



Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko

HAROUN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Robbie Leighton, Office of Staff Legal Assistance

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Elizabeth Gall, ALS/OHRM

The Application and Procedural History

1. At the time of filing the Application, the Applicant held a fixed-term appointment as an Administrative Assistant at the G-5/8 level in the United Nations Assistance Mission for Iraq (UNAMI). On 11 December 2012, she filed an Application before the United Nations Dispute Tribunal (UNDT) in Nairobi challenging the decision to reassign her from the Office of the Chief Administrative Services (CAS Office) to the Supply Section in UNAMI (impugned decision).

2. On 22 February 2013, the Registry issued a notice setting this matter down for a case management hearing on 28 February 2013. The Parties were advised to come prepared to address the court on: a) the completeness of the file, and if there are any additional documents to be submitted; b) their readiness for the matter to be set down for hearing; c) the number of witnesses they expect to call, and the number of hearing days proposed as being necessary; and d) their amenability to the matter being formally referred to mediation pursuant to Article 10(3) of the Statute.

3. On 28 February 2013, following the case management hearing, the Tribunal directed the Parties to jointly advise the Tribunal on the likelihood of this matter being settled *inter partes* or if an order formally referring this matter to mediation is necessary.

4. On 8 March 2013, the Parties jointly advised the Tribunal that informal resolution was not possible. No mention was made of referral to mediation by either Party.

5. On 7 August 2013, the Tribunal issued a Notice of Hearing setting the matter down for trial.

6. The hearing commenced on 18 September 2013, and continued through 19 and 24 September; 16, 17, 22, 23 and 24 October; and 12 and 13 November 2013.

7. The Applicant and two witnesses testified in support of her case. The Respondent called two witnesses for his case.

8. Given the length of the trial and the number of witnesses who testified in this case, the Tribunal considered it necessary to request transcription of the trial recordings. The last of these transcripts was received by the Tribunal in October 2014.

Facts and Submissions

Applicant

9. Prior to entering into the service of the United Nations, the Applicant had worked for KPMG and the diplomatic mission of the Federal Republic of Nigeria in Kuwait.

10. The Applicant started working with the Organization in 2005, as an Administrative Assistant in the CAS Office based in Kuwait. Her tasks comprised providing administrative support and translation services to the CAS. In 2009, the Applicant was assigned the additional task of supervising the visa and residency permit functions, and of liaising with the Ministry of Foreign Affairs and other Kuwaiti government agencies handling visa and residency matters for UNAMI's international and national staff, consultants and contractors.

11. These tasks had previously been handled by the Travel Unit, but were transferred to the CAS Office due to delays and other problems.

12. The Applicant is familiar with and understands the legal and administrative procedures involved in the process of obtaining visa and residency permits in Kuwait;

her experience stems from having been brought up as an expatriate in Kuwait and her work with the Nigerian mission there. This experience and her knowledge of Arabic enabled her to resolve numerous issues faced by staff in both UNAMI and the United Nations Mission in Afghanistan (UNAMA).

13. The Applicant's Performance Appraisal (ePAS) history also demonstrates that she met or exceeded performance expectations throughout her time with UNAMI¹.

14. In recognition of her capabilities, in 2011, her first and second reporting officers requested a reclassification of the post the Applicant was encumbering.

15. In June 2012, the Applicant was tasked with assisting national staff who had been reassigned from Amman, Jordan, to Kuwait as part of UNAMI's downsizing and restructuring exercise, with their visas and residency permits.

16. The Applicant did this "to the best of her abilities" but was soon castigated by the then Acting Chief of Mission Support (CMS), Mr. Raja Arumugham, for not having given the newcomers from Amman, Jordan, the necessary support. Mr Arumugham summoned the Applicant to his office for a verbal reprimand, which was followed by an email "announcing the involvement of the Conduct and Discipline Unit."

17. The Applicant responded to the emails explaining that she and her colleague provided as much support as was possible, but that some of the staff demands collided with other duties. She also explained that some of the expectations of the staff from Amman were not in line with Kuwaiti procedures and UNAMI's corresponding policies.² Specifically, the Applicant had been advised that the national staff members from Amman should have the same entitlements as all other national staff.

¹ Applicant's Annex 6.

² Applicant's Annex 7; and 10.

18. Approximately one week later, the Applicant reiterated her request to be informed about the specifics of the alleged written complaint against her, so that she could properly respond.³ There was no response to her query.

19. The Applicant's direct supervisor, Ms. Padma Nandkumar, had been away at the time this situation developed, but upon return to Kuwait she asked what the issue was. When she heard the Applicant's narration of events, she expressed surprise, saying that the Acting CMS had always spoken very highly of the Applicant. She then assured the Applicant that she would enquire with the Acting CMS.

20. However, upon receiving the decision to reassign her to UNAMI's Supply Section⁴, the Applicant enquired with her direct supervisor again and was told by Ms. Nandkumar that she had now seen the written complaints made against the Applicant; that the Applicant's former first reporting officer Mr. James Phelan, the then Chief of the Travel Unit, had also complained about her; that the Applicant's personality did not suit her office; and that the Applicant should be very careful if she wanted to preserve her job in a mission that was in the process of downsizing.⁵

21. UNAMI tried to justify the decision to reassign the Applicant to the Supply Section on the one hand with a need for the Applicant to do cross-training;⁶ she had never asked for such training nor had her supervisors explored such or similar career development possibilities with her.⁷ The Organization's Best Practices for cross-training do not suggest that such training should be forced upon staff by way of reassignment.⁸

22. The Applicant had not been trained for her functions in the Supply Section.

³ Applicant's Annex 12.

⁴ Applicant's Annex 2.

⁵ Applicant's Annex 7.

⁶ Applicant's Annex 2.

⁷ Applicant's Annex 13.

⁸ Applicant's Annex 14.

23. The reassignment decision also mentions the need “to staff the office with staff members who are multi skilled in other specialized areas⁹.”

24. Another indicator that the decision to reassign the Applicant was not thought through can be seen in the fact that the Applicant had to repeatedly urge her supervisors to tell her whom to hand over her tasks to. The delay in naming a successor made it necessary for the Applicant to assist UNAMI staff with their visa and residency problems well beyond the time of her reassignment.¹⁰ One week after her reassignment, the Applicant was told who to hand over to and did.¹¹

25. It was also apparent that the Applicant’s new supervisors at the Supply Sections were not expecting her; it took the Section nine days to tell her who she should turn to for guidance at her new work place.¹² No work-plan was given to the Applicant until mid-September¹³, nor was she given any training for her new role.¹⁴

26. Sometime into her new assignment, the Applicant’s former direct supervisor, Ms. Nandkumar, wrote to the Applicant accusing her of withholding information that was crucial for her successor’s work on visa and residency issues.¹⁵

27. The Applicant responded by forwarding an email she had sent to her successor and copied to Ms. Nandkumar two months earlier, containing a detailed list of her contacts Ministry of Foreign Affairs.

28. While an issue with the completion of the Applicant’s 2010-2011 ePAS was resolved through the intervention of the Management Evaluation Unit¹⁶ (MEU), the completion of her 2011-2012 ePAS was not completed until 7 December 2012, only

⁹ Applicant’s Annex 2.

¹⁰ Applicant’s Annex 16.

¹¹ Applicant’s Annex 17.

¹² Applicant’s Annex 18.

¹³ Applicant’s Annex 19.

¹⁴ Applicant’s Annex 20.

¹⁵ Applicant’s Annex 21.

¹⁶ Applicant’s Annex 4.

after numerous reminders by the Applicant and UNAMI's Office of the Chief of Staff.¹⁷

29. The Applicant cannot be satisfied with the findings of MEU. The evidence provided to the MEU should have made it clear that this reassignment was a veiled punitive measure against the Applicant, who was being made a scapegoat for a poorly managed downsizing exercise of the UNAMI office in Amman.

30. Apart from the documentation available to the MEU at the time, further evidence confirming the punitive character of the reassignment decision, there is sufficient evidence of the continued hostility towards the Applicant by her former supervisors¹⁸, as well as the lack of planning for the purported cross-training the Applicant was supposed to receive in the Supply Section.¹⁹

31. The Applicant kept being asked by all her colleagues why she was moved against her will. They all assumed she had fallen out with her supervisors, and understood her reassignment to constitute punishment.²⁰ The Applicant submits that this general perception of her situation is a good indicator for what was really going on.

32. The Applicant's supervisors not only abused their authority vis-à-vis the Applicant, but did so in disregard of the needs of the Mission they were supposed to manage.

Respondent

33. The impugned decision was made in lawful exercise of the Secretary-General's discretion under staff regulation 1.2(c) and staff rule 1.2(a).

¹⁷ Applicant's Annex 23.

¹⁸ Applicant's Annexes 7, 13, 21, 22 and 23.

¹⁹ Applicant's Annexes 18, 19 and 20.

²⁰ Applicant's Annex 17.

34. The Applicant's reassignment to the Supply Section was done in the interests of the Mission following the restructuring of the CAS Office. The Respondent consulted the Applicant in good faith in advance of the contested decision. The position to which the Applicant has been reassigned corresponds with her skills, qualifications, and experience.

35. The impugned decision was not motivated by an improper purpose.

36. The decision to reassign the Applicant to the Supply Section was taken in the best interests of the Organization. The Applicant was informed that the reason for her reassignment was the operational restructuring of the CAS Office.

37. The restructuring of the CAS Office entailed: (1) an increase in workload arising from the transfer of responsibility for the implementation of audit recommendations to the CAS Office; (2) a 15% cut in administrative support staff in the CAS Office upon instructions from United Nations Headquarters; and (3) streamlining of functions of the CAS Office following the establishment of the Kuwait Joint Support Office integrating two Missions, UNAMI and UNAMA.

38. Following the restructuring, an Audit Assistant was laterally reassigned to the CAS Office. The Audit Assistant's reassignment met an operational need for multi-skilled administrative staff due to the expanded role of the CAS Office and the reduction in the number of administrative support staff in the Office. The Audit Assistant's skills and experience enabled her to perform work relating to the new audit functions of the CAS Office and also carry out administrative functions that were performed by the Applicant.

39. The reassignment of the Applicant to the Supply Section also met the operational needs of the Supply Section which required an Administrative/Supply Assistant, fluent in Arabic, to prepare export and cargo movement documents for approval by the Ministry of Foreign Affairs and Customs authorities of Kuwait.

While working in the CAS Office, the Applicant performed similar functions in connection with visa and residency applications, and routinely checked the documents to be submitted by the Supply Section to the Kuwaiti authorities.

40. UNAMI engaged in good faith consultations with the Applicant regarding her proposed assignment. These consultations took place in discussions relating to her career development, in which “she expressed her preference for work relating to the preparation of documents submitted by the Supply Section to the Kuwaiti authorities”.

41. The Applicant received training prior to her reassignment to the Supply Section, and continued to receive training once she was in the Section. The Applicant was reassigned to a post at the same level in the Supply Section. The functions performed by the Applicant in the Supply Section correspond with her skills, qualifications, and prior experience as an Administrative Assistant in the CAS Office. Much of her functions in the Supply Section are functions in which the Applicant is already well-versed, and she continues to receive training.

42. The reassignment will enhance the Applicant’s functional mobility and her career prospects within the Organization once the mandate of the Mission ends.

43. There is no link between the Applicant’s performance issues and the decision to reassign her.

44. Following complaints received about the Applicant’s support to national staff members with regard to Kuwaiti visa and residency documentation, the Acting CMS issued the Applicant with a verbal caution. This was an isolated instance of a performance problem. After the matter was resolved, the Acting CMS, as the Applicant’s Second Reporting Officer, endorsed the rating of “successfully meets performance expectations” in her 2011/2012 e-PAS performance record.

45. The fact that the Applicant had not received training in all aspects of her new functions in the Supply Section before her reassignment does not provide any foundation for a finding that her reassignment was improperly motivated.

46. The speculation by the Applicant's colleagues regarding the reasons for her assignment is likewise unfounded. The actual reason for the Applicant's reassignment was as stated in the memorandum dated 10 July 2012.²¹

Respondent's Closing Submissions

47. The CAS required administrative support in discharging her responsibilities to implement audit recommendations. This support was added to the existing duties and responsibilities of the G-5 Administrative Assistant in the CAS Office. Another staff member in UNAMI was identified as suited to perform the expanded duties and responsibilities of Administrative Assistant. The Applicant has not adduced any evidence to demonstrate that this explanation for her reassignment is not correct.

48. As reflected in the proposed budget for UNAMI for 2013, the CAS is responsible for coordinating the implementation of audit recommendations within UNAMI. These include audit recommendations by the Organization's internal auditors, the Office of Internal Oversight Services (OIOS), and external auditors (Boards of Audit). The implementation of audit recommendations is imperative and the Mission is required to report on this to the General Assembly.

49. In his evidence, the Acting CMS explained that, due to his prior experience as an auditor, he did not require administrative support in discharging his audit responsibilities as the CAS.

50. The CAS identified the need for administrative support in discharging her audit responsibilities during the preparation of UNAMI's proposed budget for 2013.

²¹ Applicant's Annex 2.

The preparation of the budget commenced in late March or early April 2012, following a senior staff retreat. As instructed by Headquarters, the CAS and the Acting CMS conducted a “task-to-task” review of the CAS Office’s staffing requirements. Following this review, the CAS and Acting CMS decided that the G-5 Administrative Assistant in the CAS Office would become the audit focal point, with responsibility for reviewing recommendations received from the OIOS Resident Auditor in Kuwait.

51. The CAS and the Acting CMS decided that another staff member in UNAMI had the necessary skills and experience to act as the audit focal point, as well as to perform the other functions of an Administrative Assistant. The Acting CMS explained in his evidence that he been contacted by OIOS in New York to assist in finding a position for Ms. Zydan, who was an Audit Assistant in the Office of the Resident Auditor for UNAMI. The Office was to be moved from Kuwait to Baghdad. As Ms. Zydan was a locally-recruited staff member, she could not be reassigned to Baghdad. As recorded in her 2006 Personal History Profile, Ms. Zydan had worked as an Administrative Clerk in the Office of the Resident Auditor since September 2005.

52. The review of the staffing requirements of the CAS Office was reflected in the Chief Human Resources Section’s memorandum of 10 July 2012 informing the Applicant of her reassignment. The Applicant was not the only staff member affected by this review. As explained by the Acting CMS in his evidence, two staff members returned to Headquarters as their positions in the CAS Office were no longer funded in the UNAMI budget for 2013.

53. The Applicant has adduced no evidence to demonstrate that the CAS Office had no need for administrative assistance to support its audit responsibilities. The CAS and the Acting CMS provided consistent and credible evidence regarding the need for this assistance, and the identification of Ms. Zydan who was best suited to perform the expanded functions of the G-5 Administrative Assistant.

54. The Applicant's evidence that she has experience in implementing audit recommendations as a consequence of her previous job as an Administrative Assistant with KPMG is irrelevant. The Applicant did not produce her Personal History Profile in support of her assertions that she had such experience. Both the CAS and the Acting CMS were not aware that she had any such experience, and the Applicant never once mentioned this experience to them. Nevertheless, it was for UNAMI to determine who was suited to fill the position of Administrative Assistant given the expanded role of the post.

55. The Applicant has not discharged her burden of proving that her reassignment was punishment for criticism of the CAS Office by staff who had relocated from Amman, Jordan, to Kuwait. The Applicant has offered speculation, but no credible evidence, in support of her claim. The CAS considered that the Applicant had done a good job in supporting the Amman staff who had moved to Kuwait. This view is fundamentally inconsistent with the notion that the CAS planned to reassign her as punishment for the complaints made by the Amman staff.

56. There was a clear difference of opinion between the CAS and the Acting CMS about whether the Applicant had provided satisfactory support to the Amman staff who relocated to Kuwait. The Acting CMS's view was that the Applicant's performance was not satisfactory, and she bore some responsibility for the complaints made by the Amman staff that the CAS Office had failed to assist them to obtain family visas, residence permits, and drivers licenses from the Government of Kuwait. Matters came to a head on 10 June 2012, when the Acting CMS wrote an email to the Applicant stating: "I have a written complaint and will ask [the Conduct and Discipline Unit] to check. [...] I will not take this lightly. I will resolve this when [the CAS] returns."

57. The CAS, however, considered that the Applicant's support for the Amman staff went "above and beyond" the level of support that the CAS Office was required to provide locally-recruited staff. The CAS was surprised when she read the Acting

CMS's email to the Applicant, as he had always spoken highly of the Applicant. The CAS spoke to the Acting CMS and defended the Applicant. She explained to him that the complaints related to extra services that could only be provided by the CAS Office on a voluntary basis. The Acting CMS did not raise the issue of the Amman staff with her again.

58. The CAS explained in her evidence that she called a meeting with the Amman staff to clear up any misunderstanding about the assistance that the CAS Office could provide. Though the Applicant was not at the meeting, she was aware of it. After the meeting, the CAS and the Applicant discussed what additional assistance could be provided. No more complaints were received from the Amman staff.

59. The Applicant's evidence that she believed that her relationship with the CAS broke down following the Acting CMS's email of 10 June 2012 is not plausible. The Visa Clerk, who worked with the Applicant at the material time, did not give any evidence to support the Applicant's version of events.

60. The CAS denied in examination and cross-examination that she and the Acting CMS planned to move the Applicant out of the CAS Office as punishment for the complaints made by the Amman staff.

61. The CAS's support for the Applicant is inconsistent with the suggestions now made against her. The Applicant and the CAS were in agreement that the Amman staff should receive the same assistance as the locally-recruited staff in Kuwait. The Applicant stated that the CAS had told her "not to worry" about the Acting CMS's email. This reassurance was well-placed. No written complaint against the Applicant was made to the Conduct and Discipline Unit (CDU). The Acting CMS clarified in his evidence that he had not received a written complaint, although the Amman staff had earlier threatened to do so. The CAS also confirmed that no such complaint was made.

62. The CAS did what she told the Applicant she would do when matters came to a head with the Acting CMS, she resolved the problems directly with the Amman staff upon her return to Kuwait. The CAS stated in her evidence that the Applicant thanked her for her support after the CAS had her meeting with the Amman staff.

63. The Applicant's claims that emails sent by the CAS to her demonstrate improper motives have no merit. The CAS' correspondence was work-related, and made fair and appropriate enquiries of the Applicant.

64. First, while the CAS was in Baghdad, a Security Officer informed the CAS that someone had been in her office in Kuwait shredding documents. The CAS's email to the Applicant of 15 July 2012 enquiring about the matter was appropriate. The Applicant's email in response was defensive and evasive. Second, the CAS's email of 18 October 2012 requesting the Applicant to hand over the telephone directory of her contacts with the Government of Kuwait was a legitimate request.

65. The Applicant's claim that UNAMI was required to engage an Individual Contractor after her reassignment in order to do certain work that she had performed in the CAS Office is unfounded.

66. The Acting CMS and the CAS explained that the Individual Contractor's role was to act as a Protocol Officer to support the Iraq/Kuwait border project. It was necessary to retain a Kuwaiti national who could liaise with officials at the highest levels in the relevant Ministries in Kuwait. No-one in UNAMI had this level of access to government officials.

67. The Individual Contractor was retained at the level of a National Professional Officer (NPO-A), reflecting his academic qualifications and professional experience. He gave evidence that his main work related to the issuance of visas and residence permits for UNAMI staff. The CAS and the Acting CMS acknowledged in their

evidence that the Individual Contractor assisted the CAS Office in this respect, but explained that this was not the only work he did.

68. That the description of the Individual Contractor's duties in his Terms of Reference is similar to the description of the Applicant's protocol and liaison duties in her e-PASs is of no consequence. The Applicant's duties related to protocol and liaison support she provided in connection with the CAS's liaison functions as Head of Office in Kuwait. The Individual Contractor was retained to provide protocol support at a higher level, and on a separate project.

69. It was suggested in cross-examination of the CAS and the Acting CMS that UNAMI breached ST/AI/1999/7 (Consultants and individual contractors) as the services performed by the Individual Contractor were services that could be met from existing staff resources. This contention misrepresents the conditions under which individual contractors may be hired. Consultants may be hired if the need for the required services cannot be met from existing staff resources; and his/her work may involve functions similar to those of staff members or other functions that could be performed by staff members.

70. The Applicant's new position is at the G-5 level, the same level as her position as Administrative Assistant in the CAS Office.

71. The Applicant has the necessary skills and qualifications for the position she was reassigned to. As the CAS explained in her evidence, the education and experience requirements for a G-5 Administrative Assistant in the Supply Section are the same as those for the equivalent position in the CAS Office. The minimum requirements are a high school diploma and some years of experience as an administrative assistant, which the Applicant has.

72. The Applicant had some experience relating to UNAMI's supply operations as a result of her work in the CAS Office. The Applicant provided assistance to the

MovCon Unit to prepare and review UNAMI's customs clearance requests for the import and export of goods (Cargo Movement Requests/CMR), prior to their submission to the Government of Kuwait for approval.

73. The CAS and the Acting CMS anticipated that the Applicant would continue to be involved in the preparation of CMRs in the Supply Section. This expectation is reflected in the Applicant's work-plan, which lists one of her duties as "[p]repare CMRs for equipment/materials to be shipped".

74. The Applicant's opinion that her new position does not make use of any of her skills and experience is not relevant. There is scope for learning on the job. The Applicant's work-plan in the Supply Section included in-house training so that she would be able to carry out her new administrative functions. The Applicant acknowledged in cross-examination that she has learnt new skills.

75. The Applicant's preferences for work (and her career ambitions) are not criteria to assess the lawfulness of her reassignment. The reassignment of the Applicant to the Supply Section, in fact, advanced the Applicant's career aspirations to be an internationally-recruited staff member in a family duty station.

76. While he was CAS, the Acting CMS advised the Applicant that she should move into a position with specialist functions to pursue her ambition. He advised her that it would be difficult to further her ambition as an Administrative Assistant as there are many people on the field roster for this position in missions. For positions with specialized functions, there is less competition. The Acting CMS explained in his evidence that supplies form a critical function in peacekeeping missions, and the Applicant's reassignment would open up opportunities to be selected for positions in the Field Service category in this field.

77. The CAS gave similar advice to the Applicant, and recalled in her evidence that there may be a smaller number of international Administrative Assistant

positions as in the future due to the trend to “nationalize” positions in missions. The CAS also encouraged the Applicant to take up training opportunities in UNAMI to prepare for a move into a position with more specialized functions.

78. The Applicant stated in her evidence that she only had one career discussion with the Acting CMS over the four-year period they worked together. This statement is implausible. The Acting CMS regarded the Applicant as a valued staff member, as reflected in his comments regarding the Applicant’s performance in her e-PASes and his recommendations to her to undergo training. It is improbable that the Acting CMS had just one discussion regarding her career development given his view of her performance. The Acting CMS also stated in his evidence that he gave advice to the Applicant about positions in UNAMI that her husband might apply for. This evidence was not contested in cross-examination.

79. The Applicant contends that she lost an opportunity to be promoted to the G-6 level as there is a pending request for reclassification of the Administrative Assistant post in the CAS Office. No such opportunity has been lost. In his evidence, the Acting CMS explained that he was advised that the 2011 request to reclassify the post would not be granted, as a reclassification to the G-6 level would only be approved if the CAS post was at the D-1 level. However, the CAS post is at the P-5 level. Further, a staff member has no entitlement to be promoted following a reclassification of the post he or she encumbers to the higher level, under section 4.3 of ST/AI/1998/9 (System for the classification of posts).

80. In her evidence, the CAS explained that she spoke to the Applicant in early June 2012, soon after UNAMI received the code cable of 1 June 2012 from Headquarters regarding UNAMI’s budget for 2013. The CAS explained that the Administrative Assistant position would have an audit role. The CAS also explained that her reassignment to the Supply Section was a good opportunity, which the Applicant appeared to accept.

81. The CAS's evidence should be accepted as it is consistent with both her and the Acting CMS's evidence of their career discussions with the Applicant.

Applicant's Closing Submissions

82. The Applicant avers that the decision was a veiled punitive measure resulting from her supervisors' reaction to the handling of staff arriving at the Kuwait office from Amman.

83. The Respondent has variously justified the decision as having been in the interests of the Applicant's career development, a response to a need for the Applicant's skills in the Supply Section, the result of budget constraints at the Mission, the development of the Kuwait Joint Support Office and the transfer of responsibility for the implementation of audit recommendations to the CAS Office.

84. The Applicant submits that the evidence heard by this Tribunal clearly demonstrates that the Respondent's various justifications are not supported by the facts. The Applicant submits that these justifications were fabricated after the fact in order to disguise the real and unlawful motivation for the decision.

85. The Applicant provided clear and consistent evidence concerning her role in the CAS Office, the lead up to the decision to laterally transfer her including issues around the arrival of staff from Amman, the transfer itself and her new role in the Supply Section.

86. The Applicant asserts that within the office, she had a highly specialised and developed role with a number of duties that she had voluntarily taken on relating to contact between the Mission and the Ministry of Foreign Affairs of Kuwait

87. The Applicant described how the transfer of staff from the Mission's Amman office caused friction due to unrealistic expectations on their part as to the assistance

that they would be provided with by the CAS Office and by the immigration rules applied by the Ministry of Foreign Affairs to United Nations national staff.

88. The Applicant explained how this friction resulted in complaints against the CAS which Mr. Arumugham blamed on her. These complaints resulted in the email exchanges at annex 10 to the original application where Mr. Arumugham sought to characterise the Applicant's behaviour as a conduct matter and issued the threat: "I will not take this lightly. I will resolve this when Padma returns."

89. Exactly one month later, following the return of Ms. Nandkumar, the Applicant received the memo informing her that she would be transferred to the Supply Section.

90. The Applicant gave clear evidence that she had never been consulted regarding this move. This is supported by the evidence of Mustapha Benromdhane who stated that Ms. Nandkumar had sought to effect the transfer earlier but that he had persuaded her to postpone it until after his leave. In giving this evidence he clearly stated that this was something even the Applicant did not know about.

91. The Applicant submits that the decision to laterally transfer her was not taken for genuine operational reasons but was a veiled punitive action.

92. It is accepted by all parties that the arrival of staff from Amman to the Kuwait office resulted in complaints concerning the CAS Office.

93. The Applicant gave clear and consistent evidence that staff from Amman arrived in Kuwait with unrealistic expectations regarding immigration procedures for United Nations staff in that country. Ms. Haroun concluded that this was the result of assurances made by Mr. Arumugham to these staff prior to their transfer. Ms. Haroun explained that this resulted in complaints when the CAS Office was unable to fulfil their unrealistic expectations.

94. It is important to note that Mr. Arumugham and Ms. Nandkumar gave entirely conflicting evidence regarding the immigration rules, their implementation with regards to United Nations staff and the type of assistance offered to arriving staff by the CAS Office.

95. Ms. Nandkumar gave evidence regarding one staff member from Amman who arrived in Kuwait unaware that as a female she would be unable to sponsor a visa for her husband. She stated that in such circumstances it was not possible for the Mission to persuade the Ministry of Foreign Affairs to provide an exception to their rules for this staff member. This supports the Applicant's assertion that Amman staff arrived in Kuwait with unrealistic expectations and her assertion that the Ministry of Foreign Affairs were rigid in their application of immigration rules to United Nations national staff.

96. Mr. Arumugham, on the other hand, sought to suggest that the Ministry of Foreign Affairs was entirely flexible and prepared to accommodate whatever requests the United Nations made. He further characterised the sort of assistance CAS would offer arriving staff members as significantly broader and less defined than Ms. Nandkumar and the Applicant.

97. Mr. Arumugham accepts that he visited Amman and met with staff due to transfer to Kuwait.

98. His evidence demonstrates his lack of understanding regarding immigration rules. This supports the Applicant's assertion that he was responsible for creating false expectations amongst the Amman staff.

99. Mr. Arumugham gave evidence regarding the politically sensitive nature of the transfer of staff from Amman to Kuwait describing a situation where he was under enormous pressure to ensure their integration into the Kuwait office.

Mr. Arumugham explained how in this context any complaints by these staff were particularly significant.

100. Ms. Nandkumar's evidence contradicted that of Mr. Arumugham as she sought to minimize the importance of complaints by the Amman staff characterising them as an everyday reality of work of this nature.

101. Ms. Nandkumar gave evidence that the Applicant's treatment of the Amman staff had been appropriate and in line with CAS policies.

102. Mr. Arumugham described both the Applicant and Mr. Benromdhane as being "in denial" when he confronted them about problems relating to the Amman staff.

103. Mr. Arumugham's explanation of his email from 10 June 2012 is particularly problematic. He claimed never to have actually received a written complaint regarding the Applicant and accepted having misrepresented this in the email. Mr. Arumugham claimed that his reference to CDU was a response to a threat by Amman Staff to approach CDU with their complaints.

104. The Applicant submits that this account is simply not credible; the plain meaning of Mr. Arumugham's email is that he had received a complaint and intended to take it to CDU. This demonstrates that he had lost all perspective concerning the complaints made. It is indicative of an extreme reaction to the situation which supports the allegation that this was subsequently the motivation for punitive action against Ms. Haroun.

105. Mr. Arumugham claimed that on returning to the Duty Station, Ms. Nandkumar succeeded in satisfying the needs of the Amman staff.

106. This evidence was contradicted by Ms. Nandkumar who indicated that the requests of the Amman staff were outside the purview of the CAS Office and that on returning to the Duty Station she informed them as much.

107. Ms. Nandkumar went on to suggest that following her intervention, Mr. Arumugham recognised that the Applicant had not been at fault and apologised to her.

108. This evidence directly contradicts the account of Mr. Arumugham who maintained that the Applicant had acted improperly and that his reaction had been appropriate even going so far as to try to insinuate that the Applicant's behaviour might have resulted from prejudice.

109. Contrastingly, the Applicant gave clear evidence of a disproportionate, unjustified and furious response by Mr. Arumugham to alleged complaints from Amman staff. Her evidence is supported by the email record of communication by Mr. Arumugham on this point.

110. Budget restrictions are amongst the reasons for the transfer advanced by the Respondent in this case. In cross examination Mr. Arumugham accepted that the 2013-14 budget did not result in the loss of any National Staff jobs.

111. No specific evidence was provided of changes to the functions of the post previously encumbered by Ms. Haroun resulting from budget cuts. Nor was any evidence provided regarding why any such change would necessitate her lateral transfer from the post.

112. In her witness statement, Ms. Nandkumar testified that the “[t]ravel and visa sections were moved to the KJSO (Kuwait Joint Support Office).” In oral evidence she clarified that the functions performed by the CAS Office in relation to visa and residency permit applications for staff members continue to be carried out by the

CAS Office. Mr. Arumugham confirmed that at the time he left the mission these functions were still performed by the CAS Office.

113. No specific evidence was provided of changes to the functions of the post previously encumbered by the Applicant resulting from the implementation of the KJSO. Nor was any evidence provided regarding why any such change would necessitate her lateral transfer from the post.

114. At paragraph 8 of the Reply this was advanced as one of the reasons that the Applicant could not continue in her post. In his evidence Mr. Arumugham clarified that in fact this was not the transfer of a new responsibility to the CAS Office. Mr. Arumugham stated that this responsibility had always been part of the CAS Office but had previously been performed by him.

115. This additional responsibility is the only specific change to the functions of the post previously encumbered by the Applicant identified in evidence before the Tribunal. No documentary evidence has been provided to support the assertion that this additional function accrued.

116. The Applicant does not accept that this responsibility accrued to her post. However, even if it did she submits that no convincing explanation was placed before the Tribunal as to why this additional responsibility could not have been performed by her with minimal if any additional training. The post remains an administrative assistant post, it is submitted that such a post would not be given responsibility for substantive work in relation to audit work. The Applicant has extensive experience working for one of the leading audit firms in the world as an administrative officer. Mr. Arumugham's suggestion that experience gained outside the United Nations would not assist is simply not convincing.

117. Instead of providing the Applicant with minimal training regarding one additional function of her post, the Respondent chose to transfer her to a post where

she needed to be completely retrained in order to begin to perform the functions of the post. They further filled her post with an individual with no experience of the other aspects of the CAS Office work resulting, the Applicant submits, in the need to hire an independent contractor to assist.

118. The reason this explanation for the transfer makes no sense is that it was not the real motive for the transfer. The Applicant submits that having selected the Applicant's successor, who happens to have audit experience, this justification was advanced purely to counter the Applicant's challenge to the reassignment.

119. The management evaluation of the decision to laterally transfer Ms. Haroun reads:

One of the important functions which you performed in the CAS's office related to preparation of documentation to obtain transit clearance from the Kuwait Ministry of Foreign Affairs (MOFA) – in which, UNAMI avers, you are well versed. This will be the single most important function of your new assignment.

120. This information must have come to the MEU from UNAMI. This assertion is contradicted by the work plan provided to the Applicant on arrival in the Supply Section which makes no mention of correspondence with the Ministry of Foreign Affairs.²²

121. The Applicant gave clear and convincing evidence concerning the documentation that she had previously prepared for the Ministry of Foreign Affairs in relation to the movement of goods for the Mission. This documentation was prepared for MOVCON. Her assertion in this regard is supported by her ePAS record which makes frequent mention of work carried out for MOVCON but no mention of work carried out for the Supply Section.²³ She further gave evidence that she was not

²² Applicant's Annex 19.

²³ Applicant's Annex 6.

preparing documentation for the Ministry of Foreign Affairs in her new role in Supply Section.

122. Mr. Arumugham's account of the functioning of the Supply Section was sufficiently confused as to be unintelligible. It is submitted that no convincing evidence was put forward to support the contention that there was any link between tasks performed by the Applicant in the CAS Office and those she now performs in the Supply Section. It would have been available to the Respondent to adduce such evidence from the Applicant's current supervisor if it existed. In the circumstances the Applicant submits that the Tribunal should disregard this explanation by the Respondent.

123. While not asserted at the management evaluation stage or in the original Reply, both of Respondent's witnesses sought to suggest in their evidence that the move to the Supply Section was in fact a valuable career opportunity for the Applicant. This was advanced as a further motivation for the lateral transfer.

124. Mr. Arumugham made claims that the transfer would provide the Applicant with experience of, *inter alia*, asset management, supply chain management and monitoring the procurement of goods and services. These are functions carried out by sections other than the Supply Section.

125. This demonstrates that the Tribunal cannot take Mr. Arumugham's assertions that "Supply is the future of the UN" at face value.

126. Respondent's witnesses justified their claim that the transfer was a beneficial career move for the Applicant on the basis it would assist her in securing an international post. The Applicant has, in fact, already been rostered for a Field Service (FS) international administrative assistant post.

127. Mr. Arumugham gave evidence that the head of Human Resources (HR) had informed him that the Applicant would be ill suited for HR work due to perceived shortcomings in her ability to understand and apply rules. This information allegedly followed a failed attempt by the Applicant to secure a post in HR. This evidence is simply not credible given the Applicant's role in the CAS Office and the fact she was placed on an internal UNAMI roster for national administrative assistant posts in HR following an interview for a post in that department.

128. The reality is that the Applicant was transferred from a post the functions of which she had been performing excellently for a significant period. Her work at the CAS Office brought her into contact with a variety of different offices in the Mission, other missions and the Ministry of Foreign Affairs. She was transferred to a post where she had to learn the functions from scratch. Such a move cannot be considered to have advanced her career.

129. Some 46 days after the Applicant was transferred out of CAS, an individual contractor was recruited. A comparison of the functions of this individual's post and the Applicant's ePAS history, and the reclassification document, demonstrates that the functions of the individual contractor had previously been carried out by the Applicant.

130. In oral evidence both Mr. Arumugham and Ms. Nandkumar asserted that the hiring of this individual contractor was in relation to a specific project being carried out and that his functions did not overlap with those previously performed by Ms. Haroun. This assertion is not supported by any documentary evidence; it was not advanced in witness statements prepared by the Respondent, nor was it put to Mr. Omar al Essa, the National Professional Officer recruited, in cross examination. It was raised only after the Applicant had closed her case and was no longer in a position to refute it. The Tribunal should disregard this assertion.

131. The Applicant submits that the recruitment of this individual contractor was in contravention of sections 1, 2 and 3 of ST/AI/1999/7. This demonstrates a disregard for the rules of the Organization on the part of those who decided to laterally transfer her. In addition the Applicant submits that it demonstrates that far from being a response to the need to streamline the CAS Office it resulted in the recruitment of an additional member at great cost to the Organization.

132. It is relevant to the credibility of the Respondent's witnesses that their evidence as to how Mr. al Essa was introduced to the CAS Office was directly contradictory. Mr. Arumugham gave evidence that he was introduced by the Government Under-Secretary-General for Foreign Affairs of Kuwait whilst Ms. Nandkumar alleged that he was introduced by the Applicant.

133. It is submitted that the numerous contradictions between the two Respondent's witnesses' evidence seriously damages the credibility of their accounts as do the clear contradictions between their accounts and the documentary record. For this reason the Tribunal is asked to prefer the evidence of the Applicant.

134. The Respondent asserts that it is a mere coincidence that the decision to laterally transfer the Applicant was taken one month after Mr. Arumugham sent her a threatening email ending "I will not take this lightly. I will resolve this when Padma returns".

135. The Respondent asserts that it is a mere coincidence that at the exact moment the alleged need for an national administrative assistant with audit experience was identified there happened to be a national administrative assistant from the audit section available in the country and in need of employment.

136. Finally, the Respondent asserts that it is a mere coincidence that 46 days after the Applicant left the CAS Office an individual contractor was required to carry out identical functions in relation to an alleged project.

137. The Applicant submits that these coincidences highlight the unlikely nature of the Respondent's account. This, combined with the numerous and serious inconsistencies between the two Respondent's witnesses' evidence and the documentary record further undermine the credibility of the Respondent's account.

138. By contrast, the Applicant's account is clear and simple. Her transfer was a direct response to the situation that arose with the Amman staff. It was the "resolution" referred to in Mr. Arumugham's email.²⁴ It was facilitated as soon as possible after the incident.

139. The need for audit experience on the part of the CAS Administrative Assistant was invented after the Applicant challenged the decision in order to justify the action taken by Mr. Arumugham and Ms Nandkumar. The justification was based on the skills of the incumbent.

140. The decision to transfer the Applicant had nothing to do with streamlining the functions of the CAS Office, budget restrictions, the implementation of the KJSO, the requirements of the Supply Section or her own career advancement. These reasons were a mere smoke screen to obscure the real and unlawful motive for the decision. This is why 46 days after her transfer it resulted in the need to recruit an additional member of staff in the CAS Office.

Deliberations

141. The issue in this case is whether the decision to reassign the Applicant from the CAS Office to the Supply Section was a valid exercise of discretion or whether it was motivated by extraneous factors.

²⁴ Respondent's Annex 10.

142. A determination on those questions must be based on the evidence before the court, which largely comprises the testimony of witnesses presented by both parties whose credibility will need to be assessed and evaluated.

143. The Tribunal will carefully scrutinise the evidence and analyse it in the light of the responses given by the witnesses and conclude whether or not the evidence is capable of belief.

144. The Tribunal will endorse the approach it took in the case of *Applicant* UNDT/2016/022 where the Tribunal stated,

As a trier of facts, a first instance judge has the means and power to assess the veracity and accuracy of a witness. There is no particular rule or formula that can be used in the assessment of credibility. In a jury trial, jurors are told to use their varied experiences in life to assess the credibility of witnesses. The same applies to a judge as a trier of facts. The judge should use his/her own varied experiences in life to engage in that exercise.

145. The Tribunal will now discuss both the oral and documentary evidence before it.

146. It is the Applicant's case that her reassignment to the Supply Section from the CAS Office was unlawful, as it was a decision tainted by extraneous factors.

147. The Respondent, for his part, contends that the CAS required administrative support in the implementation of audit recommendations in UNAMI. This support was added to the existing duties and responsibilities of the G-5 Administrative Assistant in the CAS Office. Another staff member in UNAMI was identified as being suitable to "perform the expanded duties and responsibilities of Administrative Assistant". The Applicant has not adduced any evidence to demonstrate that this explanation for her reassignment is not correct.

148. Much of this case turns on the duties and responsibilities of the Applicant at the time of her reassignment, and the profile of the candidate then appointed to the CAS Office to perform the putatively “expanded duties and responsibilities” of the Administrative Assistant.

Extraenous Factors

149. Administrative decisions are dominated by discretion. Decision makers make myriad decisions involving many issues and how these issues are resolved depend on the exercise of the discretion that the decision makers wield.

150. What are the factors that the courts look at when called upon to judicially review a decision? Generally speaking the UNDT and the United Nations Appeals Tribunal (UNAT) have been using the general formula to determine the presence extraneous factors as factors which taint an administrative decision. These factors do not admit of a precise closed definition but are inferred or established by evidence.

151. In the case of *Ballo* ILOAT Judgment No. 191, 1972 it was held:

Discretionary authority must not, however, be confused with arbitrary power; it must, among other things, always be exercised lawfully, and the Tribunal, which has before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the Organisation's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority.

152. This Tribunal considers that extraneous factors are inextricable from the due process requirements that a person who is affected by an administrative decision is entitled to.

153. In a discussion under the heading “Procedural irregularities”, C.F. Amerasinghe has this to say:²⁵

The need for a fair procedure to be followed in the taking of discretionary administrative decisions has been emphasized by IATs [International Administrative Tribunals]. The recognition of the right of staff members to a fair procedure in the taking of discretionary decisions is particularly important, because it is often difficult to prove the existence of irregular motives or *détournement de pouvoir* as a ground for judicial review of a discretionary decision. Thus judicial review of procedural errors constitutes a significant means of checking arbitrary action on the part of administrative authorities.

154. The former United Nations Administrative Tribunal has stated in general terms:

It is also true that the exercise of broad powers without adequate procedural safeguards inevitably produces arbitrary limitation upon the exercise of any power. The maintenance of the authority of the Secretary-General to deal effectively and decisively with the work and operation of the Secretariat in conditions of flexibility and adaptability depends, in its exercise, in large measure upon the strict observance of procedural safeguards. In a very real sense, the mode must be the measure of the power.²⁶

155. An administrative decision therefore must be based on the facts of a particular situation viewed objectively. This presupposes that the decision maker should be free from bias and prejudice; the person affected by the administrative decision is entitled to a full and fair consideration in the process;²⁷ the decision maker should not exhibit any discrimination towards the individual affected by the decision;²⁸ there must be compliance with existing rules and regulations.²⁹

²⁵ *Principles of the Institutional Law of International Organizations*, 2nd edition, (Cambridge University Press 2005), p. 305.

²⁶ UN Administrative Tribunal Judgment No. 4, *Howrani and Four Others* [1951], at p. 10.

²⁷ *Sefraoui* 2010-UNAT-048; *Charles* 2012-UNAT-242.

²⁸ *Planas* 2010-UNAT-049.

²⁹ *Abassi* 2011-UNAT-110.

156. As UNAT held in *Hepworth* 2015-UNAT-503, “traditionally, the reassignment of staff members functions comes within the broad discretion of the Organisation to use its resources and personnel as it deems fit”.

157. In examining the evidence on the exercise of that broad discretion, the Tribunal “can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse”.³⁰

The Evidence

158. The Applicant was appointed, and served as, the Administrative Assistant in the CAS Office. She worked directly with the Chief in that Office and Mr. Ben Romdhane served as the Liaison Assistant.

159. The Applicant’s principal duties comprised providing routine administrative office support, and providing support and assistance in the processing of visa applications.

160. Ms. Nandkumar’s testimony before the Tribunal suggests that she “was not aware whether the Applicant spoke to government officials.” She was aware that the Applicant was talking to perhaps “their administrative assistant setting up the appointments”. It would always be a senior official of UNAMI who would speak “to the government officials” to “do business on behalf of UNAMI”.

161. On the liaison responsibilities of the Applicant with the Ministry of Foreign Affairs, Mr. Arumugham was at pains to explain that she had almost no, or minimal, liaison responsibilities. In his witness statement of 17 September 2013, he stated that the Applicant “was not involved in liaising with MOFA officials with respect to visa and residency permits”. In court, he admitted that the Applicant might have gone to the Ministry of Foreign Affairs but suggested that that could have been the result of a

³⁰ *Sanwidi* 2010-UNAT-084.

“private arrangement” between her and Mr. Romdhane”. Her liaison responsibilities were limited, he insisted, to arranging his appointments with officials of the Ministry of Foreign Affairs or acting as an interpreter during meetings.

162. The Tribunal, after listening to the testimony of Mr. Arumugham, Ms. Nandkumar and the Applicant, finds that both Mr. Arumugham and Ms. Nandkumar played down the Applicant’s role and functions at the CAS Office. The Tribunal rejects the testimony of Mr. Arumugham that the Applicant had only a peripheral role in the processing of visa and residency permit applications by staff members.

163. Mr. Arumugham and Ms. Nandkumar made strenuous efforts to reduce the role of the Applicant to mere routine administrative functions. The documentary and oral evidence before the Tribunal suggests that this was untrue, and that both the Respondent’s witnesses were being economical with the truth in respect of her role and functions.

164. The Applicant was examined, cross-examined and re-examined before the Tribunal, which testimony the Tribunal finds to be consistent and credible. Cross-examination of the Applicant by the Respondent did not shake her testimony.

165. Secondly, there is evidence from Mr. Arumugham himself that Mr. Romdhane, whom he described as the focal person, had IT and language limitations. Curiously, despite being at pains to downplay the Applicant’s role and responsibilities, it was the Applicant and Mr. Romdhane who were taken to task when the staff from Amman made their complaints to the SRSG.

166. So great were the Applicant’s putative responsibilities that Mr. Arumugham held her responsible for the staff members’ difficulties and threatened her with disciplinary action for supposedly failing to deliver on her functions. Except for one email, where Mr. Arumugham told both the Applicant and Mr. Romdhane that he was

not happy about the way that the Amman staff were treated, there is no evidence of similar treatment being meted out to Mr. Romdhane who time and again was presented as the focal point in the visa and residence section of the CAS Office.

167. Thirdly, it is clear from the evidence presented to the Tribunal that although Mr. Romdhane remained in the CAS Office after the Applicant was reassigned, she continued to assist with visas and residence permits and supported the work of Ms. Zydan who was recruited to replace her.

168. Fourthly, the Applicant was severely admonished by Ms. Nandkumar for sabotaging and hampering the work of the CAS Office by withholding the contact details of officials and contacts the Ministry of Foreign Affairs. The evidence did not bear this allegation out.

169. Ms Nandkumar's allegations, in its tone, tenor and gravity is surprising given the role she described the Applicant as playing. There must surely have been more than one person with a directory of contacts for the Ministry of Foreign Affairs; and if there was only one person with that directory, surely it must not have been the Applicant?!

170. There is sufficient documentary evidence on the record showing the Tribunal that the testimony of both the Respondent's witnesses misrepresented the reality within the CAS Office.

171. On 23 April 2009, the Applicant wrote the following to Mr. Arumugham:

Dear Raja, though there wasn't prior appointment with the third secretary of the ministry of foreign affairs, I was able to see him and have extensive discussions with him where I was able to understand why we are facing problems with ministry of foreign affairs.

1. First he expressed his observation about the change in number and type of application received from UNAMI since last month.

2. He mentioned that he was surprised of big number of applications received by MOFA. He added that, 'How UNAMI employing all those staff?'
3. He was not very comfortable with many applications with the heading 'Emergency'. I assure to him that this will minimise as much as possible. [...]

172. Mr. Arumugham could not recall this correspondence. When confronted with his response to the Applicant later that day commending the work of the Applicant, Mr. Arumugham suggested that she might have had the meeting [with the Third Secretary in the Ministry of Foreign Affairs] without his knowledge but that he appreciated that she has done it. He insisted, however, that meetings such as these were not “liaison functions” *per se*, that it may have been a “one off” meeting, and that “it doesn’t mean that she had been constantly liaising”.

173. The record also shows that the Applicant worked with Mr. Arumugham to prepare the documentation required for reclassification of the post she encumbered from G-5 to G-6. In cross-examination, however, Mr. Arumugham sought to explain the detailed description of the post in the reclassification document as a *proposal* of what it *would be* when upgraded. It was not, he insisted, a description of the tasks the Applicant was performing at the time.

174. The language of the reclassification document/form is clear. It is in the present tense. Mr. Arumugham’s answers in cross-examination can only be explained in two ways. The witness, who served as the Mission’s Chief Administrative Support Officer, either did not understand the form and so, the reclassification exercise as a whole, or was quite plainly not telling the truth!

175. There is more evidence to justify the Tribunal’s rejection of Mr. Arumugham’s evidence on the duties of the Applicant. The Applicant told the Court that she was given additional responsibilities to deal with visa and residency permits in 2009. Her testimony is supported by three successive performance appraisals covering the period 2009-2012. Her goals, during that period, included i) supervising

the visa and residency permit functions, ii) liaison with the Ministry of Foreign Affairs and other governmental bodies, which function included the drafting of *Notes Verbale*.

176. Mr. Arumugham featured as either first or second reporting officer in all three cycles. He consistently appraised her as frequently exceeding performance expectations and, in the first of those cycles, remarked that “she supervised the visa clerk and demonstrated managerial competencies” and commended her drafting skills.

177. A work plan results from discussion between the staff member and his/her first reporting officer. Since a work plan is personal to a staff member, bearing in mind the overall interest of the Organization, the Tribunal wonders why Mr. Arumugham chose to contradict the documents that were put to him, especially when those documents were clearly prepared in consultation with him and which he later signed off and commented on!

178. In testifying that the Applicant was not performing these duties and had only a peripheral role (Mr. Romdhane being the focal person), the contradictions between Mr. Arumugham’s testimony and the performance documents he signed are so plain that it leaves the Tribunal with little choice but to conclude that the Respondent’s witness was, quite simply, lying.

179. In the face of undisputed documentary evidence on the duties of the Applicant at the CAS Office, both Mr. Arumugham and Ms. Nandkumar strove to whittle down the real responsibilities of the Applicant with the sole aim, in the Tribunal’s view, to misrepresent facts and mislead the Tribunal. The facts were being misrepresented to shield the fact that the Applicant was being redeployed to the Supply Section to teach her a lesson, as it were, for failing to deliver on the unreasonable promises Mr. Arumugham made to the staff who were redeployed from Amman to Kuwait and the embarrassment that that must have caused him.

180. On this particular point, it was not lost on the Tribunal that Ms. Nandkumar's testimony shifted significantly from one day to the other. On 23 October 2013, Ms. Nandkumar told the Court:

[W]hen I understood that it had to do with all these other extra services, I call them "extra services" that they were expecting from our office, you know, I think -- you know, I made it clear to Raja that, you know, this is done on a voluntary basis, that both Mustapha and Miriam would provide the services as much as they could but, you know, they really cannot be forced to -- to -- to drive someone around Kuwait if they did not want to. And -- and I kind of clarified that with him; that -- that the office had done what they had to do in terms of getting the visas and filing the application, but they -- you know, the staff member could not be forced to go out and drive a staff member to -- to the police station in order to get -- to get the fingerprint or whatever.

So you -- you know, these are my staff members, this is my office and I think they are doing a good job and I recall the conversation with Raja going along those lines where I -- I defended my staff members. If there was a perception that they were not being helpful, I clarified that they were more than helpful because in my view I think they had done their job very well, and that was -- that was my conversation with Raja. [Emphasis added]

181. On 24 October 2013, the tenor of Ms. Nandkumar's testimony was this:

But it's not that I did not understand why such promises were made. I would have said something to the fact that I -- you know -- I -- I do not recall or I do not believe that Raja would have made such promises; that these were promises that maybe the Jordanians were asking for much more than were -- than were, you know, promised -- promised there. More promises used (inaudible) to them.

My understanding -- what I would have said then, would be:

"I don't believe that promises were made to these staff members. They can't say the promises were made to them. They'll have to be treated the same way as all staff members." [Emphasis added]

182. The Respondent submits that the Applicant has adduced no evidence to demonstrate "that the CAS Office had no need for administrative assistance to

support the CAS's audit responsibilities" and that the evidence of Ms. Nandkumar and Mr. Arumugham on this point should be accepted.

183. The evidence of both Mr. Arumugham and Ms. Nandkumar was that the Applicant was not qualified to take on that job, as newly profiled, because she lacked audit experience. Mr. Arumugham testified lengthily on the profile of a staff member who could combine the duties of an administrative and audit assistant in the CAS Office as the position was reclassified pursuant to budgetary constraints.

184. Ms. Zydan qualified as a lawyer and served as an administrative clerk in the resident auditor's office before joining UNAMI. Her duties were to provide support in select audit assignments and special projects; research local community information in preparation for audit assignments; translate/prepare and process confidential documents and correspondence; assist and prepare presentation materials using appropriate technological/software; draft, prepare and dispatch documents by mail, fax and pouch; maintain calendar schedules and monitor and follow up changes; maintain and update electronic/hard copy filing systems; log in incoming and outgoing correspondence and ensure mail is distributed in timely manner; monitor attendance records, leave request and other personnel-related matters; prepare requisitions and manage supplies and office assets; perform other audit and administrative tasks.

185. Except for the cursory reference to supporting "select audit assignments", the administrative duties being performed by Ms. Zydan in the office of the resident auditor were similar to those performed by the Applicant in the CAS Office. The Applicant's administrative duties as they appear in her performance appraisals for 2009 through 2012 bear this out.

186. There is no evidence that Ms. Zydan had the qualifications or experience that Mr. Arumugham insisted were necessary when he emphasised that audit in the Organization and in the private sector is not the same process. Mr. Arumugham

however conceded that Ms. Zydan had no professional audit qualifications or experience beyond having been an administrative assistant to the resident audit officer. He also testified that Ms. Zydan would spend about 15% of her time on audit duties while the rest of her time would be devoted to dealing with administrative matters, helping with visa and residency permits, verifying documents, protocol responsibilities of the CAS, liaising with the country team and monitoring and reporting of the recommendations. With the exception of the so-called audit duties all the other duties were also being performed by the Applicant.

187. Mr. Romdhane testified that Ms. Zydan was dealing mostly with visa and residency permits as well as drafting *notes verbale*. Mr. al Essa told the court that he too was dealing with visa and residence permits in the CAS Office with Mr. Romdhane and Ms. Zydan. Ms. Zydan was dealing mostly with visas and residence issues. He added that his duties were previously performed by the Applicant. His work also included customs clearance with the Ministry of Foreign Affairs.

188. Interestingly, while Mr. Arumugham denied that Mr. al Essa was working on visa and residence permits, Ms. Nandkumar conceded that he was assisting with visa and residence permits.

189. Both Mr. Arumugham and Ms. Nandkumar testified that, with a view to reducing the budget, somebody with wide experience in audit work had to be recruited in the CAS Office. There is no evidence that Ms. Zydan had that experience or that she performed audit support functions for the CAS Office.

190. The evidence, in fact, shows that Ms. Zydan continued to work on visa and residence permits and that a contractor was also recruited to assist in these duties.

191. The Respondent contends two contradictory positions. He submits that the Applicant's "previous experience as an administrative assistant with KPMG is

irrelevant”; that “she did not produce her Personal History Profile in support of her assertions that she had such experience” and that “both the CAS and A/CMS were not aware that she had any such experience”.

192. The Tribunal struggles to understand the Respondent’s logic in submitting, at once, that the Applicant’s prior experience was both irrelevant and unknown to him; or that the experience simply did not exist because a personal history profile was adduced to that effect! Would the experience have been “relevant” had they known about it? Would it have mattered if the Applicant had given them a personal history profile of herself showing such experience? The Tribunal is disturbed by the suggestion that the CAS and the Acting CMS were not aware of the Applicant’s previous experience, particularly given the ‘consultation’ that was supposed to have taken place prior to the Applicant’s reassignment – which the Applicant denies ever took place - and the number of career counseling/advancement conversations Mr. Arumugham says he had with her.

193. It is clear from the evidence that the duties being performed by Mr. al Essa were already being carried out by Mr. Romdhane and Ms. Zydan in the CAS Office in dealing with visa and residency permits. There is no evidence from Mr. Arumugham and Ms. Nandkumar that the independent contractor was recruited to help with the Iraq-Syria border issue with the exception of their word, which the Tribunal must treat with caution given all the other inconsistencies in their testimony. The Tribunal is irresistibly drawn to the conclusion that Mr. al Essa was recruited to support the work of Ms. Zydan and Mr. Romdhane and fill in the gap left by the Applicant when she was reassigned.

194. The discretion to reassign a staff member is not unfettered. Among other requirements, it must be exercised in the best interests of the Organization. There is no requirement that a staff member should consent to a transfer or reassignment. However the staff member should be consulted in good faith about the proposed transfer and the position where the staff member is being moved must be

commensurate with the skills, qualifications and experience of that staff member. In the case of *Rees*³¹, UNAT held,

Staff Regulation 1.2(c) 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”.

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.

195. The Tribunal finds that the Applicant was moved not so much in the interest of the Organization, or in the pursuit of using the best resources of the Organization, but in the interest of Mr. Arumugham and Ms. Nandkumar. Had they been more mindful of the rule that the paramount responsibility in the Organization is to ensure compliance with avowed objectives of the Organization, and had they been more objective, the Applicant, even if she had to be reassigned, would have been entrusted with responsibilities more commensurate with her skills and experience. It is obvious to the Tribunal that the process thus undertaken was a waste of material and human resources. The evidence is clear that this move was ill-conceived, clumsily effected and most certainly made on the basis of extraneous factors.

196. The situation is similar to that of the case of *Turner*.³² The applicant in that case entered the service of the European Atomic Energy Community in 1968 and was later appointed to the Commission’s medical branch. She was assigned to the department of preventive medicine where her main functions were carrying out examinations on recruitment and medical check-ups, checking reports on medical

³¹ 2012-UNAT-266.

³² Court of Justice of the European Communities, Cases 59 & 129/80 [1981] ECR, p.1883.

examinations, vaccinations, the sick-bay, medical supervision of the crèche and consultations at the request of staff. In the same period the applicant acted as replacement for the head of the medical branch. The European Court of Justice held that the transfer of the applicant was arbitrary and unlawful as the new posts did not comprise duties related to the practice of medicine.

197. The Respondent must be able to support the decisions it makes on the basis of facts. Decisions made arbitrarily, or on the basis of prejudice or other improper motivation,³³ make for poor management and invariably results in a waste of the Organization's resources and poor morale.

Observations

198. The conduct of Mr. Arumugham and Ms. Nandkumar betray a pervasive unfairness and abuse of authority in their treatment of the Applicant. They bullied her and used their superior positions to threaten and intimidate her.

199. This Judgment is littered with instances in which the Tribunal has found the Respondent's witnesses to have acted dishonourably, both in their treatment of the Applicant and in being dishonest in their testimony before the Court.

200. In conducting themselves in the manner described in this Judgment, both Mr. Arumugham and Ms. Nandkumar have fallen far short of the "efficiency, competence and integrity" required of them as an international civil servants.³⁴

Remedies

201. The Applicant's primary request, by way of remedy, was that the decision to reassign her to the Supply Section be rescinded. While the judgment was pending, the

³³ *Assad* 2010-UNAT-021, *de Kermel* 2012-UNAT-239, *Badawi* 2012-UNAT-261, *Islam* UNAT-2010-115.

³⁴ Art. 101.3 Charter of the United Nations, as annexed to ST/SGB/2002/13 on the Status, Basic Rights and Duties of United Nations Staff Members.

Registry was informed that the Applicant was separated from service. There is therefore no decision to rescind.

202. She also requested “compensation for the moral injury and prejudice” resulting from the unlawful reassignment.

203. In *Gakumba*³⁵, UNAT made a distinction between an award of compensation under articles 9.1(a) and (b) of the Statute of the Appeals Tribunal, articles that are mirrored verbatim in articles 10.5(a) and (b) of the UNDT Statute. The relevant extract from *Gakumba* reads:

This compensation [for humiliation, embarrassment and negative impact of the Administration’s wrongdoing on the staff member] is completely different from the one set in lieu of specific performance established in a judgment, and is, therefore, not duplicative. The latter covers the possibility that the staff member does not receive the concrete remedy of specific performance ordered by the UNDT. This is contemplated by Article 9(1) (a) of the Statute of the Appeals Tribunal as an alternative. The former, on the other hand, accomplishes a totally different function by compensating the victim for the negative consequences caused by the illegality committed by the Administration, and it is regulated in Article 9(1) (b). Both heads of compensation can be awarded simultaneously in certain cases, subject only to a maximum ceiling.

204. The Tribunal has considered the circumstances in which the Applicant was reassigned from the CAS Office to the Supply Section. She was reassigned to a post not commensurate with her training and qualifications, as a punitive measure following the fall out with Mr. Arumugham over the services provided to the staff members from Jordan.

205. In the circumstances, and given the gross injustice meted out to her by her managers, the Tribunal awards compensation representing twelve (12) months net base salary to the Applicant.

³⁵ 2013-UNAT-387.

Moral Damages

206. The Applicant has also requested moral damages for injury and prejudice resulting from the unlawful reassignment.

207. In *Asiarotis* 2013-UNAT-309, UNAT elaborated on the principles governing moral damages,

To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

208. In the process of an unfair decision impacting on the terms of employment of an individual there are other considerations, as pointed out by UNAT that come into play in addition to compensation resulting from a loss of employment or unfair treatment during the term of a contract.

a) Breach of terms of employment

209. The Tribunal has already made factual findings on the extraneous factors that led to the decision to reassign the Applicant from the CAS Office to the Supply Section. The Tribunal reiterates its findings that the decision to reassign the Applicant was tainted with bad faith and improper motive. That a decision on a matter as serious as a contract of employment was taken with such poor judgment, and because of personal differences between the Applicant and Mr. Arumugham and Ms. Nandkumar demonstrates conduct unbecoming of the decision makers.

210. The Tribunal awards the Applicant three months' net base salary.

b) Damage to career prospects

211. Mr. Arumugham stated that the reassignment of the Applicant to the Supply Section was to secure her job as "supply was the future of the Organization". It is not disputed now that the Applicant was separated, leading the Tribunal to the irresistible conclusion that the assignment was a colourable device to teach the Applicant the ultimate lesson that is the loss of her job and livelihood.

212. The Tribunal awards the Applicant three months' net base salary.

c) Unfair treatment at the hands of Mr. Arumugham and Ms. Nandkumar

213. Mr. Arumugham threatened the Applicant with disciplinary action for not living up to the promises that he had made to the Jordanian staff.

214. Ms. Nandkumar falsely accused the Applicant of running the office like a cowboy and of sabotaging the work of the CAS Office.

215. The Tribunal awards the Applicant USD 5,000 under this head.

Accountability

216. This case has brought to light how actions by two top officials have literally destroyed the Applicant's career. They have taken decisions in clear breach of their duties as managers as if the duty station was their fiefdom.

217. It is this Tribunal's finding that Mr. Arumugham and Ms. Nandkumar either deliberately ignored or feigned ignorance of the pertinent principles governing the role of a manager or supervisor contained in the 2014 Standards of Conduct for the International Civil Service (Standards of Conduct). The 2014 Standards of Conduct were revised by the International Civil Service Commission and approved by the United Nations General Assembly in 2013. The first Standards of Conduct were drafted by the International Civil Service Advisory Board in 1954. It was revised in 2001 and 2013, which is now the current version which was approved by the General Assembly in its resolution 67/257. In the foreword to the Standards of Conduct it is stated "The Standards of Conduct apply to all staff members, i.e. international civil servants, as defined in the Staff Rules and Regulations". In paragraph 3 of the 2014 Standards of Conduct it is stated,

The values that are enshrined in the United Nation organizations must also be those that guide international civil servants in all their actions: fundamental human, rights social justice, the dignity and worth of the human person and respect for the equal rights of men and women and of nations great and small.

218. The Tribunal accordingly **directs** the Registry to serve a copy of this judgment on Secretary-General and the Under Secretary-General for Field Support so that their attention is drawn to the conduct of these staff members under their charge.

(Signed)

Judge Vinod Boolell

Dated this 11th day of May 2016

Entered in the Register on this 11th day of May 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi