



**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

OGUNTOLA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**  
Nicole Washienko, OSLA

**Counsel for the Respondent:**  
Sandra Baffoe-Bonnie, ECA  
Sibangilizwe Ndlovu, ECA

## **Introduction**

1. The Applicant is a former staff member of the Economic Commission for Africa (ECA) who served as Senior Regional Advisor at the P-5 level in Zambia.
2. In his application filed on 27 June 2013 and amended on 5 March 2014, the Applicant challenges the decision taken by the Executive Secretary, ECA (ES/ECA) not to renew his fixed-term appointment on the basis of his post being abolished.
3. The Respondent filed his reply on 29 July 2013.
4. The Tribunal has decided that an oral hearing is not required in determining this case and will rely on the parties' pleadings and written submissions.

## **Facts**

5. The Applicant joined ECA on 1 February 2005 and served at the L-5 level as Regional Advisor for Water Resources Management. He was initially appointed under the 200 series of the Staff Rules and was later transitioned to a fixed-term appointment in 2009.
6. The Applicant's post and those of other Regional Advisors were funded under the Regional Programme of Technical Cooperation (RPTC) from the ECA's General Temporary Assistance (GTA) funds.
7. In September 2012, a new ES, Mr. Carlos Lopes, was appointed to the ECA. Soon thereafter he announced his intention to restructure part of the ECA.
8. On 12 December 2012, the ES/ECA held a town hall meeting with all staff and presented a timeline for implementing ECA's new organizational structure.<sup>1</sup> The essential message of the presentation by the ES/ECA was that there would be "no post reduction but significant realignment to re-profiled functions". Part of the

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<sup>1</sup> Annex 3 to the application.

message of the presentation was that staff members would be retrained if necessary so that they could move into their new functions.

9. By memorandum dated 14 December 2012, the Applicant was informed by the ES/ECA that the post which he encumbered would be abolished as of 1 April 2013 and that his appointment would not be extended beyond 31 March 2013.<sup>2</sup> The Applicant was one of 13 regional advisors to face the abolition of their posts.

10. ECA restructuring attracted several interventions by the Staff Union<sup>3</sup>, culminating in a town hall meeting with then Secretary-General, Ban Ki-Moon.<sup>4</sup> On 19 February 2013, the ECA staff union held a meeting with ECA management where it was noted that the RPTC regional advisors, including the Applicant, would have to undergo competitive recruitment processes against published posts as per the Organization's policies.<sup>5</sup>

11. The Applicant requested for management evaluation of the decision to abolish his post on 11 February 2013.<sup>6</sup>

12. The Applicant separated from ECA on 31 March 2013.

13. On 30 June 2016, the United Nations Appeals Tribunal (UNAT) issued its judgment in *Toure* 2016-UNAT-660 concerning a pleading arising from the same set of facts. The Applicant in *Toure* was also a regional advisor at ECA whose post had been abolished. In that case, the UNDT found that ES/ECA had acted *ultra vires* when he had abolished regional advisor posts, even though the RPTC budget for 2012-2013 biennium had provision for these posts until the end of this biennium, and without seeking prior approval from the Conference of African Ministers (COM), which is responsible for social and economic development, and the United Nations General Assembly. This UNDT conclusion was held to have

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<sup>2</sup> Annex 1 to the application.

<sup>4</sup> Annex 5 to the application.

<sup>4</sup> Annex 5 to the application.

<sup>5</sup> Annex 5 to the reply.

<sup>6</sup> Annex 9 to the application.

been unsupported in fact and in law. Specifically, UNAT held in the relevant parts of their judgment:

25. The Appeals Tribunal has consistently affirmed the principle that there is no expectancy of renewal of fixed-term and temporary contracts.  
[...]

32. First, the UNDT's question was based on an erroneous interpretation of a document in evidence, the 6 February 2012 memorandum regarding ECA's resources approved for the 2012-2013 biennium. That document, entitled "Allocation of approved resources for [RPTC] for 2012", only authorizes expenditures in connection with regional advisors "in the first year of the biennium" – not "for that biennium" in its entirety, as the UNDT incorrectly found and relied upon in framing its analysis.

33. Second, that the biennium budget provided funding for regional advisory services does not mean those funds will be fully used during the biennium. Unlike posts authorized in budgets approved by the General Assembly, which are specifically identified (by category and step), Regional Advisory services "are expressed in the form of work-months estimated to be needed ... during the biennium ... [which] are engaged on a temporary basis". Furthermore, there is no regulatory requirement that all amounts approved by the General Assembly must be fully expended within the budget biennium; to the contrary, regulations provide that approved funds are available and can be used "to the extent they are required" and that unused balances "will be surrendered".

34. Ms. Toure's RPTC-funded regional advisory position was fully-funded through 2012 and, in fact, was extended through 31 March 2013. Her "post" was abolished effective 1 April 2013 in connection with the restructuring proposed and begun during the last quarter of 2012. Although not necessary for our holding, we note that this restructuring was effectively approved by the COM in March 2013 and, ultimately, by the General Assembly by way of its approval of the RPTC 2014-2015 biennium, which reflected the restructuring and refocusing of priorities.

35. Finally, we find no abuse in the abolition of Ms. Toure's post nor any evidence that the decision was arbitrary or unfair. All 13 Regional Advisors' posts that were encumbered in December 2012 were abolished and the people that encumbered them, including Ms. Toure, were encouraged to apply for posts that would be published. [...]

36. As noted above, Ms. Toure served as a Regional Advisor, in a post funded through the RPTC programme. This programme is for temporary projects and needs, as set forth in the 2012 RPTC Inter-Regional Guidelines and Principles for Effective Delivery of Capacity Development Support (para. 1.4 ), the 2004 RPTC Report (on “Review of the regular programme of technical cooperation and the Development Account” A/59/397) and the proposed 2012/2013 RPTC Programme Budget (Section 23, para. 34). Ms. Toure did not hold a regular-budget established post but one of a temporary nature that could be discontinued without the need for the ECA Executive Secretary to seek prior approval.

[...]

39. The UNDT erred not only in finding that Regulation 6.2 applied in this case, but also when it decided that the ECA Executive Secretary lacked authority to abolish Ms. Toure’s post since only changes requiring additional resources required approval by the General Assembly.

14. On 17 October 2016, the Tribunal issued Order No. 455 (NBI/2016) requiring the parties to express their positions in light of UNAT’s findings in *Toure* by 26 October 2016.

15. A case management discussion took place on 3 November 2016. The Applicant’s assertion was that the post he encumbered was either redeployed or reclassified, whereby the case was to be distinguished from *Toure*.

16. On 7 November 2016, the Tribunal issued Order No. 478 (NBI/2016) in which it was decided that the documents relied upon by UNDT and UNAT in the case of *Toure* and contained in the case file were admitted as evidence in the current case. Pursuant to the same Order the Respondent was directed to file written submissions regarding the Applicant’s assertions that the post he encumbered was either redeployed or reclassified. Moreover, the Respondent was directed to produce RPTC Programme Budget of the ECA for the biennium 2012-2013.

17. Having been served with the Respondent’s submissions on 22 November 2016, the Applicant filed a motion for an extension of time of one week to respond. This motion for an extension was granted through Order No. 492

(NBI/2016) with the Applicant being granted one week period to present his submissions which he did on 2 December 2016. In these submissions, the Applicant presented his observations and submissions; among others, he claimed that new evidence had come to light which would prove that a reclassification of his post had taken place.

18. On 12 September 2017, the Tribunal issued Order No. 147 (NBI/2017) requiring the Applicant to file his submissions detailing the said new facts which he did on 18 September 2017. Specifically, the Applicant found an email dated 13 June 2013 from the President, ECA Staff Union, indicating that a P-5 post created at ECA was being classified in June 2013. The Respondent filed observations on the Applicant's submission on 19 September 2017 arguing that the 13 June 2013 email should not be admitted as it "bears no relevance for the purported purpose it is offered", that it is "the author's personal interpretation of a Human Resources process and is nothing more than hearsay". The Tribunal, however, decided to admit the email in evidence for the sake of completeness of the Applicant's case.

### **Applicant's case**

19. The Applicant's case may be summarized as follows.

20. The Applicant accepts that *Toure* altered some of the issues that were present in his case. Namely, the Applicant's prior arguments with respect to the legitimate expectancy of the renewal of his post and the issue of the lawful and proper exercise of managerial discretion on the part of the ES/ECA to abolish the Applicant's post are no longer in contention.

21. While the ES/ECA, according to *Toure*, possesses the ability to abolish the Applicant's post, the ES/ECA is not endowed with the authority to either redeploy or reclassify a staff member's post. He simply cannot act at his whim and later rely on false reasons, provided *ex post facto*, to cover his misdoings.

22. Although it is trite law that fixed-term appointments carry no expectancy of renewal, when a non-renewal decision occurs, it must be supported by the facts provided to the staff member in question.

23. Notwithstanding the fact that the ES/ECA chose to abolish the Applicant's post on 1 April 2013, ECA created two almost identical posts in August 2013 and January 2014. Specifically, the Respondent created the post of Senior Natural Resources Expert (Water) at ECA's Special Initiatives Division/African Climate and Policy Centre (ACPC). The fact that ECA created two similar posts with slightly different terms of reference almost immediately thereafter strongly suggests that the real intent of the Administration was to redeploy the Applicant's post without following proper procedures. These facts make the present case highly distinguishable from *Toure* in which such similar posts were not subsequently created.

*If this was redeployment, the decision was made ultra vires as any redeployment of resources requires the approval of the General Assembly.*

24. Annex I of A/67/755 (Report of the Secretary-General on the Budget for the United Nations Mission in Liberia for the period from 1 July 2013 to 30 June 2014) sets out the definition of the various terminologies applied with respect to the proposed changes in human resources. Under this Annex, a post redeployment is defined as an approved post proposed to be redeployed to cover comparable or related functions in another office. The present situation meets the elements mentioned above.

- a. the Applicant was sitting on a post that had been approved by the General Assembly. There is no dispute of fact about this.
- b. Although the Respondent implies that for a redeployment to occur, the post in question must be moved to a different programme or office, this is decidedly not the case, as indicated by A/67/755. Thus, the fact that the vacancy announcements in question were located in ECA/ACPC and not in any RPTC funded programme, does not mean that the Applicant's post was not redeployed.
- c. Contrary to the Respondent's assertions in his submission pursuant to Order No. 478, the functions that the Applicant performed as a water

expert under the discontinued RPTC functions were comparable or related to those of the posts advertised by ACPC in 2013 and 2014.

*The Applicant's post in RPTC had required him to perform comparable or related functions to the ACPC post advertised by ECA in 2014.*

25. In this regard, the Applicant submits that:

a. The Applicant assumed the role of Senior Regional Advisor on Integrated Water Resources Management in ECA Headquarters in Addis Ababa, Ethiopia, in February 2005, from where he was later posted to ECA's Sub-regional office for Southern Africa, based in Lusaka, Zambia, in January 2009. In total, the Applicant worked for the Organization for eight years and two months before being separated on 31 March 2013.

b. A comparison of the functions of the vacancy announcement for the post of Senior Natural Resources Expert (Water) at the P-5 level in ACPC advertised in 2014, with the functions listed in the vacancy announcement from 2003 of the post that the Applicant applied to and assumed in 2005, indicate that they were quite similar.

c. Still, the vacancy announcement dated 2003 does not provide the entirety of the picture of the work that the Applicant had been performing. The Applicant, therefore, refers to a document which outlines the "Activities undertaken by Regional Adviser on Integrated Water Resources Management" for the period of January 2010 to August 2011, as well as to an email, dated 21 May 2010, from the Director of the Food Security and Sustainable Development Division (who oversaw the Applicant's work on ACPC-related projects).

d. The first "Responsibility" listed in the 2014 Vacancy Announcement for the ACPC post comprises: "Lead mainstreaming knowledge generated and research undertaken on water both within ECA and beyond, focusing on the intersections between water and critical development sectors such as agriculture, electricity generation, infrastructure, water supply and sanitation". This indicates that the



responsibilities of the post extend beyond cooperation of shared water resources. However, the Respondent's submission failed to take into account that the Applicant's functions actually covered most of these areas. For example, the first "Responsibility" listed in the Vacancy Announcement for the post to which the Applicant initially applied comprised: "Deliver advisory services to member States and regional and sub-regional institutions in Africa on policy issues related to water resources management"; and the second "Responsibility" listed in this announcement was "Provide scientific input into the development of the water-related components/modules of the Population, Environment, Development and Agriculture (PEDA) ...".

e. The second "Responsibility" in the 2014 ACPC vacancy announcement calls for an incumbent who can perform climate change related functions. Among some of the functions that the Applicant had been performing in this regard are reflected in "Activities undertaken by Regional Adviser on Integrated Water Resources Management".

f. Most of the remaining functions in the 2014 vacancy announcement relate to analysis of the water development sector and the development and implementation of the Organization's goals related to this. The Applicant notes that similar functions were included in the 2003 vacancy announcement.

g. The email of 20 December 2010 indicates that the Applicant had been the technical focal point for the ACPC initiative from its inception in 2007 until his transfer to Lusaka. The email further indicated that the Applicant was "one of the most conversant ECA staff on climate change issues". Both of these comments indicate that the functions that the Applicant was actually performing prior to the restructuring were much broader than those indicated by the Respondent.

h. The competencies for both the ACPC post and the Applicant's RPTC post are virtually identical. Both call for Leadership, Communication, Planning and Organizing, and Judgment/Decision

Making. The only “competency” missing from the RPTC post that was included in the ACPC post is that of “Professionalism”, which essentially requires “in-depth knowledge of the subject matter”. As for the core competency of “Professionalism”, the RPTC post does require “good analytical and problem-solving skills”, which essentially meet the criteria of “Professionalism” set forth in the ACPC vacancy announcement.

*The source of funding for the ACPC post further indicates that the Applicant was unlawfully redeployed.*

26. If ECA used the funding for the Applicant’s post to create another post in another Division of ECA, then his post was unlawfully redeployed. Neither the Secretary-General nor his delegated representatives in other offices have been granted the authority to redeploy posts. Moving financial resources from one Division to another, including any redeployment or transfer of resources between posts without the approval of the General Assembly is void *ab initio*, as such actions require the approval of the General Assembly as per paras. 34 and 35 of A/Res/62/236 (Questions relating to the proposed programme budget for the biennium 2008–2009).

27. The fact that the Applicant may not have been successful in competing for the ACPC post in question is of no matter.

*If this was a reclassification, ECA failed to comply with the procedural requirements set out in ST/AI/1998/9 (System for the classification of posts).*

28. In the Respondent’s submission pursuant to Order No. 478, the Respondent contends that no reclassification of the Applicant’s functions was made by ECA following the abolishment of the Applicant’s post “because an abolished post cannot be reclassified”.

29. On the other hand, the Respondent submitted various classification documents related to the four posts that were classified in February 2013 and which involved “entirely new functions created in response to the changed priorities of the Commission”. The Respondent went on to state that “it was a

requirement that the Commission initiate a classification exercise as an integral part of the normal process of establishing new posts”.

30. The Applicant submits that he does not contend that any reclassification of his actual post number ever took place. However, he contends that a *de facto* classification of his post occurred which resulted in the abolition of his post and the creation of a purportedly new post enabling the ES/ECA to bypass the laws and regulations in place in the United Nations System, which clearly involves procedures for checks and balances.

31. In this regard, the Applicant refers to the ECA Revised Proposed Programme Budget for the biennium 2014-2015. The submissions indicated under the new RPTC sub-programme of “natural resources contracts negotiation” essentially addressed the functions that he was performing, as noted by the subsequent vacancy announcement issued pursuant to this undertaking. Thus, the functions that the Applicant was performing continued to exist, albeit under a different a post number. In his 18 September 2017 filing, the Applicant argues that the 13 June 2013 email, which asserts that a P-5 “water” position at the time was still subject to classification in New York, is material to the present case as it demonstrates that his post and the functions that he was performing continued to exist and that it further calls into question whether the classification documents submitted by the Respondent on 21 November 2016 provide a comprehensive picture of the ECA restructuring as it applied to the Applicant.

32. The Applicant submits that such a *de facto* classification cannot be permitted. If the Administration intended to reclassify the Applicant’s post, it committed serious procedural errors. Further, notwithstanding the arguments presented by the Respondent, there is nothing in ST/AI/1998/9 which would indicate that GTA funds (once approved by the General Assembly) are no longer subject to this most important review by the appropriate parties, which does not include the ES/ECA. There is no indication as to where funds used for the new posts emanated from.

## **Respondent's case**

### *Toure case*

33. As is the case in *Toure*, the Applicant's contract was not renewed due to post abolition. The reasons given to the applicant in *Toure* are the same reasons given to the current Applicant through a similarly worded memorandum of 14 December 2012:

2. Going forward, the delivery of regional advisory services under RPTC will be guided by the principles of providing African member States with focused capacity development in support of the limited set of high priority development areas which are complementary to the overall work of a restructured ECA. We intend to fully use the flexibility of the resources available under RPTC in providing our member States with targeted support in few areas relevant to the transformative agenda of the continent such as, but not limited to, industrialization, natural resource contract negotiation and development planning. In addition, funds available under RPTC will also be used for shorter-term advisory services rather than only for continued involvement for extended periods.

3. In line with the above, I regret to inform you that the that you currently encumber, funded under the RPTC resources, will be abolished. As you are aware RPTC posts are established based on a set of identified focus areas for cooperation under RPTC for a limited period of time.

34. To the extent that both matters are based on the same cause of action, UNAT's *ratio decidendi* on the Organization's power to restructure its programmes applies with the same measure to the matter at hand.

### *No classification of post relating to the Applicant's functions.*

35. The Applicant's functions were never classified as they were proposed for abolishment following the ES/ECA's decision to refocus ECA priorities.

36. The four posts whose functions were classified in February 2013 were entirely new functions created in response to the changed priorities of ECA. It was a requirement that ECA initiate a classification exercise as an integral part of the normal process of establishing new posts. As part of the new priorities after the 2012 reforms, ECA created posts for delivery of programmes funded through

extra budgetary sources in areas of (i) macroeconomic policy; (ii) development planning; (iii) industrialization and (iv) natural resources contract negotiations. None of the classified functions required the appointment of candidates with skills-set relating strictly to water resources management.

37. The functions that the Applicant applied for and performed focused on water resources management which is a smaller component of the wider functions of a Senior Natural Resources Expert (Water) which was advertised by ECA in August 2013 and re-advertised in January 2014. The Applicant's function as a water resources management expert was part of ECA's RPTC which was complementary to ECA's core activities.

38. The Applicant's post, not being an established post funded through the regular budget, was not established by the General Assembly and was never a component of the formal ECA staffing table. Like all other Regional Advisor posts, the Applicant's post was created at the ECA level on the basis of priority areas set out by Member States. There is, therefore, no basis upon which the functions of his post, being RPTC functions funded through GTA funds would be subjected to a classification exercise for review by the Office of Human Resources Management (OHRM) as required by ST/AI/1999/8.

*There was no redeployment of functions relating to the Applicant's job description.*

39. The Applicant's functions were not redeployed and the funding for his post was not used to create posts in other ECA Divisions.

40. The two vacancy announcements of August 2013 and January 2014 were not connected to any RPTC funded programmes or posts affiliated to the Applicant's functions as a Regional Advisor. The January 2014 vacancy announcement was a re-issuance of the August 2013 announcement which had not attracted the minimum required number of female candidates.

41. The advertised position of a Senior Natural Resources Expert (Water) was to fill a vacancy at ECA's Special Initiatives Division/ACPC which has never had its programmes funded through GTA or the RPTC programme. The Applicant

could not be laterally moved to the advertised position as it required a candidate with a wider scope of expertise than just water resources management. He had to apply as an external candidate and be considered as such. The Applicant did apply for the ACPC vacancy and was unsuccessful in his application as he did not pass the written technical exam.

42. Despite the restructuring and change in priorities, ECA still has a lot of work to implement as part of its mandate on the African continent on issues relating to water in the context of sustainability and natural resources management. This is an aspect of ECA's mandate that continues to be implemented independent from and unrelated to the promotion of cooperation on the use of shared water resources among riparian states, a specialty that the Applicant was fundamentally recruited to perform as Regional Advisor. It is this latter function that was discontinued by the ES/ECA as part of the ECA reforms and not the broader ECA responsibilities regarding management of natural resources. As such, the vacancy announcements referred to by the Applicant should be understood in this context.

43. Programmes delivered under the Special Initiatives Division and ACPC are funded from either the regular budget or from extra-budgetary sources. None of them bear any relationship with RPTC programmes or receive any funds through GTA. It is therefore misguided for the Applicant to assume that funding for his post was used to create another post in another Division of ECA.

### **Considerations**

44. In deciding this application, the Tribunal has to determine if the facts in this case give rise to legal issues which are distinguishable from those in *Toure*.<sup>7</sup>

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<sup>7</sup> As held in *Igbinedion* 2014-UNAT-410, at para.24: there can be no doubt that the legislative intent in establishing a two-tier system was that the jurisprudence of the Appeals Tribunal would set precedent, to be followed in like cases by the Dispute Tribunal. The principle of *stare decisis* applies, creating foreseeable and predictable results within the system of internal justice. The Appeals Tribunal has the power of judicial review of the Dispute Tribunal's decision making, and the Dispute Tribunal should recognize, respect and abide by the Appeals Tribunal's jurisprudence.

45. It considers that, given the identical temporary nature of the positions held by Ms. Toure and this Applicant and identical circumstances of their abolition, the UNAT judgment is binding on this Tribunal in that the Applicant had no legitimate expectancy of extension of his appointment and that under budgetary rules, including ST/SGB/2000/8 (Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation), the abolishment of regional advisors' posts did not require prior approval of the Council of Ministers or the United Nations General Assembly and constituted a lawful exercise of managerial discretion.

46. The Tribunal recalls that, in recognition of the impact of *Toure* on the present case, the Applicant's prior arguments claiming legitimate expectancy of the renewal of his post and unlawfulness in the exercise of managerial discretion on the part of the ES/ECA to abolish the Applicant's post are no longer maintained. The Applicant contends, however, that the present case is distinguishable from *Toure* due to the fact that ECA created a position of a similar functionality within ECA, which rendered the abolishment of his post unlawful. The Applicant's contentions are discussed *infra*.

47. The Tribunal did not deem it necessary to hold a hearing. All relevant determinations are possible upon documents on file in the present case and in *Toure*. Moreover, the Tribunal considered facts adjudicated in *Toure* and/or facts which were undisputed. Regarding a few factual issues on which the parties' positions have not been articulated, the Tribunal's findings are set out as follows:

48. The Applicant's assertion that there is no dispute that he was sitting on a post "established by the General Assembly" is inaccurate. The RPTC programme is for temporary projects and needs, as set forth in the 2012 RPTC Inter-Regional Guidelines and Principles for Effective Delivery of Capacity Development Support<sup>8</sup>, the 2004 RPTC Report<sup>9</sup> and the proposed 2012/2013 RPTC Programme

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<sup>8</sup> Paragraph 1.4.

<sup>9</sup> A/59/397 (Review of the regular programme of technical cooperation and the Development Account).

Budget.<sup>10</sup> As shown by the budget documents<sup>11</sup> and confirmed by UNAT<sup>12</sup>, unlike posts authorized in budgets approved by the General Assembly, which are specifically identified by category and step, Regional Advisory services “are expressed in the form of work-months estimated to be needed ...during the biennium...[which] are engaged on a temporary basis.” It was on these facts that UNAT concluded that Ms. Toure’s post could have been discontinued without the need for the ES/ECA to seek prior approval.<sup>13</sup> As such, the Applicant’s claim that his post would have been “established by the General Assembly” implies a role that the General Assembly did not play; the role of the General Assembly in this connection was as described above, i.e., to endorse the quantum of work-months.

49. The Applicant initially alleged that the Respondent had created two new positions of the portfolio similar to the one held by the Applicant, one in 2013 and another one in 2014. In this regard, the Respondent explained that it had been just one post, which had been re-advertised. As the explanation is plausible and the Applicant does not call it in question, the Tribunal accepts the Respondent’s explanation as true.

50. Other differences of position as to the facts have been found not relevant for the outcome of the case.

51. The first of the Applicant’s contentions is that, had the creation of the new post at ECA of “comparable or related functions” been effected against the RPTC funds, it would have constituted a redeployment of the post which would have been illegal in light of paragraphs 34-35 of General Assembly Resolution A/RES/62/236.

52. The Tribunal observes, first, on the purely legal plane, that what is required by A/RES/62/236 invoked by the Applicant is that the Secretary-General *inform* the General Assembly of creation, conversion, suppression and

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<sup>10</sup> Paragraph 23.34.

<sup>11</sup> RPTC biennium budget for 2012-2013, paras. 23.24 and 23.37.

<sup>12</sup> Paragraph 33, reproduced above,

<sup>13</sup> Paragraph 36, reproduced above



redeployment of posts within the Secretariat<sup>14</sup>, whereas *approval* of the General Assembly is required for the transfer of resources between posts and non-post expenditures.<sup>15</sup> As such, normative statements contained in the paragraphs relied upon by the Applicant are not relevant for the question at hand. On the factual plane, the Respondent denies the use of RPTC funds for the new ECA positions. Noting that this latter fact remains contentious, the Tribunal considers it irrelevant since the restructuring of RPTC advisory services was approved by the Conference of Ministers and ultimately by the General Assembly by way of its approval of the RPTC 2014-2015 biennium budget. Thus, any use of RPTC funds would have had an approval granted prior to effective establishment of any new post. In summing, therefore, whether viewed on a concrete or abstract legal plane, the Applicant's argument fails on the score of illegal redeployment of post.

53. Turning to the argument that the Respondent would have carried out a *de facto* classification of the Applicant's post in bypassing the laws and regulations in place in the United Nations System, the Tribunal recalls that UNAT endorsed the exercise of managerial discretion in the abolition of post of all Regional Advisors, for reasons given in the memorandum of 14 December 2012, which stated:

We intend to fully use the flexibility of the resources available under RPTC in providing our member States with targeted support in few areas relevant to the transformative agenda of the continent, such as, but not limited to, industrialization, natural resource contract negotiation and development planning.... funds available under RPTC will also be used for shorter-term advisory services rather than only for continued involvement for extended periods.

No evidence submitted in either case, *Toure* or the present one, indicates that the restructuring of ECA would have involved entire abandonment of functions thus far performed. On the other hand, it has been obvious all along that the restructuring would involve a change in the modality of the delivery of services under RPTC. The UNAT holding in *Toure* leaves no doubt that abolishment of

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<sup>14</sup> Paragraph 34.

<sup>15</sup> Paragraph 35.

regional advisor posts was found legitimate in consideration of this feature of the restructuring.

54. Moreover, whereas the Applicant is correct that the application of ST/AI/1998/ is not limited to regular budget posts, it must however be noted that, while ST/AI/1998/9 requires classification in certain circumstances<sup>16</sup>, it does not determine whether in any given circumstance a classification of an existing post is preferred over establishing and classifying a new one of a similar functionality. As determined in the *Toure* judgement, the ES/ECA had acted within the ambit of his discretionary authority in deciding whether to keep Regional Advisors' post or not. As such, the question of legality of ES/ECA action under ST/AI/1998/9 would only concern the newly created posts. These, as demonstrated by the documents filed by the parties, were indeed submitted for classification by OHRM under ST/AI/1998/9, again, in the readily known context of restructuring of RPTC advisory services. The fact that the classification of the newly established posts would not have been concluded in February 2013 but would be still ongoing in June 2013 is immaterial for the case.

55. In summing, the instruments invoked by the Applicant do not lend support to the contention about illegality of the abolition of his post occasioned by the fact that a post of a similar functionality would have been subsequently created within ECA. No violation of procedures envisaged in these instruments has been shown. Specifically, neither of these instruments obligated ES/ECA to carry out redeployment or classification of existing Regional Advisor posts in priority over creation of new posts at ECA.

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<sup>16</sup> Section 1.1: Requests for the classification or reclassification of a post shall be made by the Executive Officer, the head of Administration at offices away from Headquarters, or other appropriate official in the following cases: (a) When a post is newly established or has not previously been classified; (b) When the duties and responsibilities of the post have changed substantially as a result of a restructuring within an office and/or a General Assembly resolution; (c) Prior to the issuance of a vacancy announcement, when a substantive change in the functions of a post has occurred since the previous classification; and (d) When required by a classification review or audit of a post or related posts, as determined by the classification or human resources officer concerned.

56. To the extent that the Applicant's argument may be construed to be alleging abuse of discretion in the abolition of his post ("real intent of the Administration was to redeploy the Applicant's post without following proper procedures" and "He simply cannot act at his whim and later rely on false reasons, provided *ex post facto*, to cover his misdoings"), the Tribunal understands that the Applicant attributes to the ES/ECA, alternatively, acting with a prior improper intent or acting on a whim and then procuring false justifications. However, neither was substantiated. At the outset, as discussed above, no organizational procedures were violated.

57. Further, just as UNAT in *Toure*<sup>17</sup>, this Tribunal finds no abuse, arbitrariness or unfairness in the abolition of the Applicant's post considering that all 13 Regional Advisors' posts were abolished, which indicates a genuine pursuit of reform and not targeting individuals. As concerns establishment of a new post, of a "comparable or related" functionality to the one held by the Applicant, the Tribunal does not find it *prima facie* capricious or unreasonable. First, the Regional Advisor funding modality through GTA was inappropriate for a post of a lasting duration. GTA by definition are for temporary needs whereas functionality required for longer periods should be provided through regular posts, which are classified and filled through rigorous competitive process. Second, it is undisputed that the discontinued Applicant's post had never been classified either before or during his time in office. The Applicant calls into question the creation of a new post arguing that responsibilities attaching to it could as well be interpreted out of the responsibilities listed under the 2003 vacancy announcement for his Regional Advisor's position; he shows, moreover, that *de facto* he had performed larger functions than described by that 2003 vacancy announcement. This, however, in the Tribunal's opinion only demonstrates that the original responsibilities of the post of Regional Advisor had become inadequate to the actual needs of the Organization and needed to be redefined.

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<sup>17</sup> Paragraph 35, reproduced above.

58. Last, as admitted by the Applicant, the character of his fixed-term appointment did not require ES/ECA to retain his post after expiration of his term in priority over reformulating ECA and the RPTC advisory services. All these factors considered, there was no abuse of discretion in opting for a creation of a new post at ECA, even if certain responsibilities were to be replicated. This Tribunal echoes UNAT in *Toure* that the imperative of lack of abuse, arbitrariness or unfairness was satisfied once the new posts were open for people who encumbered Regional Advisors' positions to apply and compete for them, an opportunity of which the Applicant availed himself.

### **Judgment**

59. In light of the aforesaid, the application has no merits and is accordingly dismissed in its entirety.

*(Signed)*

Judge Agnieszka Klonowiecka-Milart

Dated this 28<sup>th</sup> day of September 2017

Entered in the Register on this 28<sup>th</sup> day of September 2017

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi