Before:

Registry:

Registrar:

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OF THE UN

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Katya Melluish, OSLA

Counsel for Respondent:
Stephen Margetts, ALU/OHRM

Notice: The format of this judgment has been

Background and Facts

1.1 The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA). On 12 June 2009, the Applicant was invited for an interview for the post of Director, Trade, Finance and Economic Development Division (TFED) of ECA. On 13 June 2009, the Applicant wrote to the Human Resources Services Section of ECA and informed them that since in the past ECA had appointed candidates from the roster, he should be treated in the same manner as those other rostered candidates. The Applicant avers that on the same date, he wrote to OHRM to request for an authoritative interpretation of the provisions of ST/AI/2006/3 – *Staff Selection System* of 15 November 2006 as they concern rostered candidates but that he never received a response.

1.2 On 24 June 2009 the Applicant wrote to the Secretary-General of the United Nations to complain of discriminatory treatment and abuse of due process in promotions at ECA. The Applicant alleges that he has been the subject of discrimination at ECA for a considerable period of time because he refused the offer of the Executive Secretary of ECA of an L-6 post in the latter's office where he "would be writing for him". The Applicant alleges that this discrimination was again demonstrated in the process of filling the vacant post of Director, TFED.

1.3 The Applicant avers that according to recent past precedents at ECA, candidates have been appointed to positions from the roster and that he was rostered by OHRM for the post of Director, TFED at ECA. The Applicant avers that notwithstanding the precedents, however, the Head of Department decided to once again treat him in a manner that was different from other rostered candidates and that following the Head of Department's refusal of his numerous requests for a meeting to resolve the issue, he

MEU further concluded that in order to avoid even the appearance of a conflict of interest, ECA should reconfigure the composition of the Advisory Selection Panel (ASP) constituted to interview him.

1.5 On 8 September 2009, the Applicant filed the present Application, in which he requests, inter alia, the Tribunal to,

> "…[c]ompel the Organization (the United Nations) to investigate in full my complaints against ECA Senior Management, notably, my principal, the Executive Secretary, […] of abuse of due process and discrimination in appointments to D/1;
>
> • Restrain the Executive Secretary of UNECA and/or any of his agents from canceling the vacancy announcement for the post of Director of the Trade, Finance and Economic Development Division VA #: 08-ECO-ECA-417319-R-Addis Ababa until this matter is either fully resolved or fully adjudicated in the UNDT;
>
> • Cause the Executive Secretary of ECA to treat as expeditiously as possible the complaint that I filed with him on 4 August 2008 on my victimization by Advisory Selection Panels (ASPS);
>
> • Cause MEU to investigate the pre-selection of […] by the ECA Executive Secretary to fill the post of Director of the Office of the Executive Secretary VA#: VA 08-GM-ECA-417495-R-Addis Ababa as detailed in my letter dated 24 June 2009. The pre-selection foreclosed fair competition and evaluation for the post;
>
> • Cause an investigation into the adverse materials submitted to the Central Review Body in respect of one of the candidates for the post of Director of the Office of the Executive Secretary of ECA VA#: 08-PGM-ECA-417495-R-Addis Ababa;
>
> • Restrain ECA from concluding the recruitment process for the post of Director of the Trade, Finance and Economic Development Division until this litigation is either fully resolved or adjudicated in order not to create any material conditions that could be prejudicial to a just and fair outcome;
>
> • Cause the ECA Programme Manager/Department Head to observe due process, respect recent past precedence and ensure equal treatment of all staff and to therefore in keeping with recent past precedence established by the Executive Secretary (Department Head) himself,

appoint me to the vacant position of Director of the Trade, Finance and Economic Development Division as he has not found me unsuitable for the position;

• Consistent with due process and non-discrimination cause the Department Head/Executive Secretary to treat me in a manner not different in any way or manner from the way that […] (promoted D1 from P5) and […] (promoted P5 from P4) have been treated in the recent past and to appoint me to the post of Director of the Trade, Finance and Economic Development Division;

• Restrain the Executive Secretary or his agents from, either directly or indirectly, punishing me for filing this litigation case;

• Cause the United Nations Organization to make me whole in every way and grant me any such other reliefs as may be deemed proper under these circumstances."

1.6 On 5 October 2009, the Executive Secretary, ECA, announced his decision to fill the post of Director, TFED. On 16 October 2009, the Respondent filed a Reply to the Application dated 8 September 2009.

1.7 On 14 October 2009, the Applicant filed an Application with the Tribunal seeking an Order to suspend the implementation of the administrative decision dated 5 October 2009. On 21 October 2009, the Applicant filed an 'Application for Admission of Additional Evidence'. In the latter Application, the Applicant requested the Tribunal to admit the following documents as additional evidence/documentation in support of his application for suspension of action:

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(v) Minutes of a Senior Management Team meeting of 7 October 2009.

1.8 On 26 October 2009, the Tribunal pronounced UNDT Judgment Number 2009/054 rejecting the Applicant's Application for suspension of action dated 14 October 2009. In the judgment, the Tribunal observed:

> "7.1 The position to which the Applicant is laying claim is related to an appointment. The administrative decision dated 5 October 2009, of the Executive Secretary, UNECA, to fill the post is an appointment. This cannot be the subject of an interim relief in view of the exception contained in Article 14 of the Rules.
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> 7.2 Further, as stated for the purposes of Article 13.1 above at paragraph 6, the decision is not *prima facie* unlawful.

management and its administrative practices. In this respect, the Tribunal recalls the United Nations Administrative Tribunal Judgment Number 1086, *Fayache*, (2002) where it was held, inter alia,

> "…that the instigation of disciplinary charges against an employee is the privilege of the Organization itself. The Organization, responsible as it is for personnel management, has, among other rights, the right to take disciplinary action against one or more of its employees and, if it does that unlawfully, the Administrative Tribunal will be the final arbiter of the case. It is not legally possible for anyone to compel the Administration to take disciplinary action against another party. Therefore, the Tribunal rejects the Application in the "sixth case"."

In light of the foregoing, by analogy, the Tribunal cannot compel the Organization to investigate the Applicant's complaints against ECA's Senior Management as pleaded by the Applicant. An investigation is part of a disciplinary procedure as described at paragraph 2 of ST/AI/371 – *Revised Disciplinary Measures and Procedures*, which provides, inter alia, that,

> "Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake a preliminary investigation…"

2.3 The Tribunal notes the provisions of paragraph 5.11 of ST/SGB 2008/5 - *Prohibition of Discrimination, Harassment, Including Sexual Harassment, and Abuse of Authority* which provide that,

> "Section 5
>
> Reporting retaliation to the Ethics Office
>
> 5.1 Individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with a duly authorized audit or investigation should forward all information and documentation available to them to support their complaint to the Ethics Office as soon as possible. Complaints may be made in person, by regular mail or by e-mail, by fax or through the Ethics Office helpline."

JUDGMENT

3.1 The Tribunal observes that the Applicant has recourse under the Staff Regulations and Rules to pursue his grievances in relation to his allegations of abuse of authority by ECA Management. The Tribunal does not consider that there is, in the present Application, an administrative decision "that is alleged to be in noncompliance with the terms of [the Applicant's] appointment or [his] contract of employment" as defined by its Statute and in the Tribunal's pronouncements in UNDT Judgment Number 2009/074, *Luvai* and UNDT Judgment Number 2009/090, *Teferra.*

3.2 In light of the foregoing, therefore, the Tribunal finds that this Application is irreceivable and rejects the Application in its entirety.