



Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

NWUKE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Bérengère Neyroud, ALS/OHRM

Introduction

1. The Applicant is a staff member of the United Nations Economic Commission for Africa (ECA). He has filed seven substantive applications before the Tribunal challenging 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 the 13 July 2011 decision not to select him for the ECA Post of Director, Regional Integration and Infrastructure and Trade Division (D/RIITD). He alleges that this case is another in the series of persistent retaliatory actions taken against him by the ES/ECA that began in 2009.

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.

4. Hearings were held in the seven cases over eight consecutive working days in September. This case was heard on 17 and 18 September 2013. In preparation for these hearings the Tribunal made several case management orders¹ which included the consolidation of three of the cases² (the Trio).

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

¹ Order Nos. 098 (NBI/2013), 150 (NBI/2013), 159 (NBI/2013), 179 (NBI/2013), 180 (NBI/2013) and 194 (NBI/2013).

² Case Nos. UNDT/NBI/2009/044, UNDT/NBI/2010/045 and UNDT/NBI/2010/077.

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 documents for the hearing containing all documents to be referred to by the witnesses or in submissions. The Applicant's evidence comprised his sworn confirmation of the facts alleged by him in his application supplemented by his oral testimony. He wished to call Mr. Amareswara Rao, the current Chief of the Human Resources Services Section (HRSS) of ECA, but had difficulty in obtaining Mr. Rao's agreement to attend the Tribunal. The Respondent chose not to call Mr. Rao or any other witnesses and relied on the documentation submitted to the Tribunal. The Tribunal of its own motion³ called Mr. Rao who appeared and gave evidence in this case. His evidence was also relevant to Case No. UNDT/NBI/2011/060.

The issues

7. The issues in this case as identified by the Tribunal and agreed by the parties are:

- a. Was the Respondent's decision to fill the post of Director/RIITD from the roster ahead of the closing date stipulated in the Vacancy Announcement (VA) lawful?
- b. Was the decision motivated by personal animus and retaliation?
- c. Was the Applicant accorded due process during the selection process?
- d. Was the Applicant harassed and discriminated against in relation to this case?

Facts

8. All of the Divisions referred to in this decision are Divisions of ECA unless stated otherwise.

³ Order No. 194 (NBI/2013) dated 29 August 2013.

Background

9. The Applicant joined the United Nations on 1 June 2001. He holds the P-5 position of Chief of the New Technologies and Innovation Section in the Special Initiatives Division at ECA.

10. Until March 2003 he worked as a Senior Economist in the Economic and Social Policy Division (ESPD). From April to December 2003 he worked in the Office of Policy and Programme Coordination performing similar functions. In January 2004 he was transferred to the Trade and Regional Integration Division (TRID). The Director of TRID was Mr. HH. Following a four-month secondment in 2005 from ECA as a special adviser to the Nigerian Minister of Finance he resumed working at TRID.

11. The ES relevant to this case was appointed in early 2006. Until then the Applicant had applied for one ECA D-1 post. After the arrival of the ES a repositioning of ECA took place and a large number of vacancies became available over a short period of time.

12. In 2006 the Applicant was made P-5 Chief of the Millennium Development Goals and Poverty Analysis and Monitoring Section (MDGs and PAMS) and the section was moved from TRID to the African Centre for Gender and Social Development (ACGSD).

13. In April/May of 2009 because of issues between him and the Applicant the ES told the incoming Director of ACGSD, that he did not want to see the Applicant. The Applicant said that from then on the ES did not talk to him.

14. On 12 June 2009, the Applicant was invited to attend an interview as a rostered candidate for the D-1 post of Director, Trade Finance and Economic

Development (D/TFED). He refused to attend the interview. One of his reasons was that as a rostered candidate he should not be required to be interviewed.⁴

15. 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 matters⁵, MEU and the Secretary-General urged ECA to take an appropriate action to ensure the integrity of the selection process, including the selection panel, and urged the ES of ECA that for future vacancies for which the Applicant was a candidate, to ascertain that all Advisory Selection Panels (ASPs) were established in a manner that guaranteed fairness and impartiality of all Panel members.

16. At the end of September 2009, the ES proposed a new management structure at a meeting of the ECA Senior Management Team (SMT) under which the MDGs and PAMS headed by the Applicant would be transferred to TFED.

17. On 5 October 2009, the ES announced the appointment of Mr. N to the position of D/TFED. By a request dated 19 October 2009, the Applicant sought management evaluation of a number of decisions, including the decision to appoint Mr. N to the TFED post.⁶

18. On 1 December 2009, a temporary vacancy announcement for the post of Officer-in-Charge, RIITD was issued.

19. On 3 December 2009, MEU issued its conclusions on the Applicant's 19 October request for management evaluation. It said that the TFED decision had been reviewed by MEU and was pending review by the UNDT so MEU lacked competence to review it again; the decision to transfer the MDGs and PAMS was a proper exercise of managerial discretion; and the allegations of harassment should be addressed in the context of ST/SGB/2008/5. The MEU further recommended that:

⁴ *Nwuke* UNDT/2013/157 (Case No. UNDT/NBI/2010/045).

⁵ *Ibid.*

⁶ In Case No. UNDT/NBI/2009/066, he also sought suspension of action of the appointment decision pursuant to article 14 of the Tribunal's Rules of Procedure. This application was dismissed in Judgment No. UNDT/2009/054.

...for future vacancies for which [the Applicant] is a candidate, the ES of the ECA should be urged to ascertain that all ASPs are established in a manner that guarantees fairness and impartiality of all the Panel members.

20. The Applicant agreed under cross-examination that after those two MEU decisions he was interviewed by two ASPs for other posts at the D-1 level.⁷

21. On 4 December 2009 the ES announced the redeployment of staff members following the restructuring decisions.⁸ The ACGS Division, including the Applicant, was to be moved to the former Trade, Finance & Economic Development (TFED) Division now designated as 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 in August 2010 following the intervention of a number of senior officials.

22. On 5 December 2009 the Applicant applied for the temporary post of OIC RIITD.

23. On 8 February 2010 the post of Director/RIITD was advertised and the Applicant applied for it.⁹ He was interviewed but not recommended for the post or placed on the roster. The ES informed all ECA staff on 9 September 2010 that Mr. A-M had been appointed to the post effective 1 September 2010.¹⁰

24. On 8 February 2010, an Office of Human Resources Management (OHRM) Support Mission to ECA, conducted between 29 October and 6 November 2009, finalized its Mission Report. It reported, *inter alia*, that vacancy management and recruitment at ECA was chronically deficient. The recruitment processes were

⁷ *Nwuke* UNDT/2013/158 and *Nwuke* UNDT/2013/159 (Case Nos. UNDT/NBI/2011/001 and UNDT/NBI/2011/008 respectively).

⁸ *Nwuke* UNDT/2013/157 (Case No. UNDT/NBI/2010/045).

⁹ The facts and decision relating to this recruitment process are in *Nwuke* UNDT/2013/159 (Case No. UNDT/NBI/2011/008).

¹⁰ *Ibid.*

viewed by staff members as highly politicized (subject to favoritism); managers were not sufficiently aware and adequately trained to fully perform their people management roles; grievances and staff member claims remained outstanding for too long and the perception was that their resolution, if any is biased and not to be trusted. The Report made many recommendations for steps to be taken to improve the unresolved issues in the management of human resources. A second consolidated report by OHRM recommended the expansion of roster based recruitment and placement but this was not approved by the General Assembly.

25. On 12 March 2010, the Applicant filed a formal complaint of prohibited conduct against the ES with the Secretary-General pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). A fact-finding panel (Investigation Panel) was set up in April 2010 to investigate his complaint.

26. On 10 May 2010, the ES sent comments to the Investigation Panel. The Applicant cited these as examples of the alleged antipathy of the ES towards him.

27. The ES referred to the Applicant's "continuous resort to various dispute resolution processes" and his "track record of behaviour that is antithetical to the norms and values of the UN" He said, "[t]he staff member is notorious in ECA for sending abusive and harassing emails to colleagues and making all manner of accusations against them for unfathomable reasons".

28. In relation to the ASP for the RIITD post¹¹ the ES described the contents of a letter that the Applicant had written about several ECA directors who had been appointed to an ASP for the post as "...this false and worrying allegation which was no doubt aimed at intimidating the panel". The ES denied harassment or intimidation of the Applicant by anyone in ECA referring to the Applicant's own "abominable track record of misbehaviour".

¹¹ *Nwuke* UNDT/2013/159.

29. On 1 October 2010, Mr. Rao was appointed Chief HRSS at ECA. He is the chief advisor to the ES on all human resources (HR) matters mostly through the Director of Administration. He is responsible for HR processes relating to promotion and selection. He gave evidence to the Tribunal about some of the HR procedures at the ECA.

30. He said that the responsibility for implementing the recommendations for the OHRM Support Mission was with the Director of Administration and the Chief of HRSS but no matrix was ever made. ECA addressed issues as they came up but not in a systematic way.

31. In response to questions about the selection of candidates from the roster, Mr. Rao said that A/RES/63/250 (Human resources management) referred to appointing pre-screened candidates from the rosters and paragraph 9.4 of ST/AI/2010/3 (Staff selection system) referred to specific job openings. At ECA the roster system is used normally when a job opening is advertised. The hiring manager makes a recommendation of candidates suitable for the position from the roster to HR. If no roster candidate is available the other candidates go through normal assessment. In the past two years just a handful of appointments were made from the roster.

32. In May 2011, ECA filled the D-1 post of Director, Office of Strategic and Programme Management (OPM) by laterally transferring Mr. A-M from Director/RIITD without advertising the post.¹²

Selection process for RIITD post

33. On 9 June 2011, the post of Director/RIITD was advertised with an application deadline of 8 August 2011. The Applicant applied for the post on 16 June 2011. Mr. Rao said that approximately 65 candidates applied and about 17 of them were screened in, including the one who was selected.

¹² The facts and decision relating to this matter are in *Nwuke* UNDT/2013/160 (Case No. UNDT/NBI/2011/060).

34. On 4 July 2011, the ES requested the list of all candidates rostered against D-1 posts in substantive divisions. HRSS sent him a list of rostered candidates in the Economic Affairs Job family at the D-1 level on the same day. The Applicant was not on this list.

35. On 13 July 2011, the ES wrote to the Director of Administration advising her that he considered that it was appropriate and important given the urgent demands on ECA in the area of trade, to fill the position of Director/RIITD expeditiously. He said he had reviewed the roster and decided to make a selection from it as per paragraph 9.4 of ST/AI/2010/3. On the same day he selected Mr. K who had been rostered against the Director/RIITD post after it had been advertised in February 2010¹³ and had applied for the post again. The ES set out the qualities to justify Mr. K's appointment and asked the Director of Administration to take the necessary steps to appoint Mr. K effective immediately. On the same day Mr. K was notified of his selection from the roster of pre-approved candidates. He accepted the appointment immediately.

36. The appointment was effective 1 August 2011. On 27 July 2011 when it was announced by the ES to all staff, the Applicant requested management evaluation of the decision of the ES to fill the post of Director/RIITD from the roster and applied to the Tribunal for a suspension of action. This was rejected. The MEU decision dated 28 September 2011 upheld the decision to fill the post from the roster.

37. The Applicant told the Tribunal that he waited and thought carefully about his next step. He was considering not proceeding with his challenge but because matters at the ECA were not improving, he filed his application with the Tribunal on 12 December 2011.

¹³ *Nwuke* UNDT/2013/161 (Case No. UNDT/NBI/2010/008).

Applicant's Submissions

38. The Applicant submitted that there are dynamic linkages between the events in this and the other cases he has brought to the Tribunal. He recognizes that he has no right to promotion but to full and fair consideration in a promotion exercise. He has brought the case in the interests of the Organization, the Administration and the staff members. He said he is not searching for lucrative awards but a contribution to the improvement of the administrative and management practices at the United Nations.

39. The Applicant alleges that the ES had antipathy towards him and had not complied with the two MEU recommendations about ensuring the integrity of the selection process for posts for which he was a candidate.

40. The Respondent's decision to fill the post of Director/RIITD from the roster ahead of the closing date stipulated in the VA was not lawful as it was in breach of the Staff Rules and Regulations as well as ST/AI/2010/3 which stipulates that full and fair consideration must be given to candidates already in the service of the Organization. The applications of non-rostered candidates in the service of the Organization cannot be disregarded entirely.

41. ST/AI/2010/3 does not state that an applicant not on the roster should not be considered and the General Assembly has never given explicit approval to the Administration to engage in broad-based roster recruitment. The General Assembly resolved that all job openings must be advertised.

42. If the INSPIRA manual states that applicants who are not on the roster should not be considered then this is inconsistent with the governing ST/AI on the Staff Selection System.

43. The ES, as Head of Department, assumed the role of both Hiring Manager and Head of Department (HoD) in breach of ST/AI 2010/3. The selection of Mr. K was

done in secret. This is an egregious violation and contemptuous disregard of the General Assembly's mandate of transparency in the recruitment process.

44. The decision was motivated by the personal animus of the ES against the Applicant. It was retaliation for the complaint he made against the ES. The Applicant relies on evidence given in the Trio of cases¹⁴ to substantiate his allegations of harassment. The Applicant was not accorded due process as his candidature was not even considered.

45. In spite of the Ruling of the Tribunal in *Nwuke* UNDT/2011/107 paragraph 59, the ES did not make even a minimal attempt to consider his application. His decision to ignore the ruling was contemptuous. The decision was improperly motivated because it was designed to block the Applicant from appearing before a selection panel to deliberately frustrate the recommendations of the Secretary-General in the 2 MEU decisions.

46. The use of the roster candidates was unlawful because although Mr. K was on the roster he was not rostered against this post. He was not marked with the symbol RM but was marked "screen". Even if Mr. K were rostered against this post, the decision is unlawful because the suitable roster candidates were not submitted by the recruiter within five working days as required by Chapter 15.5.2 of the INSPIRA Instructional Manual or linked by the recruiter to the job opening as required by Chapter 15.5.7 of the instructional manual.

47. Mr. K was rostered based on his performance in an interview as a candidate for the previously advertised post of Director/RIITD however MEU had found that the Applicant had not been given full and fair consideration for that post. It is unfair to use the outcome of a flawed process to deny him an opportunity of an interview.

¹⁴ *Nwuke* UNDT/2013/157.

48. In 2009, as a rostered candidate, the Applicant was required to undergo an interview but in 2011 when Mr. K applied he was not required to undergo an interview. This is an example of discriminatory conduct.

Respondent's Submissions

49. The Respondent relied only on the facts relating to the selection process. The Secretary-General is vested with wide discretion to select staff members for positions. The Tribunals do not substitute their judgment on the outcome for that of the Secretary-General. The staff member has the right to full and fair consideration but has no right to selection to a higher level post. There is a presumption that official acts have been regularly performed. The staff member must show that he or she was denied a fair chance of appointment

50. The ES was not required under section 9.4 of ST/AI/2010/3 to consider the non-rostered candidates, including the Applicant, before taking the decision. The primary purpose of section 9.4 was to remove the previous requirement in ST/AI/2006/3 for programme managers to consider all candidates, including non-rostered candidates. The 2010 amendment is consistent with the purpose of roster selection which is to expedite the recruitment process. This was recognised by the General Assembly in paragraph 9 of A/RES/61/244 and paragraph 12 of A/RES/63/250.

51. ST/AI/2010/3 neither specifically mandates nor prohibits a manager from selecting a roster candidate without further consideration of non-roster applicants. It is at the discretion of the manager. The Head of Department had the prerogative to select a rostered candidate at any point in time during the selection process and may select immediately after being provided with the list of rostered candidates.¹⁵

¹⁵ Section 15.6.2 of the Instructional Manual for the Hiring Manager on the Staff Selection System (INSPIRA Manual).

52. UNDT has consistently recognised that the Organization may establish criteria for selection even if it limits the pool of eligible applicants so long as the criteria serve an important interest of the Organization. The Tribunal notes that of the three cases cited by the Respondent in support of this proposition none does so expressly.

53. The Applicant did not receive disparate treatment as the facts relating to the appointment of Mr. K are different from those of the Applicant while on the roster. The selected candidate did not receive favourable treatment.

54. The decision was not a retaliatory act. The Applicant's complaint against the ES was fully addressed and completed in July 2010. There was no finding of discrimination against the ES. There is no evidence that the Applicant is a victim of harassment.

55. The Applicant's right to a full and fair process was not violated and there was no breach. The Applicant has not proven any damage or prejudice. Any loss of chance would be highly speculative. There is no basis on which to award compensation.

Considerations

56. ST/AI/2010/3 was promulgated in April 2010 to integrate the recruitment, placement, promotion and mobility of staff within the Secretariat. The issue is whether this administrative instruction enables the Administration lawfully to fill a vacancy by appointing a roster candidate without evaluating other candidates who have applied to the vacancy.

57. United Nations legislative instruments are interpreted in the first place in light of the Charter of the United Nations. Article 101.3 of the Charter is relevant to instruments and decisions on human resources. It refers to "the necessity of securing the highest standards of efficiency, competence, and integrity" as the "paramount consideration in the employment of the staff and in the determination of the

conditions of service”. These words are reflected in General Assembly resolutions on Human Resources Management.

58. General Assembly resolution 65/247 (Human resources management), adopted on 24 December 2010, at section II, para 20, requested that the Secretary-General “ensure that all administrative instructions and any other internal instructions on human resources ...are in full compliance with the relevant resolutions of the General Assembly”. It follows that where there is a dispute about the interpretation of an administrative or other internal instruction, the Tribunal should take into account any relevant resolutions of the General Assembly. In the case of the use of rosters in the selection process, the following Resolutions are relevant.

59. General Assembly resolution 63/250 (Human resources management), adopted on 24 December 2008, noted the desirability of speeding up the recruitment and staffing process but at section III, paragraph 8 decided that in order to ensure the transparency of the recruitment process all specific vacancy announcements shall continue to be advertised. At section III, paragraph 16, the General Assembly requested that the Secretary-General ensure all anticipated and immediate vacancies are properly advertised and filled quickly, and to report on the success of this endeavour to the General Assembly at its sixty-fifth session.

60. A/RES/61/244 (Human resources management), adopted on 22 December 2006, stated at section I, paragraph 2, that the Secretary-General’s proposals on the new human resources framework shall be based on “clear ethical standards, simplicity, clarity and transparency,”... In that resolution the General Assembly recognized the importance of speeding up the recruitment and staffing process, in accordance with article 101, paragraph 3, of the Charter, and at section II, paragraph 9 recognised that pre-screened rosters can considerably expedite the recruitment process in the United Nations. To that end it requested the Secretary-General at paragraph 10:

to promote the full utilization of existing rosters for recruitment and to further elaborate the use of pre-screened rosters... taking into account the need for transparency, support for the provisions of Article 101 of the Charter and administrative and resource implications...

61. At section II, paragraph 12 the General Assembly requested the Secretary-General to ensure that use of the envisaged expedited recruitment process is confined to surge needs, with established procedures for recruitment being waived only in “exceptional cases”.

62. Section 9 of ST/AI/2010/3 provides that:

Selection decision

...

9.3 When recommending the selection of candidates for posts up to and including at the D-1 level, the hiring manager shall support such recommendation by a documented record. The head of department/office shall select the candidate he or she considers to be best suited for the functions [...].

9.4 Candidates for position-specific job openings up to and including at the D-1 level included in a list endorsed by a central review body other than the candidate selected for the specific position shall be placed on a roster of candidates pre-approved for similar functions at the level of the job opening, which shall be drawn from all duty stations for job openings in the Professional and above categories. The roster candidate shall be retained in a roster for a period of two years for male candidates and three years for female candidates the month following the selection decision. Candidates included in the roster may be selected by the head of department/office for a subsequent job opening, without reference to a central review body.

63. In *Charles* UNDT/2013/040, the Tribunal held that:

ST/AI/2010/3 does not provide for the practice whereby non-roster candidates may be completely disregarded. Candidates from a pre-approved roster who are considered for position-specific job openings still have to be compared against other, non-rostered candidates. However, if selected, they do not have to be referred to the central review bodies for approval pursuant to sec. 9.4 [...].¹⁶

¹⁶ Followed in *Skourihine* UNDT/2013/113.

64. The Tribunal's reasons in *Charles*, which are respectfully adopted in the present case, included, *inter alia*, that the purpose of the roster was mainly to speed up the recruitment process by avoiding the stage of a referral to the central review bodies if a roster candidate is considered the best candidate when compared to all other candidates but that an automatic appointment without a selection process that affords other candidates full and fair consideration is contrary to the paramount requirements of article 101.3 of the United Nations Charter and staff regulation 4.2.

65. The Tribunal in *Charles* also held that appointment from the roster without proper consideration of all candidates is a practice that is inconsistent with a proper interpretation of ST/AI/2010/3 since it allows managers unreasonably wide discretion to disregard non-roster candidates.

66. In addition to these reasons, this Tribunal adds that the General Assembly resolutions quoted above reiterate the principle of transparency in the selection process and the need for vacancies to be advertised. There is no transparency in a process that selects a candidate from the roster without interview or objective comparison with the other candidates. The reason for advertising a vacancy is to attract a wide range of candidates for selection and to give full and proper consideration to securing the highest standards of efficiency, competence, and integrity. The need for advertising is obviated if those who apply to the vacancy are not even considered.

67. Section 9.4 must be interpreted in the context of the entire ST/AI. Section 7 is the prescreening and assessment section of the ST/AI. It requires the hiring manager to prepare a shortlist from **all** applicants released from prescreening, not just from rostered candidates. Following the assessment of the shortlisted candidates, the hiring manager shall submit his/her proposal to the CRB. Under section 9, selection decisions shall be made by the head of department on the basis of the proposal made by the hiring manager. These are mandatory procedures. The appointment of a roster candidate without going through these procedures is unlawful.

68. The Tribunal expressly rejects the submission of the Respondent that the decision whether or not to select a roster candidate without further consideration of non-roster applicants is at the discretion of the manager. The manager's discretion is exercised once all suitable candidates have been considered. In making this submission the Respondent relied on the INSPIRA Manual section 15.6.2. In the hierarchy of legal documents an instruction manual cannot prevail over the General Assembly resolutions or staff rules.

69. Even if the Respondent is correct in this submission, the General Assembly resolution 61/244 at section II, paragraph 12 confined the use of expedited recruitment processes to meet "surge needs" in exceptional cases. Although that paragraph referred to the pre-screening process it is clear from that Resolution and the others quoted above that although the General Assembly acknowledged the desirability of speeding up the recruitment and staffing process it was concerned with maintaining transparency. Selection of a candidate from the roster without considering the other applicants does not amount to a transparent process.

70. In *Contreras* 2011-UNAT-150, the United Nations Appeals Tribunal (UNAT) examined the provisions of ST/AI/2006/3 and the role of the programme manager or Head of Department. It held that up to the stage of approval of a list of qualified candidates, the head of department is not entitled to drop a candidate from the list of qualified candidates.

71. In 2010 a new administrative instruction replaced ST/AI/2006/3 however, in spite of the changes to the staff selection system in ST/AI/2010/3, the division of responsibilities remained substantially the same. If anything they were even more clearly delineated in section 9.2, which provides that selection decisions shall be made by the Head of Department on the basis of proposals by the hiring manager (formerly the programme manager).

72. The Tribunal holds that, contrary to the submission of the Respondent, changes made between section 7.8 of ST/AI/2006/3 and section 9.4 in ST/AI/2010/3 did not remove the requirement for all candidates to be considered. This submission is not supported by the wording of section 9.4 or in the scheme of ST/AI 2010/3 nor is it consistent with the requirement for an objectively verifiable transparent process.

73. In this case, Mr. K was selected without recourse to the procedures in sections 7 and 8 of ST/AI/2010/3. The actions of the ES in calling for the list of candidates from the roster and making a selection directly from that list without considering the proposal of the hiring manager were in violation of section 9.2. The reasons given by the ES for the appointment were generalized and subjective. None of the checks and balances of the ST/AI designed to ensure an objective and transparent process of appraisal were followed.

74. The Applicant also alleges that in addition to the selection being in breach of the Staff Rules the decision was motivated by personal animus and retaliation against him and that he was harassed and discriminated as a result.

75. The Tribunal finds that the selection process and decision in this case was an example of the poor human resources management prevalent at that time in ECA as recognized by the OHRM Support mission report. But there is insufficient evidence that it was a specific act of retaliation by the ES in response to the Applicant's 2009 complaint against him. That complaint was investigated by an Investigation Panel in 2009. In spite of the Applicant's disagreement with the outcome, the Panel found that the Applicant's allegations of harassment and victimisation by the ES were unsubstantiated. Since 2010 when the Investigation Panel issued its report the Applicant has applied to and been interviewed for other vacancies at the ECA. There is no evidence of a nexus between the allegation of prohibited conduct and the alleged act of retaliation by the selection process in this case.

76. The fact that the Administration had apparently different requirements about whether to interview rostered candidates in two separate selection processes is

another example of inconsistent human resources practices in the ECA at that time but is not sufficient evidence to establish an act of discrimination against one individual.

Conclusion

77. The Tribunal finds that the decision to appoint a staff member to the post of Director/RIITD off the roster without consideration of the other candidates (including the Applicant) who had applied to the post, was unlawful. It failed to give him full and fair consideration for the post and denied him due process.

Compensation

78. The Applicant sought rescission of the selection decision and an order for his retroactive appointment to the post. He also sought “appropriate compensation for the violation of my rights, for emotional and psychological stress and for harm to my reputation.”

79. In *Contreras*,¹⁷ UNAT held that in principle in cases concerning appointment and promotion, pursuant to article 10.5(a) of the Statute of the United Nations Dispute Tribunal, the Tribunal should not only grant compensation but has to provide the Administration with a choice between on the one hand, rescinding the decision or performing an obligation and, on the other hand, paying compensation. In that instance, however, UNAT accepted the reasons of the Tribunal for not ordering rescission of the decision.

80. In the present case the practical effects of rescinding the selection decision made in July 2011 would have wide ranging implications especially because of the number of interrelated selection decisions at least one of which has been found to have been flawed.¹⁸ However, an order for a sum in compensation would be inappropriate. There were a number of suitable candidates rostered against the post.

¹⁷ 2011-UNAT-150.

¹⁸ *Nwuke* UNDT/2013/160.

Although he was interviewed for the post in 2010 the Applicant was not included in this roster, which diminished his chance of appointment. The Applicant repeatedly acknowledged he had no expectation of being appointed. There is no evidence that the unlawful decision has caused him any monetary or professional harm such as loss of chance of appointment that would entitle him to compensation.

81. The Applicant is however entitled to moral damages. Throughout this case and all the other cases heard by the Tribunal, he exhibited a strong sense of injustice both to himself and to the institution of the United Nations and its ideals. These were compromised by the unlawful selection processes. His legitimate expectation that, having applied for a post, he would be fully and fairly considered for it was disappointed.

82. UNAT has held that it is within the discretion of the Dispute Tribunal to determine the amount of moral damages to award a staff member for procedural violations in light of the unique circumstances of each case.¹⁹

83. The Tribunal acknowledges the stress caused to the Applicant by the circumstances of this case and awards one month of net base salary at the rate applicable to the Applicant at 13 July 2011.

(Signed)

Judge Coral Shaw

Dated this 4th day of December 2013

¹⁹ *Cieniewicz* 2012-UNAT-232; *Morsy* 2012-UNAT-330 and *Wu* 2010-UNAT-042.

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

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi