



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TOURE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Alexandre Tavadian, OSLA

Kristina Maximova, OSLA

Counsel for the Respondent:

Sandra Baffoe-Bonnie, OES/ECA

Sibangilizwe Ndlovu, OES/ECA

Introduction

1. The Applicant is a former staff member of the United Nations Economic Commission for Africa (“ECA”). In her Application dated 26 June 2013, she is contesting the decision dated 14 December 2012 not to renew her appointment based upon the abolition of her post and non-reassignment.

2. The Respondent filed a Reply on 1 August 2013.

3. The Tribunal held a hearing on the merits from 17-18 September 2014.

Facts

4. The Applicant began to work in the United Nations on 30 November 2009 as a Regional Advisor at the P4 level with the ECA. She was posted to the sub-regional office of the ECA in Yaoundé, Cameroon.

5. Her contracts, which were renewed periodically between 2009 and 2012, were all fixed-term contracts.

6. The Applicant’s post and those of other Regional Advisors were funded under the Regional Programme of Technical Cooperation (RPTC). Each of the said Regional Advisors at the ECA all had diverse substantive portfolios. The Applicant on her part had her substantive role in the Civil Society and Post Conflict Section at the Governance and Public Administration Division (GPAD).

7. In September 2012, a new Executive Secretary, Mr. Carlos Lopez, was appointed to the ECA. Soon after he came on board, the new Executive Secretary announced his intention to restructure part of the ECA. Thereafter, in late November and early December 2012, the ECA Staff Union met with the new Executive Secretary to discuss proposals for the restructuring he had spoken about and to express their concerns that staff members should not lose their jobs.

8. On 12 December 2012, the Executive Secretary then called a Town Hall meeting of all staff members of the ECA. At the said Town Hall meeting, he made a power-point presentation which is Annex 3 to this Application. The essential message of the presentation was that there would be “no post reduction but significant realignment to re-profiled functions”. Part of the message of the presentation was that staff members would be retrained if necessary so that they could move into their new functions.

9. Two days after the Town Hall meeting, the Applicant received a letter purporting to abolish her post. The contents of the said letter implied that all Regional Advisor posts were similarly abolished.

10. All of the three Regional Advisors whose duty posts were in Addis Ababa were recruited to other posts. The Applicant and another colleague, Mr. Johnson Oguntola who worked in Zambia, were not assigned to other posts but were separated.

11. The Applicant received her separation notification dated 11 February 2013 and was separated on 31 March 2013.

12. On 11 February 2013, the Applicant sent a management evaluation request with regard to the abolition of her post to the Management Evaluation Unit (MEU). Thereafter on 26 June 2013, she brought the present Application.

13. On 17 and 18 September 2014, the matter was heard by the Tribunal. Two witnesses testified for the Applicant and one witness testified for the Respondent while a fourth witness was called by the Tribunal. The witnesses were: (1) the Applicant for herself, (2) Mr. Johnson Oguntola for the Applicant, (3) Mr. Amareswara Rao for the Respondent; and (4) Mr. Makana Faye called by the Tribunal.

Applicant's case

14. The Applicant's case is summarized below.

15. The Applicant submits that she had a legitimate expectation of renewal of her fixed-term contract. She submitted that she was entitled to either have her appointment extended up till December 2013 or to be offered an alternative post within the ECA.

16. The Administration of the United Nations and staff representative bodies had reached an agreement in June 2012 in Arusha, Tanzania regarding the regularization of the former 200-level series appointments. The real purpose of that Arusha agreement was to re-advertise the posts of Regional Advisors and others on 200 level series contracts and allow the incumbents of those positions to be selected for the said posts through a regular competitive process.

17. In the present case, the ECA had an obligation to regularize the Applicant's post before 31 December 2014 by advertising a regular Regional Advisor position but instead it separated the Applicant and failed to honour its obligation.

18. At a town hall meeting on 12 December 2012, the Executive Secretary of ECA reassured staff members that ECA's restructuring would entail no post reduction and he made no distinction between posts funded through the regular budget and those funded through the RPTC and General Temporary Assistance (GTA) funds. The ECA Administration breached its undertaking by separating the Applicant.

19. ECA failed to conduct adequate consultations prior to the re-structuring that led to the abolishment of her post. Consultations with the staff union had not taken place before the ECA Executive Secretary decided to abolish the Regional Advisor posts. A duty to consult the affected staff members before abolishing their posts existed and the said duty was breached.

20. Some Regional Advisors were accommodated beyond the purported date of abolishment of Regional Advisor posts. The Applicant and another colleague, Mr. Oguntola, were marginalized and discriminated against because out of the thirteen Regional Advisors who received letters on 14 December 2012 abolishing their posts in the ECA, they were the only ones who submitted management evaluation requests and did not withdraw them. While some of them were allowed to work until their impending retirements, at least one of them has continued to work beyond September 2014.

21. The Executive Secretary had no authority to abolish any post within the ECA and this lack of power on his part rendered the impugned decision ultra vires. He acted beyond his powers because he was not authorized by the General Assembly to conduct such a major re-structuring that led to the abolishment of 13 Regional Advisor positions which included the Applicant's post.

22. Moreover, the abolishment of the said posts took place after the General Assembly had already approved the budget for the 2012-2013 biennium. As a result, neither the budget nor the posts of Resident Advisors already approved by the General Assembly for the biennium could be modified, restructured or abolished by the Executive Secretary under any guise of authority or discretion.

23. On 20 June 2014, the Applicant amended her written submissions and filed additional documentary evidence made up of her Annexes 10 and 11. In particular, Annex 11 is an interoffice memorandum dated 6 February 2012 and authored and sent by the then Director, Division of Administration of the ECA, Ms. Bongoy-Mawalla.

24. The memorandum was sent to the Directors of the different units in the ECA. It informed the said Directors of the allocation of approved resources under the RPTC for the 2012-2013 biennium. It also noted that the resources were to be used for the activities approved in the work programme of the Proposed Programme Budget PPB of the 2012-2013 biennium for each subprogramme. The memorandum pointed out

that the GTA resources were to be used only for those staff recruited as Regional Advisors for that biennium.

25. The Respondent's claim that the Executive Secretary was asked by the Conference of African Ministers (COM) responsible for social and economic development to refocus the ECA mandate is irrelevant because the COM, while it may provide legislative mandate and policy guidance for the work of the ECA, has no authority to approve major restructuring exercises that have important administrative consequences for the Organization.

Respondent's case

26. The Respondent's case is summarized below.

27. In 2012, Mr. Lopez decided to refocus the mandate of the ECA through a restructuring programme. He then conducted extensive dialogue with his senior management team, stakeholders, ambassadors of African countries and the Staff Association at town hall meetings and other fora, sought input and gave briefings on the progress being made at different stages of the restructuring.

28. The Regional Advisor posts which include the Applicant's post were only complementary to the core activities of the ECA and were not funded from the regular ECA budget. The said posts were funded under the RPTC which were short term in nature and advisory and could only be continued subject to the need of the Advisors' expertise.

29. The refocus of the thematic areas of the RPTC which led to the abolishment of the Advisor posts was part of a restructuring programme undertaken after the said extensive consultations and dialogue with staff members, ECA senior management and other stakeholders.

30. Because they are non-regular posts, the Executive Secretary is not obliged to seek the authorization or approval of the General Assembly for the non-extension of GTA posts or the restructuring of such posts.

31. Whenever the ECA determined that priorities in mandate delivery of RPTC programmes had changed, the Executive Secretary had the discretion to discontinue the functions performed by the Applicant and the other Advisors and therefore his decision to do so was a proper and lawful exercise of his discretion.

32. The decision to not extend the Applicant's contract was based on the operational requirements of the ECA and the need to attend to shifted priorities as determined by the needs of the African continent and all Regional Advisors were treated in the same manner as the Applicant without favouring any one of them.

33. While some of the Regional Advisors whose contracts were not extended had successfully applied to other advertised posts or were selected from a roster or were even retained on the basis of different contractual status, the Applicant did not apply for any post and was not selected following the expiry of her contract.

34. The Executive Secretary's promise at a town hall meeting of 12 December 2012 that there would be no post reductions was meant for staff members occupying regular posts. The said promise or reliance on it cannot create a legitimate expectation of renewal for the Applicant as any impression created by that address was soon corrected only two days later by the letter of 14 December 2012 to the Applicant informing her about the abolition of her post.

35. The Arusha Agreement relied upon by the Applicant did not envisage an automatic conversion process for the 200 level series staff members or that the said 200 level series staff members would be regularized without going through a competitive recruitment process.

Order No. 120 (NBI/2015) of 20 April 2015

36. On 20 April 2015, the Tribunal issued Order No. 120 (NBI/2015) in which the Respondent was directed to produce the RPTC Programme budget of the ECA for the 2012-2013 biennium.

37. The Tribunal also directed the Parties to provide comments on the said budget and to make submissions as to whether the Executive Secretary of the ECA had the authority to amend the budgetary provisions of the 2012-2013 biennium half-way through and before the end of that biennium.

Issues for determination

38. In spite of the fact that several issues were raised and canvassed by the Parties, only two critical questions beg for determination in this matter.

a. Did the Executive Secretary of the ECA act *ultra vires* when he abolished the Applicant's post?

b. Did the Executive Secretary have the authority or discretion to abolish the Applicant's post as a Regional Advisor in December 2012 despite the existence of an RPTC biennial budget of 2012-2013 which made provision for the said post for the entire biennium?

CONSIDERATIONS

Did the Executive Secretary of the Economic Commission for Africa (ECA) act ultra vires when he abolished the post of the Applicant as a Regional Advisor in December 2012? Did he have the authority or discretion to abolish the said post in December 2012 despite an existing RPTC Biennial budget for 2012-2013 which made provision for the post in question up till the end of that biennium?

39. It is part of the case for the Applicant that the Executive Secretary exceeded his powers when he abolished her Resident Advisor post. It was argued on her behalf

that unless the Administration can show an explicit delegation of power to abolish the Applicant's post, the impugned decision was *ultra vires*.

40. It was also submitted for the Applicant that once the Secretary-General prepares and submits the budget for the Organization, it is first reviewed by the Advisory Committee for Advisory and Budgetary Questions (ACABQ). Its report is then transmitted to the Fifth Committee before its approval by the General Assembly. None of these steps were taken before the decision to abolish the 13 Regional Adviser posts by the Executive Secretary.

41. The Executive Secretary, it was argued, began restructuring the ECA only after the General Assembly had already approved the budget for the 2012-2013 biennium. Neither the budget proposal for that biennium nor the approved budget contained any information with regard to the major restructuring of the ECA.

42. The Executive Secretary had no authority to drastically change the priorities of the Commission in the middle of the biennium without first obtaining the approval of the General Assembly. The Applicant's Counsel in support of this submission cited General Assembly resolution 594 (VI) of 4 February 1952 in which it was resolved *inter alia*:

...that the administrative part of the technical assistance programme financed by voluntary contributions and executed by the United Nations shall be subject to the same scrutiny on the part of the Advisory Committee on Administrative and Budgetary Questions as that applied to expenses proposed under the regular budget.

43. It was further argued that even if the COM had endorsed the Executive Secretary's proposal to refocus the mandate of the ECA and may provide legislative mandate and policy guidance for the work of the Commission, it had no authority to approve major restructuring exercises.

44. The Respondent on his part, submitted that the Applicant's post was a temporary one funded under the RPTC, drawing from GTA funds provided for in the 2012-2013 Biennium Programme Budget. All posts of Regional Advisors at the ECA

were similarly funded under the RPTC. The Applicant was one of about 13 Regional Advisors at the ECA as at December 2012 when all the Regional Advisor posts were abolished.

45. He argued that since RPTC posts are not part of the approved staffing table and were not regular posts established under the General Assembly framework, they were only temporary and subject to the programme priorities as set out by the ECA member states and could be discontinued at the expiry of their contractual cycle at any time that member states determined that the modalities of implementing programme priorities needed to be changed.

46. The Respondent also submitted that the role of the Executive Secretary in such circumstances was to execute the requirements set out by the member states in the AU/ECA COM and to ensure that ECA's programme implementation plan is in conformity with the priorities as set out by the member states. According to the Respondent, the new ECA strategic directions for the transformative development of Africa were approved by the COM in March 2013 in Abidjan, Côte d'Ivoire.

47. As to whether the Executive Secretary has the authority to amend budgetary provisions before the end of a biennium, the Respondent in his comments pursuant to the Tribunal's directive in Order No. 120 (NBI/2015), cited the provisions of regulation 6.2 of 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). He additionally emphasized in his submission regarding that regulation that the prior approval required by the Executive Secretary for the reformulation of a sub-programme and the introduction of a new programme into the existing biennial programme budget of the ECA for 2012-2013 was that of an intergovernmental body, which in the case of the ECA is the COM.

48. He continued that although the Executive Secretary had no authority to change the priorities of the ECA in the middle of the biennium as reflected in ST/SGB/2000/8, he had "the authority and discretion to modify the modalities

through which programmatic priorities are executed, particularly where such a change is necessitated by member states requirements that certain non-core functions that are complementary to the ECA regular mandate be discontinued in the following biennium”.

49. The Respondent concluded in his comments that although the restructuring of the ECA and focus on priorities defined by the COM in the Abidjan meeting may have changed the modalities of delivery of some services thereby affecting Regional Advisors, the content of the mandate as approved by the General Assembly was not altered in the middle of the biennium but remained the same.

The nature and purpose of the Regular Programme of Technical Cooperation (RPTC).

50. In the report of the Secretary-General to the General Assembly dated 1 October 2004¹, while responding to General Assembly resolution 58/270 of 23 December 2003 for a review of the RPTC and the Development Account (DA); he described the RPTC as a fund allocated by the General Assembly to support technical cooperation activities of United Nations Secretariat entities. The fund is intended to provide rapid response to government requests and to deal with smaller initiatives formulated and implemented within the biennium period.

51. The objectives of the RPTC fund have been discussed in many official documents of the United Nations. Specifically, in the proposed programme budget of the RPTC for the 2012-2013 biennium, the Secretary-General in an overview observed that the RPTC serves to support developing countries, least developed countries, countries with economies in transition and those countries emerging from conflict in their capacity-development efforts.

52. With regard to how the fund is deployed in Regional Commissions such as the ECA, it was observed that the “RPTC allows Regional Commissions a fast and

¹ Annex D, A/59/397, para. 5.

flexible response to requests of Member States to meet small-scale but urgent requirements, as defined by them, and enables those countries to harness the expertise that exists in the UN.”²

53. In other words, the RPTC “provides the operative flexibility for implementing entities to respond to urgent, unanticipated needs of developing countries, in a rapid-response capacity that is not provided for in any other section of the regular budget biennial work plan.”³

54. For example, RPTC resources enabled the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) to respond to the urgent need in Samoa for post-disaster impact and needs assessment after the tsunami in that country and to support recovery and reconstruction efforts. The United Nations Economic Commission for Latin America and the Caribbean (ECLAC) also provided rapid-response services to Mexico to assess the impact of the human influenza pandemic and to Bolivia to evaluate the impact of its first-ever dengue fever epidemic with a view to formulating recovery plans.

55. It was emphasized, however, that new types of RPTC interventions are not limited to responding to requests but are part of more complex programmatic approaches and that these call for higher levels of skills and knowledge and require deeper awareness of the conditions that affect programme countries and the development of well-documented, regionally-based and nationally-based thematic priorities. And further, that applying innovative programme approaches also increase RPTC’s ability to transition to results-oriented work with enhanced effectiveness and accountability and still remain demand-driven at the core of its services.⁴

² Annex B to the Respondent’s submission of comments pursuant to the directive in Order No. 120 (NBI/2015) dated 30 April 2015; Regular Programme for Technical Cooperation: Inter-Regional Guidelines and Principles for Effective Delivery of Capacity Development Support, 2012.

³ United Nations Regional Commissions New York Office: Regional Commissions and Regular Programme of Technical Cooperation (RPTC).

⁴ *Supra*, note 2.

Use of Advisors within the RPTC.

56. In the above-cited report of the Secretary-General of 1 October 2004, the use of Advisors as the prime delivery mechanism for the RPTC was highlighted. It was also stated that the fundamental purpose of the RPTC historically has been to provide advisory services through specially recruited Advisors. In defining advisory services, the Secretary-General pointed out that they must: (1) respond to requests by governments for urgent, on the spot advice on policy-related issues; (2) provide governments with specific advice on sectoral matters relevant to their countries; and (3) assist governments in the formulation of projects and in programme evaluations leading to the enhancement of national programmes. In other words, the RPTC is a mechanism for quick response in meeting the needs of developing countries.

57. Paragraph 18 of the said report made it clear that Advisors are not permanent United Nations staff members, but are hired under fixed-term contracts, generally of one year's duration, that can be renewed as required.

58. Also, the proposed programme budget of the RPTC for the 2012-2013 biennium refers to the short-term nature of advisory services. At paragraph 23.12 of that document, it is stated that extensions of the Advisors are reviewed on an annual basis by senior level departmental panels. A review of the advisory services provided during the past period and an examination of a results-based work plan would take place and would be fully integrated within the sub-programme's technical cooperation programme for the forthcoming period.

59. The centrality of Advisors in the delivery of RPTC services is not in question. "A key feature of RPTC is the availability of GTA funds earmarked for recruitment of short-term Regional Advisors. The most recent Budget Instructions, disseminated in 2010, re-emphasized that there are no established posts under RPTC. As such, GTA funds are to be used for 'contracting of advisors in response to requests from Governments for advisory and technical support services. Advisors under GTA may

be recruited against short-term or intermediate-term contracts, in line with demonstrated needs of the subprogramme.”⁵

60. The fore-going brief reflection of the nature and purpose of the RPTC fund especially in Regional Commissions such as the ECA and the use of Advisors within it is helpful for considering the issues that arise in this case.

The provisions of ST/SGB/2000/8

61. ST/SGB/2000/8 is the Secretary-General’s bulletin which promulgates the Regulations and Rules governing Planning, Programming, monitoring and evaluation of all activities undertaken by the United Nations irrespective of their source of financing. Its regulation 6.2 states:

An entire subprogramme shall not be reformulated nor a new programme introduced in the programme budget without the prior approval of an intergovernmental body and the General Assembly. The Secretary-General may make such proposals for review by the relevant intergovernmental body if he or she considers that circumstances so warrant.

62. It is sufficiently clear that the provisions of regulation 6.2 make it a requirement that in addition to the approval of the intergovernmental body which in the case of the ECA is the COM, the Executive Secretary must obtain the approval of the General Assembly. It is not the case of the Respondent that this approval was sought or obtained in respect to the refocusing and re-profiling of ECA priorities leading to abolishment of Resident Advisor posts in the middle of the 2012-2013 biennium.

63. In view of regulation 6.2, did the Executive Secretary have the authority or discretion to abolish the Applicant’s Resident Advisor post in December 2012 on his own initiative and without recourse to and approval of the relevant intergovernmental body, the COM, and the General Assembly?

⁵ Ibid.

64. The Respondent pointed out that the role of the Executive Secretary is the implementation of priority programmes set out by member States and the implementation of budgetary requirements outlined in the Programme Budget for each biennium. He also submitted that in exercise of these duties, the Executive Secretary relies on the priorities set out by the COM as an intergovernmental body involved in formulating and defining Africa's priorities.

65. It was further submitted for the Respondent that the COM had approved the refocusing and re-profiling of ECA priorities in Abidjan in March 2013 and that it was on the basis of the said approval that the Executive Secretary implemented the decision to abolish Regional Advisor positions including that of the Applicant.

66. The Tribunal will here examine this critical claim by turning its attention to certain relevant documents which were placed before the COM in March 2013 by the ECA Secretariat and the Executive Secretary and the resolutions adopted as a result by the said COM.

67. Annex 1 to the Respondent's Reply to this Application is an address by the Executive Secretary at the sixth joint annual meetings of the AU Conference of Ministers of Economy and Finance and the ECA COM held on 25 and 26 March 2013 in Abidjan.

68. The Executive Secretary concluded that address by calling for the endorsement of his proposals to refocus and re-profile the ECA and for the COM to provide guidance for the implementation of the said proposals. In that call, he informed the COM that if endorsed, the said proposals would then be submitted also to the United Nations Economic and Social Council and thereafter to the General Assembly for endorsement.

69. While presenting its Annual Report at the Conference in which it highlighted several achievements in the course of the preceding year, the ECA Secretariat also

presented the Revised Strategic Framework for the 2014-2015 biennium and the Proposed Programme Budget for the same 2014-2015 biennium.

70. Regarding the presented Revised Strategic Framework/Biennial Programme Plan for the 2014-2015 biennium, the ECA Management pointed out to the COM that although a strategic framework had been endorsed at the same ECA-AU COM meeting the previous year (in March 2012) in Addis Ababa, major global and regional developments necessitated a revision of the ECA strategic framework for the said 2014-2015 biennium.⁶

71. In the discussions that followed, the COM endorsed the revised ECA Strategic Framework and the accompanying Proposed Programme Budget for 2014-2015 and welcomed the focus on statistics.⁷

72. After discussions and deliberations, the COM went on to adopt several resolutions. One of the resolutions adopted is Annex 2 to the Respondent's Reply titled "Refocusing and recalibrating the Economic Commission for Africa to support Africa's structural transformation."⁸

73. A closer examination of that Resolution shows that the COM took note of the Executive Secretary's paper and the Revised Strategic Framework/Biennial Programme Plan for the biennium of 2014-2015 (E/ECA/COE/32/15) and also the related Proposed Programme Budget for the same biennium 2014-2015 (E/ECA/COE/32/12) both presented by the ECA Secretariat.

74. In its resolution, the COM at paragraph 2 of that document⁹ mandated the Executive Secretary to realign the programmes and priorities of the ECA to the new strategic orientation proposed. It also endorsed at paragraph 3, the revised Strategic

⁶ See paragraphs 71 and 73: Proceedings of the Sixth Joint Annual Meetings of the Conference African Ministers of Finance, Planning and Economic Development of the Economic Commission for Africa and the African Union Conference of Ministers of Economy and Finance (E/ECA/CM/46/6).

⁷ Ibid, paragraph 74.

⁸ Annex 2 of the Respondent's Reply to the Application.

⁹ Ibid.

Framework presented by the ECA and its related Proposed Programme Budget for the 2014-2015 biennium.

75. The summary of the Respondent's case is simply that the ECA Executive Secretary's abolishment of the Applicant's RPTC-funded post or discontinuation of her contract was based on new priorities set by the COM of member States at the 25-26 March 2013 Conference. It is also his case that there was no longer any need for the functions associated with the Applicant's position, as priorities in mandate delivery of the RPTC programme had changed based on the outcome of the 25-26 March 2013 Conference.

76. Regarding the authority and discretion of the Executive Secretary, it is additionally the Respondent's case that his role is the implementation of priority programmes and the approved budget for each biennium and that he had the discretionary authority to decide to discontinue the functions performed by the Applicant since he has the delegated responsibility for the administration and delivery of ECA's mandate.

77. While the Tribunal is not in any doubt that the Executive Secretary has the delegated authority to see to the implementation and delivery of the ECA's mandate, it is not a matter of contention that these implementations are carried out only at the instance and guidance of African member States with their approval given through the COM and the additional approval of the General Assembly.

78. Firstly, the Executive Secretary led the ECA Secretariat in the last week of March 2013 to request from the COM, a mandate to revise the strategic framework and programme budget for the 2014-2015 biennium which had been endorsed and adopted a year before by the same body in March 2012 in Addis Ababa. That request was granted by the COM.

79. Secondly, the said Executive Secretary went forward thereafter as is the practice and legal requirement, to also obtain the approval of the General Assembly

with regard to the revised strategic framework and programme budget for the 2014-2015 biennium. The General Assembly also gave its approval.

80. Thirdly, the Executive Secretary did not place any request to refocus, reprioritize or re-strategize the already adopted programmes and budget for the 2012-2013 biennium which at the late March 2013 Conference had only nine more months to come to its end. In other words, the remainder of the 2012-2013 biennium was never an issue before the COM in Abidjan or at any time.

81. Fourthly, as at December 2012 and barely three months after the arrival of Mr. Lopez as ECA's new Executive Secretary, he had decided, based on his own personal initiative and whim, to restructure and reorganize the programmes and budget of the ECA. Following this personal decision, he proceeded to abolish the Applicant's post and those of other Regional Advisors which were funded under the RPTC. He later extended the Applicant's contract for three months to end on 31 March 2013.

82. The submission that because Resident Advisor posts are RPTC-funded and not created by the General Assembly, the Executive Secretary can, on his own personal whim, abolish them or discontinue them is untenable. The RPTC funds support programmes for which planning and a biennial budget is usually made. The programmes are planned in advance and a budget made which must be endorsed or approved by the relevant intergovernmental body (in the case of the ECA, the COM) and the General Assembly.

83. Even though RPTC funds can be used by Regional Commissions as a fast and flexible response to the requests of member states to meet urgent unanticipated requirements such as responding to the tsunami as happened in Samoa or the influenza in Mexico, the Respondent has not shown that the funds for the Applicant's post were needed to meet any urgent situations or requests by any member states.

84. There are also no documented regionally-based or nationally-based thematic priorities that arose in December 2012 when the Executive Secretary abolished the Applicant's post. When he took a request for a refocusing and re-strategizing of priorities to the COM and later to the General Assembly and obtained approval, it was not about any urgent or unanticipated situation in any African country in the remainder of the 2012-2013 biennium. It was rather about refocusing, re-strategizing and consequently changing the programme content and the budget of the previously approved 2014-2015 biennial budget.

85. Additionally, the Respondent has not claimed or placed any document before the Tribunal to show that before a decision was taken to abolish the posts of the Applicant and other Regional Advisors and to not renew their contracts for the last year of the biennium, the extension of each Advisor had been reviewed by a senior level developmental panel as required.

Summary of findings

86. The Tribunal, in view of the foregoing, finds and holds as follows:

- a. The Executive Secretary acted *ultra vires* when he unilaterally abolished the Applicant's post in December 2012.
- b. The Executive Secretary had neither the authority nor the discretion to abolish Regional Advisor RPTC-funded posts which were set up to implement already approved programmes for the 2012-2013 biennium without seeking and obtaining approval as provided for in regulation 6.2.
- c. The approvals obtained by the Executive Secretary from the COM in March 2013 and later from the General Assembly for a refocusing and re-prioritizing of the ECA programmes only related to the ECA's previously approved 2014-2015 biennium, not the 2012-2013 biennium that had only nine more months to come to its end.

Remedies

87. In *Asariotis* 2013-UNAT-309, the United Nations Appeals Tribunal (UNAT) held that in order for the Dispute Tribunal to invoke its jurisdiction to award moral damages,

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

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

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

37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

38. Following the identification of the moral injury by the UNDT under (i) or (ii) or both, it falls to the Dispute Tribunal to assess the quantum of damages. This will necessarily depend on the magnitude of the breach that may arise under (i). With regard to (ii), it will depend on the contents of any medical or other professional report or evidence before the Dispute Tribunal.

88. In the present case, the Applicant sought compensation for moral injury in the amount of one month salary for the breaches of her staff rights and emotional

distress. The Tribunal considers that the unlawful abolition of the Applicant's post was of such a fundamental nature as to give rise to an award of moral damages.

Judgment

89. The Tribunal orders the Respondent to pay the Applicant compensation equivalent to her net salary from April 2013 to December 2013.

90. The Applicant is also awarded one months' net base salary as moral damages for the failure of the Administration to follow its own guidelines, rules and procedures in abolishing her post and not extending her contract in the middle of a biennium without the required approvals.

91. The total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

92. All other pleas are refused.

(Signed)

Judge Nkemdilim Izuako

Dated this 9th day of September 2015

Entered in the Register on this 9th day of September 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi