgments of the Administrative Tribunal of the International Labour Organization ("ILO"), 23 October 1956. Having surveyed the current rules and practice concerning fixed term contracts, the IJC held at p 92:

The practice as here surveyed is a relevant factor in the interpretation of the contracts in question. It lends force to the view that there may be circumstances in which the non-renewal of a fixed-term contract provides a legitimate ground for complaint.

170. To be legitimate, an expectation does not require an express promise but may be inferred from relevant past practice. However, as observed by the Administrative Tribunal of the African Development Bank, again in the context of renewal of fixed term contracts,¹² the important principle to emphasize is that the practice must be constant and consistent in order to give rise to a general rule or practice. It must be well established and accepted by the organization. The evidence establishing it must be clear and compelling to leave no doubt that the practice exists and is observed.

171. The question in this case is whether the ECA's past practice of appointing two individuals from the roster without advertising the posts is sufficient

¹⁰ *Halsbury's Laws of England*, Vol. 1, 4th Edition, Simon Hetherington (1998), paragraph 81, pages 151-152.

¹¹ *R v. North East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622.

¹² Judgment No. 85 rendered on 12 November 2013.

foundation for the Applicant to assert a legitimate expectation that he was entitled as a matter of fairness to the same or a similar practice.

172. Evidence was given of two specific examples of selection off the roster which occurred before the TFED selection process but they do not provide sufficient foundation for a regular and lawful practice which the Applicant could reasonably have expected to continue. The TFED process required all candidates, rostered or not to be interviewed. At the very least a legitimate expectation must be based on legitimate practices. The two examples relied on by the Applicant are not sufficient evidence of a regular practice.

173. The Tribunal concludes that while the Applicant had good reason to query the difference between the ways the vacancies in different posts were handled, he had no legitimate expectation pursuant to ST/AI/2006/3 to be selected from the roster without being fully considered for the post including the requirement to be interviewed.

Composition of the ASP

174. From 17 December 2007, the Administration of ECA was on notice from the Applicant that he objected to the presence of one individual, Mr. HH, on an ASP which was evaluating his candidacy. He followed that up in his 4 August 2008 complaint when he again specifically referred to that issue in his request for an investigation into the ASPs. There was no investigation into his complaint and the individual about whom he had complained was appointed to the ASP for the TFED selection process.

175. The Applicant also objected to Mr. HH being on the ASP as he had recently encumbered the vacant post. In the submission of the Applicant, this was in breach of the OHRM TOR for the interview process under the staff selection system revised in January 2006. However, these TORs concerned the United Nations Office in Vienna/the United Nations Office on Drugs and Crime (UNOV/UNODC) and therefore are not directly relevant to the ECA. In addition

they were not approved by OHRM. They are therefore of dubious worth to this case.

176. In this case the Administration did not address the question of whether Mr. HH should have been on the selection panel where the Applicant was a candidate. It took the view that the composition of the ASP was for the ES alone to determine. While that is correct, the ES does not have unfettered discretion. Any allegations of bias or ill motivation towards a candidate should have been taken into account in that selection process. There is no evidence that this happened.

177. Mr. HH's presence on the ASP predictably added to the Applicant's belief that his chances of a fair consideration were limited. This was noted by MEU in its 3 December 2009 report in which it urged the ES to ascertain that all ASPs are established in a manner that guarantees fairness and impartiality of all Panel members.

178. However, the inescapable fact is that after consideration, the Applicant was invited to an interview for a post against which he had been rostered. This was in accordance with the ST/AI. He refused to attend. On the face of it some of his reasons had some merit, such as the presence of Mr. HH on the ASP, but by not attending the interview the Applicant lost all chance of consideration for the post.

179. In conclusion, the Tribunal finds that the invitation to the interview was lawful. The Applicant was not justified in refusing the invitation to be interviewed for the TFED post either by his interpretation of the ST/AI or by a legitimate expectation.

Did the October 2009 selection process for the post of Director TFED amount to harassment and discrimination against the Applicant?

180. The Tribunal acknowledges the Applicant's deep sense of grievance that he was treated differently in this case from others and his belief that this disparity was motivated by a deliberate attempt to victimize him by preventing his promotion to a D-1 post. Much of this stems from the breakdown in the relations

with the ES including the Applicant learning of the ES' reported statement that he did not want the Applicant in his office and the failure of ECA to take any decisive action on the 4 August complaint. However the Tribunal is limited to determining the facts of each particular case as it was presented to it.

181. In this case, like the Applicant, the successful candidate who was also rostered against the post was required to be interviewed before he could be considered for selection. The invitation provided the Applicant with the opportunity to be fully considered in the selection process.

182. The New York meeting with the ES and the Chief of Staff did not go well for the Applicant who did not appreciate being rebuffed by the ES. However it was the Applicant who had sought that meeting. Although he did not get the response he wanted this does not constitute harassment by the ES who invited the Applicant to seek remedies if he wished.

183. The Tribunal finds that the Applicant was not discriminated against or harassed in the selection process for the TFED post. He was treated no differently from the other applicants in his situation nor was he harassed by being required to be interviewed for the post.

Conclusions on Case No. UNDT/NBI/2009/044 and issue 1 of UNDT/NBI/2010/045.

184. The Tribunal concludes that:

- a. ECA contravened ST/SGB/2008/5 by failing to investigate the Applicant's 4 August 2008 complaints against the ASPs and his complaints against the ES of ECA made on 24 June 2009.
- b. The decision of 15 June 2009 to require the Applicant to be interviewed for the post of D/TFED was lawful; and
- c. The Applicant was not subjected to discrimination and harassment by being invited to interview for the TFED post.

UNDT/NBI/2009/045

Applicant's submissions

Legislative mandate for changes to ECA management structure.

185. The Applicant submitted that the changes to the management structure for ECA in 2009 had no legislative mandate because:

- a. They were not endorsed by the Commission of the ECA/ECA Conference of Ministers of Finance, Planning and Economic Development.
- b. The changes to the work programme of sub-programme 10 - Social Development (to which the MDGs and PAMS belonged) was not presented to the Committee on Human and Social Development, the oversight committee, which met in Addis Ababa on 15 October 2009.
- c. The ES of ECA was in breach of ST/SGB/151 (Administration of the Staff Regulations and Staff Rules) because he did not have the authority to make the changes when an SGB on the proposed new structure was never promulgated.
- d. There was no consultation as required by ST/SGB/172 (Staff-Management Relations: decentralization of consultation procedure) and ST/SGB/274 (Procedures and terms of reference of the staff-management consultation machinery at the departmental or office level) paragraph 3.

Was the transfer of responsibility of MDGs/PAMs to EDND lawful?

186. The Applicant submits that while the Secretary-General has discretion in the way programmes are arranged, that discretion must be exercised properly by his agents acting under his delegated authority. The ES' authority to move and change structures is limited in the absence of an enabling law.

187. The stated purpose of bringing all the development frameworks together was not met. Not all development frameworks were transferred to EDND.

Transfer or redeployment of Applicant to EDND

188. The Applicant submitted that this transfer was unlawful because:
- a. A Staff member has the right to a peaceful working environment (ST/SGB 2008/5).
 - b. The move was improperly motivated. Assigning him to work under a person occupying a post that is subject to his litigation was a deliberate effort to harass, humiliate, intimidate and abuse, an attempt to vitiate or extinguish Case No. UNDT/NBI/2009/044 and to obstruct justice.
 - c. Staff members have the right to be consulted in advance of decisions which may have substantial implications for their careers, welfare and working conditions (ST/SGB/274 paragraph 4). No consultation was provided and the Applicant's efforts to discuss the effects on the new structure on him were treated with scant regard.

Respondent's submissions

Legislative mandate for changes to ECA management structure.

189. Under article 17 of the Charter of the United Nations, the General Assembly is vested with the authority to approve the United Nations budgets and office structures.

190. Under the Financial Rules, the Secretary-General decides on the programme content and resource allocation of the proposed programme budget. Heads of Departments are responsible for preparing proposals for programme budget for the forthcoming budget period. The budget describes any change to the work programme, organisational, structure and resources.

191. The Secretary-General presents the proposed budget to the General Assembly for review and approval under Financial Regulation 2.7. Upon approval of the programme budget the organisational structure set out in the budget becomes effective.

192. Heads of Offices may redeploy posts within their office whenever necessary to ensure immediate programme implementation (Rule 04.01.4 of the Finance and Budget manual).

193. The Financial Rules and Regulations do not require that an SGB is issued before a restructuring can be implemented.

194. The fact that an SGB was not issued after the restructuring of ECA in 2006 and 2009 had no impact on the terms of the Applicant's employment apart from the change to his first and second reporting officers. Such changes are envisaged by ST/AI/2010/5 (Performance management and development system) and do not require the issuance of an SGB to become effective.

195. The Secretary-General has broad discretion in matters relating to organisation of work. Decisions regarding organisation of work may only be set aside on limited grounds e.g. if the Administration breached procedural rules, or if the discretion was exercised in an arbitrary, capricious or illegal manner.

196. There is no need for the Secretary-General to seek legislative approval from the oversight bodies to internally reorganize ECA as long as the core functions of the Commission are not affected.

197. There is no nexus between the Applicant's allegations about the ES and the restructuring in ECA. Consultations about the changes began before the Applicant wrote his 24 June 2009 letter and the proposed budget for the biennium was submitted to the General Assembly on 24 March 2009.

Was transfer of responsibility of MDGs/PAMs to EDND lawful?

198. The Secretary-General has broad discretion in all matters of organisation of work. The transfer of the MDGs from the ACGSD division to another division (TFED which then became EDND) was a proper exercise of that discretion.

199. The restructuring was not directed at the Applicant. There is no evidence of arbitrariness or improper motive for the move which was a minor rotation of some sections. The Applicant was the only one who complained.

200. The move had no impact on his skill, competencies and knowledge and therefore no impact on a future selection exercise.

Transfer or redeployment of Applicant to EDND

201. It is for the Organisation to decide in its discretion whether a reassignment of a staff member is in its interests. Staff members do not determine the organisation of work in their office.

202. The discretion is not unfettered but subject to limited review by the Tribunal where the decision was arbitrary, based on improper motives or in violation of mandatory procedures.

203. The post encumbered by the Applicant was redeployed in accordance with the restructuring exercise. Following this, the Applicant was reassigned to the new Division, EDND in accordance with staff regulation 1.2(c). The Applicant was moved with his section with no change in his functions.

Considerations on UNDT/NBI/2009/045

Legislative mandate for changes

204. Pursuant to Article 17 of the Charter of the United Nations, the General Assembly shall consider and approve the United Nations budgets. Article 17 does not refer to office structures however these are implicitly if not expressly covered by the Financial Regulations and Rules of the United Nations which are periodically promulgated by SGBs.

205. The Financial Regulations and Rules in force at the time of the events in this case were approved by the General Assembly¹³ and promulgated in ST/SGB/2003/7 on 9 May 2003.

206. Financial Rule 102.1 provides that the Secretary-General is to decide on the programme content and resource allocation of the proposed programme budget to be submitted to the General Assembly and it is the responsibility of Heads of department to prepare programme budget proposals for the forthcoming financial period.

207. Regulation 2.2 provides that the proposed programme budget shall be divided into parts, sections and programmes. Programme narratives shall set out subprogrammes, outputs, objectives and accomplishments expected during the biennium. The proposed programme budget shall be preceded by a statement explaining the main changes made in the content of the programme and the volume of resources allocated to it in relation to the previous biennium.

208. Following examination of a report by the advisory committee by the Administrative and Budgetary Committee the proposed programme budget is considered by the General Assembly and adopted. At that stage the organizational structure set out in the budget becomes effective.

209. Rule 04.01.4 of the Finance and Budget Manual provides:

Administrative redeployment of posts within sections may be undertaken whenever necessary to ensure immediate programme implementation. However, this is not intended for promotional purposes or to meet long term arrangements. Any expected redeployment of a longer term nature is to be justified in the context of the programme budget proposals for the following biennium and will be considered by ACABQ and the General Assembly for ultimate approval. Such proposals for redeployment of posts reflected in the proposed programme budget must be supported by the relevant classification guidance (e.g. Generic Job

¹³ Decision 57/573 of 20 December 2002 in Resolutions and Decisions adopted by the General Assembly during its fifty-seventh session, Volume II, Decisions 10 September – 20 December 2002.

Profile or classifiable notice). Heads of Offices may redeploy posts within their office whenever necessary to ensure immediate programme implementation.

210. The evidence establishes that each of these steps was adopted in relation to the restructuring of the ECA. The proposed budget was presented to the General Assembly on 24 March 2009. It contained detailed explanations of the programmes of work to be funded. It expressly referred to the 2006 repositioning and the changes which were proposed. The General Assembly approved the budget on 4 March 2010.

211. The Tribunal finds that as from 4 March 2010, the changes to the management structure of ECA in September 2009 had a legislative mandate in the General Assembly decision. The ES' decision to implement the redeployment of staff in accordance with the proposed budget submitted to the General Assembly was in accordance with Rule 04.01.4 of the Finance and Budget manual to ensure immediate implementation of the programmes.

212. The budget proposal which contained the proposed restructuring of the ECA programmes was formulated and presented to the General Assembly in March 2009, well before the Applicant's complaint of 24 June 2009. There is no temporal proximity between that complaint and the overall decision to restructure ECA. In addition the proposal was for a number of changes to programme organisation and delivery which included but extended well beyond the sphere of the Applicant's work. The rationale for the changes was formulated by an external consultant to remedy issues that were outstanding from the 2006 re-positioning.

213. It is accepted by the Respondent that no subsequent SGBs were promulgated to reflect the restructuring. While that omission is regrettable, the General Assembly decision legitimated the restructuring decisions by approving the ECA budget proposals which outlined the changes in detail.

Was the transfer of responsibility of MDGs and PAMS to EDND lawful?

214. The Applicant's reason for objecting to the transfer of responsibility was principally based on his disagreement with the policy of rationalizing the structure and operation of the development frameworks and his opinion that the objectives of such a policy would not be met by the transfer of responsibility.

215. It is within the delegated authority of the ES to set policy and implement it. The Applicant was not the only one who disagreed with the policy but in the end the ultimate responsibility rested with the ES. Unless the new policy can be shown to have been ill motivated or in breach of authority it is not for the Tribunal to interfere with it.

216. The Tribunal finds that the transfer of responsibility was within the discretion of the ES. It was foreshadowed in the budget proposal to the General Assembly and ultimately sanctioned by the General Assembly when it adopted the ECA budget. There is no evidence that the transfer of responsibility of the MDGs and PAMS section to EDND was ill motivated.

Transfer or redeployment of Applicant to EDND

217. In *Rees* 2012-UNAT-266, UNAT considered the question of reassignment of a staff member. It referred to staff regulation 1.2(c) which provides that "[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations". UNAT stated:

It is for the Administration to determine whether a measure of such a nature is in its interest or not. However, the decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures. An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's

competence and skills; and, whether he or she had substantial experience in the field.¹⁴

218. Further, UNAT held:

The UNDT recognised that “it is for management to organize its affairs in the best interests of the Organization and that it may involve placing a staff in a position for which they might not have much appetite”...

...No staff member has the right to select his or her own supervisors. No organization can be compelled to keep such a staff member who insists on retaining his or her post while refusing to report to a supervisor who he or she claims has discriminated against him or her or created a hostile work environment.

219. The Tribunal finds that the reason for the redeployment of the Applicant was because his section had been transferred. The transfer of the section of which the Applicant was the chief was lawful and a proper exercise of the ES discretion. In spite of the transfer there was no change to the Applicant’s level and grade or to the work programme that he had performed for some time and would continue to be responsible for.

220. The Tribunal accepts that the Applicant had serious personal issues in having Mr. EN as a supervisor. His challenge to the appointment to the TFED post was at that time the subject of legal challenge. As UNAT has determined, the Organization cannot be compelled to keep an employee in such circumstances but in this case there is no suggestion that ECA even considered terminating the Applicant for refusing to work with his new supervisor. To the contrary there is ample evidence of attempts to negotiate a resolution with him including the committee set up by the ES to work with the Applicant, and ample time given for the Applicant to move as directed.

221. The Tribunal further notes that a solution was finally reached which removed the Applicant from the direct supervision of Mr. EN. Although the

¹⁴ Cf. *Allen v. Secretary-General of the United Nations*, Judgment. No.2011-UNAT-187, affirming UNDT Judgment No. 2010/212.

position which he was eventually transferred to was largely non-productive, that transfer was not challenged by the Applicant.

Conclusions on UNDT/NBI/2009/045

222. The changes to the management structure of the ECA in September 2009 was mandated by the General Assembly

223. The transfer of responsibility for the MDGs to EDND was lawful

224. The transfer or redeployment of the Applicant to EDND was lawful.

UNDT/NBI/2010/077

Applicant's Submissions

Disciplinary proceedings

225. The Applicant argues that disciplinary proceedings were initiated against him in the course of the Ssekandi/Torrey Investigation. He alleged that the Investigation Panel acted on the allegations against him by the ES when responding to the Applicants allegations. In his submission, the investigators went all the way back to his early career at ECA and chose not to investigate his allegations of prohibited conduct.

Declassification of ASG/OHRM letter

226. The Applicant relied on the submissions he made in his application and a lengthy reply to the 12 November 2010 decision of MEU. He was unable to understand the continuing refusal of the ASG to grant his request to declassify her letter and that a reasonable inference (which he admitted could be wrong) is that her letter was not an accurate representation of the findings and conclusions of the Investigation Panel.

Disclosure of the investigation report

227. The Applicant asserts that the report of the Investigation Panel contains adverse material against him which he should have had the opportunity to comment on.

228. There is no provision in ST/SGB 2008/5 which restricts the right of a staff member access to the full report of the investigation panel beyond the summary and conclusions.

Was the appointment of a Non United Nations staff member (Ssekandi) to membership of the investigation panel lawful?

229. The Applicant alleged that Mr. Ssekandi had separated from the United Nations in 1996 and submits that the appointment of a person to the Investigation Panel who is not a staff member is a breach of section 5.14 of ST/SGB/2008/5. In his letter to MEU, he referred to this issue by stating that the membership of the Investigation Panel should be determined by the Tribunal. He also stated:

I believe that both Ms. Torrey and Mr. Ssekandi are very honorable people and I have no reason to assert otherwise. I have not impugned their independence or impartiality.

230. However, he noted that not having read their report (at that stage) he was not in position to assess the report.

Respondent's Submissions

Disciplinary proceedings

231. Under section 5.17 of ST/SGB/2008/5, the mandate of a fact finding panel is expressly wide and open ended so that the panel can determine the relevant facts. It is inherent to the investigation to test the allegations made with a view to establishing the truth. It would be highly irregular for a panel not to establish the credibility of the aggrieved party.

Declassification of ASG/OHRM letter

232. It is within the discretion of the ASG/OHRM to declassify or not a letter she wrote to a staff member. The ASG/OHRM allowed the Applicant to share the letter with whomever he wanted. The confidential nature of the document was meant to preserve the interests of the Applicant in view of the sensitive matters contained therein. It was the Applicant's decision not to share the letter with MEU.

Disclosure of the investigation report

233. According to section 5.18 of ST/SGB/2008/5, the Applicant has no right to be provided with a copy of the investigation report. The ASG complied with the obligations. In any event the claim is now moot as the Applicant was provided with a redacted copy of the report in the context of the present proceedings.

Was the appointment of a Non United Nations staff member (Ssekandi) to membership of the Investigation Panel lawful?

234. The Respondent does not deny that one panel member was not a staff member but submits that the Applicant was aware of the identity, employment history of that person from the beginning of the fact finding investigation and did not raise any objections at the time.

235. OHRM appointed a panel from outside ECA to ensure an unbiased and fair investigation.

Considerations on UNDT/NBI/2010/077

Were Disciplinary proceedings initiated against the Applicant?

236. The Investigation Panel was convened by the ASG/OHRM in response to the Applicant's 12 March 2010 complaint under ST/SGB/2008/5. The SGB was promulgated with the express purpose of ensuring that all staff members of the Secretariat are treated with dignity and respect and are aware of their role and

responsibilities in maintaining a work place free of any form of discrimination, harassment, including sexual harassment, and abuse of authority.

237. On receipt of a formal complaint a responsible officer under section 5.14 reviews the complaint to establish if it is made in good faith and if it warrants formal investigation.

238. A fact finding investigation under section 5.14 is to be conducted by persons who have been trained in investigating allegations of prohibited conduct. The SGB contemplates that disciplinary proceedings may be initiated but only following the investigation and report and after consideration by the ASG/OHRM.

239. Section 5 of the SGB provides for disciplinary proceedings where the conduct of the alleged offender amounts to misconduct (section 5.18 (c)) or where the report indicates that the allegations of prohibited conduct were unfounded and based on malicious intent (section 5.19).

240. In the course of its investigation into the Applicant's complaint of prohibited conduct, the Investigation Panel canvassed the counter allegations of misconduct made by the ES against the Applicant. It set out the ES' allegations but it did not reach any conclusions about them and did not make a recommendation that disciplinary proceedings should be initiated against the Applicant. There is no evidence that the ASG/OHRM considered taking disciplinary action against the applicant under section 5.19.

241. In the long history of this case, on the one occasion that the ES threatened an investigation into alleged misconduct by the Applicant, no action was taken to pursue that in spite of the Applicant agreeing to such an investigation.

242. The Tribunal therefore finds that no formal charges of misconduct have been made against the Applicant during his time at ECA and no disciplinary action taken against him. Any allegations made against him during the course of his employment with ECA remain uninvestigated and consequentially unsubstantiated.

243. This is unsatisfactory and unfair to the Applicant. Specific and serious allegations of misconduct by him were made directly to him and to the Investigation Panel. The administration has failed in its responsibility under ST/AI/371 to properly investigate these to a final conclusion leaving the allegations outstanding and unresolved.

244. However, the Applicant's claim in this part of his case is that the Panel had improperly initiated disciplinary measures against him. The Tribunal finds that no disciplinary measures were initiated against him.

Declassification of ASG/OHRM letter

245. The Applicant's approach to this issue demonstrates his unfortunate capacity to be blinded by his adherence to strict formalism. His request for clarification about the use of the ASG's memorandum was prudent in light of it being marked strictly confidential but his unwillingness to accept and act on the ASG's advice that it was his prerogative to present it to MEU was pedantic and unreasonable.

246. Whatever the label on the memorandum, the Applicant was not precluded by the ASG from using it to pursue his lawful right to request management evaluation.

Disclosure of the investigation report

247. In the cases of *Bertucci* 2011-UNAT-121 and *Calvani* 2010-UNAT-032, UNAT upheld the proposition that in accordance with article 9.1 of the Statue of the UNDT and article 18.2 of the Rules of Procedure of the UNDT, the UNDT has discretionary authority in conducting proceedings, including being entitled to order the production of any document in the interest of justice and for the fair and expeditious disposal of the case. In addition, the Tribunal has the power to redact any document to preserve confidentiality.

248. However, the powers of the Tribunal are different from the disclosure obligations of the Administration stipulated in section 5.18 of ST/SGB 2008/5 which states:

- (a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusion of the investigation.

249. In light of the indication that no prohibited conduct took place, the administration acted correctly in terms of section 5.18 of the ST/SGB 2008/5 by providing him with a summary of the findings and conclusions of the Investigation Panel Report. The Tribunal finds that the ASG's summary was a very full and accurate account and caused the Applicant no detriment. There was no breach of the rules or of the due process rights of the Applicant.

250. If an aggrieved person does not accept the outcome of a summary, he or she may challenge it before the Tribunal and in so doing request the full report thus preserving his or her right to disclosure as appropriate. That is what occurred in this case. The Applicant challenged aspects of the investigation report, the Tribunal ordered the release of the full report with limited redactions and the Applicant therefore has had the opportunity to read it.

Was the appointment of a Non UN staff member (Ssekandi) to membership of the investigation panel lawful?

251. Section 5.14 of ST/SGB/2008/5 requires that where a complaint warrants a formal fact finding investigation the responsible officer shall promptly appoint a panel. The panel is to consist of at least two individuals from the department, office or mission concerned who have been trained in investigating allegations of prohibited conduct or, if necessary, from the OHRM roster.

252. The section contemplates the selection of either an internal panel of staff members or one selected from the OHRM roster. It does not specify what the OHRM roster is but unlike the case of the internal panel it does not require that

the persons on the OHRM roster should be staff members. In the absence of any evidence on this point the Tribunal may infer that the OHRM has a roster of suitable persons to undertake investigations of this sort as required.

253. The evidence is that the selection was made by OHRM and not from within the immediate organisation concerned. In light of the Applicant's persistent allegations of harassment, discrimination and bias by the administration of ECA towards him, that decision was necessary in terms of section 5.14.

254. On the evidence available to it, the Tribunal finds that the Investigation Panel was lawfully convened. In any event, the Applicant expressly disavowed any criticisms of the independence or impartiality of the panel members. Given this, the Applicant has failed to point to any detriment to him by reason of the membership of the panel. Even if it were in breach of section 5.14, such a breach is minimal as there were no consequential breaches of the Applicant's right to a fair and impartial investigation.

Conclusions on UNDT/NBI/2010/077

255. The ASG/OHRM did not decide to initiate disciplinary proceedings against the Applicant without duly informing him.

256. The decision of the ASG/OHRM of 12 August 2010 not to declassify her letter of 30 July summarizing the conclusions and recommendations of the Investigation Panel was lawful.

257. The decision of the ASG/OHRM not to provide him with a copy of the investigation report was lawful.

258. The appointment of a Non United Nations staff member to the investigation panel was lawful. The Applicant's right to a fair investigation was not prejudiced by the membership of the panel.

Abuse of process, systematic victimisation and discrimination

259. The contents of the 2009 Mission Report of the OHRM Support Mission to ECA amounted to an indictment of human resources and management practices at the ECA at that time. It substantiates the Applicant's allegations of favouritism in appointments, poor selection processes and the failure to address staff grievances including allegations of harassment, if at all, in a timely and appropriate way. The report spoke of a malaise at ECA, and staff cynicism and frustration as serious and significant unresolved issues. The issues of vacancy management and recruitment were among the most serious weaknesses.

260. The Report raises strong doubts about the Respondent's claim that the Applicant was the only one who complained or questioned the selection processes and other aspects of the treatment of staff members.

261. It is obvious that the once strong relationship between the ES and the Applicant deteriorated from at least early 2009. Their last meaningful discussion was in June 2009. The Applicant ceased to trust any decisions made by the ES or by the Administration and challenged those decisions with increasing frequency. This led to a state of siege between the Applicant and the Administration. As the ES explained to the Investigation Panel, he did not want to make any decisions about the Applicant for fear of the inevitable challenge that would follow.

262. The Tribunal acknowledges the complex dynamic that existed during this time which led to deep frustration and mistrust on both sides. However the decisions challenged in this set of cases are insufficient to sustain the serious allegations of abuse of process and systematic victimisation and discrimination made by the Applicant. Apart from the failure to investigate the 4 August 2008 and 24 June 2009 complaints all of the other decisions he challenged in the Trio of cases were lawful. What the Applicant perceived as abuses of power directed at him personally were the lawful exercise of the managerial discretion vested in the ES.

263. The failure by ECA to investigate the Applicant's 4 August 2008 complaint about the composition and conduct of the ASPs became an underlying complaint of the Applicant in the Trio of cases and subsequent challenges to selection decisions that he could have no confidence in the ASPs appointed by the ES to evaluate his candidacy for vacancies while the 4 August complaint remained uninvestigated.

Compensation

264. The Tribunal asked the Applicant what outcome he wanted to achieve as a result of his litigation. He replied at length but concluded "just to tell my story and vindicate my rights".

265. The Applicant did not seek financial redress in this Trio of cases. There will be no award of compensation.

(Signed)

Judge Coral Shaw

Dated this 4th day of December 2013

Entered in the Register on this 4th day of December 2013

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi