



Introduction

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

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

Procedural Matters

3. Since February 2010, the Applicant has represented himself in all of his cases. Before the hearing of the substantive Applications the Tribunal heard and decided a number of interlocutory matters. These included an application for suspension of

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

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

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

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

Issues

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

a.

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

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

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

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

³ Nwuke UNDT/2013/157.

⁴ Ibid.

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

24.

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

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

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

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

Applicant's Submissions

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

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

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

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

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

37. The pattern of adverse actions was shown in the evidence adduced in the Trio of cases.⁶ This evidence included the failure of the ES to investigate his 4

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

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

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

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

48. While the A/RES/61/244 requirement for the waiver of established procedures for recruitment to be in exceptional cases was made in the context of the pre-screening process, the combined effect of the three resolutions referred to indicates

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

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

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

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

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

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

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

Discussion

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

57. Lateral moves are exempted from the ST/AI/2010/3 staff selection procedures requiring advertisement of vacancies and the screening of candidates. The ST/AI defines a lateral move but is silent on the criteria for when such a move is appropriate. A lateral move may be seen as an expedited method of recruitment, such

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

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

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

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

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

65. As established in Case No. UNDT/NBI/2010/045¹⁰ the Applicant was, for his own reasons, very resistant to the ES requirement for his section and therefore for

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(Signed)

Judge Coral Shaw

Dated this 4th day of December 2013

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

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi