



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 filed seven substantive applications before the Tribunal in which he challenges a number of administrative decisions taken between August 2008 and July 2011. He alleges that each of these administrative decisions is unlawful because they are not only in breach of specific regulations or rules but also are examples of a continuing pattern of abuse of authority against him by the Executive Secretary (ES) of ECA.

2. In this case he has challenged a June 2011 decision by the ES to fill the post of Director, Office of Strategic Planning and Programme Management (D/OPM) by way of a lateral transfer without advertising it. He alleges that this decision was one of a series of retaliatory actions taken against him by the ES that began in 2009 when he made an allegation of prohibited conduct against him.

Procedural Matters

3. Since February 2010, the Applicant has represented himself in all of his cases. Before the hearing of the substantive Applications the Tribunal heard and decided a number of interlocutory matters. These included an application for suspension of action of the decision not to advertise the OPM decision.¹

4. Hearings were held in the seven cases over eight consecutive working days in September 2013. This case was heard on 13 and 16 September 2013. In preparation for this hearing the Tribunal made several case management orders² which included the consolidation of three of the cases: UNDT/NBI/2009/044, UNDT/NBI/2010/045 and UNDT/NBI/2010/077 (“the Trio”).

¹ Registered as Case No. UNDT/NBI/2011/025. Judgment No. UNDT/2011/107 was subsequently rendered on 23 June 2011.

² Order Nos. 097 (NBI/2013); 149 (NBI/2013); 158 (NBI/2013); 177 (NBI/2013) and 178 (NBI/2013).

5. 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.

6. The Parties produced a bundle of all documents referred to by the witnesses or in submissions for the hearing. The Applicant's evidence comprised his sworn confirmation of the facts alleged by him in his application supplemented by his oral testimony. The Applicant also relied on evidence given in the Trio of cases by Mr. Hachim Koumare, former Director of the ECA Sub-regional Office in Central Africa, Dr. Monique Rakotomalala, former Director of the African Centre for Gender & Social Development (ACGSD) and Mr. Abraham Azubuikwe, former President of the ECA Staff Union, to provide context for his evidence in this case, particularly in relation to his allegations of improper motivation for the appointment of the Director of OPM by a lateral move.

7. The Respondent did not call any witnesses and chose to rely only on the documentation submitted to the Tribunal.

8. The Tribunal called Mr. Amareswara Rao, Chief, ECA Human Resources Services Section (HRSS) to give some evidence in relation to this case.

Issues

9. The issues identified by the Tribunal and agreed by the parties are:

a. Was the Respondent's decision not to advertise the post of Director/OPM lawful? At the hearing it was clarified that the alleged unlawfulness lay in breaches of the rules and because of the ill motivation by ECA to subvert the Advisory Selection Panel (ASP) process.

b. Was the selection for the post a lateral transfer, an appointment or a reassignment and was it lawful?

c. Did the Applicant suffer any prejudice or damage that requires compensation?

d. Did the Applicant suffer from harassment, discrimination and abuse of authority?

Facts

10. All posts referred to are ECA posts unless otherwise stated.

Background

11. The Applicant joined the United Nations on 1 June 2000. He holds the P-5 position of Chief of the New Technologies and Innovation Section in the Special Initiatives Division at ECA.

12. 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, and preparation of 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). The Director of TRID was Mr. HH.

13. 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. Over this time the relationship between the Applicant and Mr. HH deteriorated. The reasons for this were not fully explained to the Tribunal but the fact of this deterioration was not contested.

14. 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 at ECA a large number of vacancies became available over a short period of time. The Applicant unsuccessfully applied for six or seven D-1 posts up to August 2008.

15. In 2006 as a result of an ECA repositioning exercise all P-5 staff members were appointed Chiefs of Sections. The Applicant was made Chief of the Millennium Development Goals and Poverty Analysis and Monitoring Section (MDGs and PAMS) which was moved from TRID to ACGSD.

16. On 3 August and 3 December 2009 in its responses to two of the Applicant's requests for management evaluation of selection decisions and other matters³, MEU and the Secretary-General urged ECA to take appropriate action to ensure the integrity of the selection process, including the selection panel, and to ensure that for future vacancies for which the Applicant was a candidate, the ES of ECA should be urged to ascertain that all ASPs are established in a manner that guaranteed fairness and impartiality of all Panel members.

17. Following another restructuring of ECA announced at the end of 2009⁴ ACGSD was moved to the newly designated Economic and Development and NEPAD Division (EDND). The Director of EDND was Mr. N against whom the Applicant had lodged complaints. The Applicant's objections to being relocated to what he perceived as a hostile working environment were eventually resolved following the intervention of a number of senior officials. The outcome was that he was transferred to OPM from 16 August 2010.

18. The Applicant gave evidence that the Director of OPM at that time had made a complaint with the Ethics office about unethical behaviour and the division had fallen out of favour. The fact that the Director OPM was due to retire in 2011 was well known.

³ Nwuke UNDT/2013/157.

⁴ Ibid.

The OPM Post

19. On 27 May 2011, the ES announced in a memorandum to all staff that the Director/OPM was retiring at the end of the month having attained the statutory retirement age and he had decided to appoint Mr. A-M, at that time the Director/RIITD, to the post of Director/OPM with effect from 1 June 2011. Mr. Rao who was involved in the administration of that transfer confirmed from the personnel action form that the appointment was a lateral move from RIITD to OPM. The position had not been advertised.

20. Mr. Rao told the Tribunal that when deciding to make a lateral move the ES looked at the competencies required for a specific function and scanned around the senior management group for a suitable person to move. Normally a person would be moved to the position for one year but this is not mandatory. He said that the policy of the Organization is that all vacancies must be advertised but lateral moves are used when there is an urgent need to fill a vacancy.

21. Mr. Rao discussed the OPM vacancy with the Director of Administration who told him it would have to be advertised. After this Mr. Rao was on sick leave for two months in March and April. He was hospitalized and did not follow closely what happened in relation to the vacancy.

22. The Applicant requested management evaluation of the decision to laterally transfer the new Director on 30 May 2011 and on 31 May he applied to the Tribunal for a suspension of action of the decision. This was refused.⁵

23. The Applicant told the Tribunal that he believes that ECA decided not to advertise the OPM vacancy to prevent him from appearing before any more ASPs. He believes that following the guidance to ECA by MEU on 3 August and 3 December 2009 about the composition of the ASPs and MEU's finding in his favour on 3

⁵ Judgment No. UNDT/2011/107.

February 2011, the next strategy by ECA was to make sure he did not appear again before an ASP by not advertising the vacancy for the Director/OPM.

24. The Respondent challenged the evidence on this point. In cross examination it was put to the Applicant that he had originally stated that ECA's alleged strategy against him began after the 2009 letters from MEU but that he changed this evidence when it was revealed that he had attended an interview by an ASP in May 2010 for the post of Director/RIITD.

25. The Tribunal has assessed the evidence given on this point in both this case and in the Trio of cases. According to his submission to MEU on 30 May 2011, the Applicant's allegation of retaliation arose initially after he submitted his complaint about the ES in June 2009. He repeated the allegations in the Trio and in Case Nos. UNDT/NBI/2011/001, UNDT/NBI/2011/008 and UNDT/NBI/2011/082.

26. The Tribunal finds that the Applicant's allegation of retaliation and/or ill motivation toward him by the Administration is a continuation of the issues he raised in 2009. In this case the particular act of alleged retaliation is the alleged strategy to prevent him from appearing before and being interviewed for posts by ASPs by not advertising vacant posts was formulated by the ES who was motivated by the MEU decision in February 2011.

27. The Respondent did not present any direct evidence in the course of the hearing of this case about the reasons for filling the post of Director OPM by way of lateral transfer rather than by a competitive selection process.

28. In a response to the request by the Tribunal during the suspension of action proceedings for the rationale for the lateral transfer of Mr. A-M, the Respondent replied that:

According to ECA, the Executive Secretary could not afford to leave the function of Director of OPM uncovered, as it is a critical post, particularly at this time as the Commission is finalizing its programme planning for the next biennium.... It is important that Mr. A-M is

involved in this process during these final stages so that he will be able to guide the programmatic implementation of the Commission's mandate more effectively during 2012-2013.

29. The MEU decision recorded that the ES explained that the decision to appoint Mr. A-M as Director, OPM was taken after careful and thorough assessment and consultation with the senior staff of the Commission. However there is nothing to suggest that the ES explained to MEU why the decision was made. The only other evidence was Mr. Rao's general statement to the Tribunal that lateral moves are used when there is an urgent need to fill a vacancy.

30. The Applicant produced the travel plans for the new Director/OPM in the first month of his appointment to demonstrate that there was no urgency of pressing work. The plans showed that the Director's travel between 1 June and July 2011 was related to RIITD duties rather than to OPM. During 4 of his absences between June and October 2011 the Director/OPM appointed the Applicant as Officer-in-Charge (OIC) of OPM.

31. The Applicant said that once he filed this present Application with the Tribunal on 14 September 2011 challenging the appointment of the Director/OPM, for the most part he was not again appointed as OIC unless there was nobody else to fill that role. From September 2011 that year he stopped receiving work until he was transferred on 1 March 2013 to his present position. His only main output was the quality review of the African Governance Report 2011 which was neither reviewed nor acted on.

Applicant's Submissions

32. In accordance with General Assembly resolutions A/RES/63/250 (Human resources management), adopted on 24 December 2008 and A/RES/51/226, adopted on 3 April 1997 and the Inspira Instructional Manual Release 1.1.06.04.2011, the vacancy for Director/OPM was an anticipated vacancy due to the retirement of the incumbent. The post should have been advertised six months before the retirement.

33. These instruments create a legitimate expectation that the position of the Director/OPM would be advertised. The lateral transfer denied the Applicant the opportunity to be fully and fairly considered for the post. In his case he was the next most senior officer in the division.

34. There was no basis for the ES to claim urgency in this appointment. The lateral transfer was improperly motivated, arbitrary and in bad faith. It was made in order to circumvent the Secretary-General's two recommendations and MEU's finding that his procedural rights had been violated in the selection for the RIITD post.

35. The letter announcing the decision stated that it was an appointment but could not have been since it did not go through the staff selection system. The decision caused him significant damage in terms of career advancement, loss of time, intellectual growth, health, emotional and psychological distress and loss of reputation.

36. The Applicant accepts that allegations of harassment, discrimination and abuse of authority are generally hard to prove but alleges that the decision not to advertise the vacancy was yet another demonstration of the continuing pattern of adverse employment actions taken by the ES against him which continued in the lack of work assigned to him during his time at OPM.

37. The pattern of adverse actions was shown in the evidence adduced in the Trio of cases.⁶ This evidence included the failure of the ES to investigate his 4 August 2008 complaint about the ASPs; the statements of the ES that he did not want to see him and that he will not be promoted; and, in the ES' response to an Investigation Panel dated 10 May 2010 in which he made accusations of serious misconduct by the Applicant.

⁶ Case Nos. UNDT/NBI/2009/044; UNDT/NBI/2010/045 and UNDT/NBI/2010/077 (see *Nwuke* UNDT/2013/157).

38. In reliance on Judgment No. 1258 of the former UN Administrative Tribunal, the Applicant contended that this is a situation where the cumulative result of several actions taken by the Administration could lead to a conclusion that the “whole picture” rather than the isolated acts indicates the contended abuse.

Respondent’s Submissions

39. The Secretary-General/ES has broad discretion in making decisions regarding appointments. It is not the role of the Tribunal to substitute its own decision for that of the Secretary-General. Where the staff member alleges the contested decision was based on improper motives he or she bears the burden of proving his or her allegations by a preponderance of the evidence.⁷

40. The Respondent relied on staff regulation 1.2(c) of ST/SGB/2009/7 (Staff Regulations of the United Nations and provisional Staff Rules) and sections 2.5 and 3.2 of ST/AI/2010/3 (Staff selection system) as authority for the ES to assign, transfer and make lateral movements of staff without advertisement of the job opening. The discretion of the ES was not exercised in an arbitrary or improper manner but based on the best interests of ECA.

41. The Applicant has failed to meet his burden of proof that the contested decisions were motivated by improper motive. There is a presumption of regularity of official acts, and there is no evidence that the decision was specifically intended to block the Applicant from applying to the post. The lack of advertisement is not a proper foundation for concluding that the contested decision was motivated by improper purposes.

42. The Applicant has no legitimate expectation of being selected for the position based on his appointment as OIC for a short period of time in 2011. The Applicant

⁷ *Assad* UNAT-2010-021; *Azzouni* 2010-UNAT-81.

has suffered no harm from the decision to make a lateral appointment. There is no evidence to support an award.

43. The Applicant's claim of harassment cannot be investigated in the absence of his following the prescribed procedure under ST/SGB/2008/5. His complaint against the ES was fully addressed in July 2010. There can be no finding of harassment in this case.

Considerations

Was the Respondent's decision not to advertise the post of D/OPM lawful or was it motivated by extraneous factors.

The Legal framework

44. The well-established hierarchy of United Nations instruments was affirmed by the Tribunal in *Hastings* UNDT/2009/030 and *Villamoran* UNDT/2011/126. The hierarchy is headed by the Charter of the United Nations followed by resolutions of the General Assembly, staff regulation and rules, Secretary-General Bulletins and then administrative instructions. Manuals and policy documents are subservient to these. Article 101.3 of the Charter provides:

The paramount consideration in the employment of the staff and the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity.

45. In A/RES/61/244, adopted on 22 December 2006, in relation to the pre-screened rosters referred to in section 9, the General Assembly requested:

[t]he Secretary-General to ensure that use of the envisaged expedited recruitment process is confined to surge needs, with established procedures for recruitment being waived only in exceptional cases, and also requests the Secretary-General to report to it on the use of this mechanism, including the criteria for defining such exceptions, in the context of its consideration of human resources management.

46. In A/RES/63/250, the General Assembly resolved that:

[I]n order to ensure the transparency of the recruitment process, all specific vacancy announcements shall continue to be advertised.

47. In paragraph 5, Sec. II of A/RES/51/226 the General Assembly requested the Secretary-General:

To announce all vacancies so as to give equal opportunity to all qualified staff members and to encourage mobility...

48. While the A/RES/61/244 requirement for the waiver of established procedures for recruitment to be in exceptional cases was made in the context of the pre-screening process, the combined effect of the three resolutions referred to indicates the intention of the General Assembly that recruitment and selection processes other than the established ones, such as advertising vacancies, should be only be used on an exceptional basis in order to ensure transparency, equal opportunity and mobility.

49. In ST/SGB/2009/7, staff regulation 1.2(c) provides that:

Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities and or offices of the United Nations...

50. The Secretary-General is required by the preamble of the Staff Rules to provide and enforce staff rules which are consistent with the fundamental conditions of service and the rights, duties and obligations of the United Nations Secretariat as embodied in the Staff Regulations.

51. ST/AI/2010/3 was promulgated in April 2010 to integrate the recruitment, placement, promotion and mobility of staff within the Secretariat. The ECA is part of the Secretariat. The AI defines a lateral move as:

...movement of a staff member to a different position at the same level for the duration of at least one year. The new position may be in the same or a different department or office, in the same or a different duty station and in the same or a different occupational group.

...

Temporary assignments of at least three months but less than one year, with or without special post allowance, shall also qualify as a lateral move when the cumulative duration of such assignments reaches one year.

52. Section 2.5 gives Heads of Departments the authority to transfer staff members within their departments or offices including another unit of the same department to job openings at the same level without advertisement of the job opening.

53. Section 3.1 states that the system shall apply to the selection and appointment of all staff members.... for one year or more to specified grades and levels and in specified categories. Section 3.2 lists exceptions to section 3.1. Among these are lateral movements of staff by heads of department/office/mission in accordance with section 2.5.

54. Section 4 of the ST/AI is titled "Job Openings". Section 4.1 states that immediate and anticipated job openings for positions for one year or longer shall be advertised through a compendium of job openings. Under 4.2, position-specific job openings shall be included in the compendium when the incumbent separates from service.

55. The obligations of the administration in relation to vacancies that arise because of retirement are set out in ST/AI/2003/8 (Retention in service beyond the mandatory age of separation and employment of retirees). These include the section 3.1 requirement for departments and offices to regularly identify staff appointed under the 100 series of the Staff Rules who are due to retire within a period of 12 months. Section 3.2 of this AI provides that:

Heads of departments and offices shall regularly monitor all vacancies that are foreseen to occur in their department or office, normally as a result of staff reaching mandatory age of separation, and shall take all necessary steps to ensure that such vacancies are advertised in accordance with the requirements of section 4 of administrative instruction ST/AI/2002/41 at least six months before the anticipated vacancy occurs. No extension shall be granted if that requirement is not met.

Discussion

56. The General Assembly resolutions cited above require all vacancies to be advertised to ensure transparency of selection and the opportunity for mobility of staff except for expedited methods of recruitment to be used only in exceptional circumstances.

57. Lateral moves are exempted from the ST/AI/2010/3 staff selection procedures requiring advertisement of vacancies and the screening of candidates. The ST/AI defines a lateral move but is silent on the criteria for when such a move is appropriate. A lateral move may be seen as an expedited method of recruitment, such as the pre-screening process referred to in General Assembly resolution A/RES/61/244. If so, such moves should only be resorted to in exceptional cases.

58. In any event, as a lateral move is a discretionary measure, its use must be in accordance with the established procedural rules and must not be arbitrary or motivated by factors inconsistent with proper administration or based on erroneous, fallacious or improper motivation.⁸

59. To the extent that the staff member was laterally transferred within the same department or office of ECA and the job opening was at the same level, the appointment to the post of Director of OPM fulfilled the technical requirements of section 2.5.

⁸ *Assad* 2010-UNAT-021.

60. However, as the post of Director of OPM became vacant by reason of the retirement of the incumbent, it was subject to section 3.2 of ST/AI/2003/8. The job opening should have been advertised at least six months before the retirement occurred and the procedures for filling a job opening in section 4.1 of ST/AI 2010/3 should have been followed. If there was a problem filling the post through the regular procedures, section 2 of ST/AI/2003/8 provided for the maintenance of an incumbent in the post past retirement age in order to carry out a recruitment process.

61. The Respondent has not explained why the Administration used an expedited and last minute process days before the retirement of the incumbent rather than the established selection procedures other than to say that ECA could not afford to leave the function of Director of OPM uncovered as it was a critical post. This begs the question of why the administration did not meet its responsibility under ST/AI/2003/8 to anticipate the vacancy of such a critical post and advertise it six months before the holder of the post was due to retire. The rationale provided at the request of the Tribunal during the Suspension of Action proceedings did not address this point.

62. The Tribunal concludes that the filling of the post by lateral transfer on the retirement of the incumbent was in breach of ST/AI/2003/8. As no adequate reasons exceptional or otherwise have been given by the Administration to justify the use of a lateral transfer in this case, it is an arbitrary use of the discretion conferred by ST/AI/2010/3.

63. In *Asaad* 2010-UNAT-021, UNAT held that the burden of proving improper motivation lies with the staff member contesting the decision and in *Azzouni* 2010-UNAT-081 that the standard of proof of discrimination was to be on the preponderance of evidence. As decided by the Tribunal in *Sefraoui* UNDT/2009/095, this proof includes those adverse inferences that may be drawn where the party with the ability to refute or contradict a relevant fact does not do so.

64. The unchallenged evidence adduced by the Applicant in support of this contention is that from early 2009, he had a strained relationship with the ES.⁹ The reasons and responsibility for that is not for the Tribunal to assess but it existed.

65. As established in Case No. UNDT/NBI/2010/045¹⁰ the Applicant was, for his own reasons, very resistant to the ES' requirement for his section and therefore for him to move to EDND. This resistance caused the ES a great deal of difficulty. He had to call special meetings and set up a committee to try and resolve the matter. It took several months for these efforts to bear fruit.

66. Contrary to the Respondent's submission that there is no evidence that the lateral move decision specifically was intended to block the Applicant from applying to the post, the Tribunal holds that there is no evidence that it was not intended.

67. The relevant factors in this case are the difficult relationship between the ES and the Applicant; the inevitability that the Applicant would have applied for the vacancy if it were advertised; the unlawfulness of the process and the announcement of the lateral move at the last minute, only days before its implementation. In addition, an adverse inference may be drawn from the Respondent's failure to contradict or refute the Applicant's allegation of improper motives other than by an unsupported oral submission to that effect by Counsel.

Compensation

68. In his application the Applicant sought a number of remedies in the nature of findings of unlawful acts and decisions. He also sought rescission of the selection decision and an order for the Administration to advertise the post. His final request was to "make me whole as the circumstances determine".

69. In *Contreras* 2011-UNAT-150, UNAT held that, in principle, in cases concerning appointment and promotion, pursuant to article 10.5(a) of the Statute of

⁹ *Nwuke* UNDT/2013/157.

¹⁰ *Ibid.*

the United Nations Dispute Tribunal, the Tribunal should not only grant compensation but has to provide the Administration with a choice between on the one hand, rescinding the decision or performing an obligation and, on the other hand, paying compensation. However in that case UNAT accepted the reasons of the Tribunal for not ordering rescission of the decision because:

[...] Owing to the passage of time, a rescission of the decision would serve no purpose or the performance of an obligation would be impossible, or when one of those options would affect the rights of third parties.

70. In the present case not only would the practical effects of rescinding the selection decision made in July 2011 be wide ranging but as the Applicant repeatedly acknowledged, he had no expectation of being appointed. He has therefore not suffered any monetary or professional harm that entitles him to compensation for the loss of the chance of being appointed to the position. The re-advertising of the post would not be feasible given the consequential effects on the incumbent of the post.

71. The Applicant did not seek any monetary compensation nor did he claim that he was caused any specific harm or damage other than the lost opportunity to apply for the OPM post. There will be no order for compensation.

Conclusions

72. The Tribunal finds that the ES abused the authority and discretionary powers vested in him by ST/AI/2010/3 to make appointments and transfers by appointing the new Director to the OPM post by an unlawful and unjustified lateral transfer instead of the established procedures.

73. The Tribunal concludes that the ES' decision to fill the OPM post, for which the Applicant was an obvious and inevitable candidate, by a lateral move was tainted by the improper motive of denying the Applicant his right opportunity to apply for the vacancy and be considered for the post.

(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