



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HAROUN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Robbie Leighton, Office of Staff Legal Assistance

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Nicole Wynn, ALS/OHRM

Introduction

1. At the time of the filing of this application, the Applicant held a fixed-term appointment as an Administrative Assistant at the G-5/10 level in the United Nations Assistance Mission for Iraq (UNAMI). She was based in Kuwait City.

The Application and Procedural History

2. On 13 April 2015, the Applicant filed an application challenging the Respondent's decision to terminate her appointment as of 26 January 2015.

3. The Respondent filed his reply to the application on 2 June 2015. His case was that there was no basis for including the Applicant in the comparative review of warehouse assistants because her primary duties were different from those of the warehouse assistants who were part of the review. Her functions and title, he submitted, were that of an administrative assistant.

4. On 18 June 2015, the Tribunal issued Order No. 202 (NBI/2015) listing the matter for a Case Management Discussion (CMD).

5. The Tribunal held the CMD with the parties on 12 August 2015.

6. By Order No. 254 (NBI/2015) issued on 13 August 2015, the Tribunal required the parties to, *inter alia*, file a list of witnesses and witness statements with the Tribunal by 30 September 2015. In the same Order, the Tribunal listed the matter for hearing of the substantive application on 16 November 2015.

7. On 30 September 2015, the Respondent indicated that he intended to call Mr. Vladimir Danileyko, Chief Central Warehouse Section as a witness. No witness statement was provided and the Respondent sought an extension of time until 16 October 2015 in which to file the witness statement.

8. On the same day, the Applicant submitted her list of witnesses and filed statements summarizing her own testimony and that of the three witnesses she intended to call.

9. The Applicant filed a motion for production of documents relating to the impugned decision on 16 October 2015.

10. On 30 October 2015, the parties filed a joint trial bundle.

11. On 9 November 2015, the Applicant asked for a brief CMD to address the request for production of documents and the absence of any information from the Respondent regarding the evidence they were to adduce at the hearing the following week.

12. On 10 November 2015, the Respondent sought leave to file additional submissions, and amend his reply to the application, based on new information received from the Field Personnel Division (FPD). In amended pleadings, the Respondent conceded that the Applicant performed the functions of a warehouse assistant although her post title was Administrative Assistant. He also admitted that the Applicant should have been included in the comparative review but pleaded that she would not have been retained even if she was included in the review because she would have scored the lowest rating amongst her peers.

13. On 13 November 2015, the Applicant filed a motion for leave to file further submissions in response to the Respondent's amended pleadings. The intended submissions were attached to the motion.

14. The hearing commenced, as scheduled, on 16 November 2015.

15. During the hearing, Counsel for the Respondent stated that she did not have sufficient time to respond to the additional filings made by the Applicant on

13 November 2015. An adjournment was granted to enable Counsel take further instructions. The Respondent was directed to review the documents submitted by the Applicant on 13 November and to inform the Tribunal if he intended to call rebuttal witnesses in that regard.

16. On 18 November 2015, the Respondent informed the Tribunal that he intended to cross-examine the Applicant and call two witnesses. The Respondent's witnesses were listed as Ms. Padma Nandkumar who was the Chief of Administrative Services (CAS) at UNAMI at the times material to this application and Mr. Thomas Woanya, a Security Coordination Officer at UNAMI. The Respondent also sought to tender the Applicant's Personal History Form.

17. On 19 November 2015, Counsel for the Applicant moved for adjournment of the hearing scheduled for 30 November 2015.

18. The Tribunal issued Order No. 380 (NBI/2015) on 27 November 2015 granting the parties' motions of 10, 13 and 18 November 2015. Hearing of the matter was listed to resume on 27 January 2016.

19. On 4 January 2016, the Applicant filed a motion to compel the Respondent to file witness statements for the two witnesses he intended to call prior to the continuation of the hearing listed for 27 January 2016.

20. On 22 January 2016, the Tribunal issued Order No. 010 (NBI/2016) granting the Applicant's motion and directed the Respondent to file statements of the two witnesses by 25 January 2016.

21. The witness statements were filed on 26 January 2016.

22. The hearing of the matter continued as scheduled on 27 January 2016.

23. On 3 February 2016, the Tribunal proposed formal mediation for a resolution of the matter. The parties agreed.

24. The matter was formally referred to mediation by Order No. 017 (NBI/2016) of 5 February 2016. The proceedings were suspended for mediation until 5 April 2016.

25. On 4 April 2016, the Office of the Ombudsman and Mediation Services (OMS) requested more time for mediation. This request was granted and the proceedings remained suspended.

26. On 5 May 2016, the Tribunal received information from the OMS that efforts to have the matter resolved were unsuccessful.

27. The case was thereupon adjourned for judgment.

Facts and Submissions

The Applicant's case

28. The Applicant began working for the United Nations in 2005 when she was recruited as an Administrative Assistant in the office of the Chief of Administrative Services (CAS) of UNAMI in Kuwait. The CAS was Mr. Raja Arumugham who later became the Chief of Mission Support (CMS). Ms. Padma Nandkumar then became the CAS.

29. While she worked in the office of the CAS, the Applicant received excellent e-PAS evaluations. On 10 July 2012, the Applicant received a memorandum

informing her that she had been laterally assigned to the Supply Section of the Mission's warehouse.¹

30. The Applicant challenged the decision to redeploy her alleging, *inter alia*, that the decision was motivated by malice and was a punitive action on the part of the former CMS Mr. Arumugham and the CAS Ms. Nandkumar. The Management Evaluation Unit upheld the administrative decision.

31. The Applicant subsequently challenged the decision at the UNDT where a hearing was held and testimonies of both Ms. Nandkumar and Mr. Arumugham were taken. Closing submissions were filed on 16 December 2013 and judgment was issued in favour of the Applicant on 24 May 2016 (UNDT/2016/058).

32. Since her redeployment in 2012, the Applicant had been working as a Supply Assistant in the Supply and Services Section of the warehouse.

33. On 20 November 2014, the Applicant received a memorandum dated 15 November 2014 which had been sent by email at 9.45pm the previous evening.² The memorandum indicated that her contract would be terminated effective 1 January 2015 as her post had been relocated to Erbil, Iraq.

34. The Applicant's supervisor was on medical leave so she was unable to seek clarification as to the reasons for the termination beyond what was stated in the letter.

35. On 23 November 2014, the Applicant became aware that an Internal Review Panel (IRP) was conducting comparative reviews of cases of post abolishment or redeployment within the mission. She did not at that stage know which staff, sections or groups were involved in the review.

¹ Applicant's Annex 1.

² Applicant's Annex 2.

36. On either 2 or 3 December 2014, the Applicant was informed by a Supply Assistant colleague, Mr. Jose Quinagutan, that he was requesting an agreed termination because he was close to retirement age. While discussing this option the Applicant came to know that Mr. Quinagutan had received an email from the CMS informing him that he would be contacted by HR regarding the documentation he was required to submit for the IRP.

37. It was then that the Applicant became aware that the internal review panel was considering staff at her level in her section. She had not received such an email.

38. The Applicant later learnt that all four colleagues who worked at her level in the warehouse were included in the internal review exercise to compete for the two posts that would remain in Kuwait. Mr. Quinagutan was subsequently withdrawn with his agreement due to his approaching retirement. The Applicant, alone, was excluded from the internal review exercise.

39. On 10 December 2014, the Applicant requested management evaluation of the decision to terminate her contract; she asked for the decision to be reversed and that she be included in the comparative review process.³

40. On 16 January 2015, the Applicant filed a supplementary submission to the Management Evaluation Unit,⁴ in which she annexed a memorandum from Hassena Yasin (CMS) dated 18 November 2014 showing that another colleague who also worked in the warehouse with the functional title of Administrative Assistant was included in the comparative review process.⁵

41. On 20 January 2015, she received a response from the management evaluation unit upholding the administrative decision to terminate her contract and to not allow her take part in the comparative review exercise.

³ Applicant's Annex 3.

⁴ Applicant's Annex 4.

⁵ Applicant's Annex 5.

42. On 26 January 2015, the Applicant was separated from service.

43. The Applicant challenges the Respondent's decision to exclude her from the comparative review exercise of warehouse assistants which resulted in her employment with the Mission being terminated. She submitted that since she performed the functions of a Supply/Warehouse Assistant, she was eligible to be comparatively reviewed for retention against her peers.

44. Two Staff Association members, Ms. Dalal Al Omar and Ms. Sudakshina Chaudhuri, who sat on the IRP, questioned the Applicant's exclusion from the CRP pool during the comparative review. They were informed that Ms. Haroun had moved to the Supply section with her post from the Office of the CAS and was working there as an Administrative Assistant. This was clearly and demonstrably untrue. She was not employed against the post she previously occupied in the CAS.

45. On 10 July 2012, the Applicant had been laterally transferred against her will from the Office of the CAS to the Supply Section warehouse. She challenged this transfer at the Tribunal.

46. The Applicant alleges that it was this previous decision which she challenged at the UNDT that motivated the later decision to exclude her from the IRP pool. The justification for her exclusion from the CRP which was that she had moved to the Supply section with her post of Administrative Assistant therefore had no basis.

47. The Supply Section in UNAMI is divided into two sub-sections, the Warehouse Unit and the Contracts Service Unit. These two units are physically located in different places and they perform different tasks.

48. Since her lateral reassignment, the Applicant had worked exclusively in the Warehouse Unit. This is clearly demonstrated by her e-PAS history and a snapshot of her Galileo access which demonstrates she was carrying out warehouse functions.⁶

49. Without her knowledge, the Applicant was placed against a post as a Contract Management Assistant under the Contracts Service Unit in September 2013. This placement did not in any way change the functions performed by the Applicant who continued to work in the Warehouse without realizing that any change had taken place. At no point did the Applicant work in the Contracts Service Unit.

50. Despite having the functional title of Administrative Assistant while working in the Warehouse Unit, the Applicant's day to day work was essentially the same as that of her other colleagues working at the GL-5 level in the Warehouse Unit.

51. It was accepted in the Management Evaluation Unit response that in September 2013 the Applicant was placed against a post in the Contracts Service Unit rather than the Warehouse Unit where she had been working and where she continued to work thereafter.

52. There was no legitimate operational reason for this move and it was made without the knowledge of the Applicant. The move was made deliberately to distance the Applicant from her actual role as a Warehouse Assistant and in anticipation of the impending restructuring of the Supply Section. This was demonstrated by UNAMI's and the MEU's reliance on this technical status change when justifying the termination decision.

53. The technical change in the status of her post in September 2013 was purely a calculated move to distance her from the actual functions she performed and to justify her exclusion from the IRP pool and thereby achieve the termination of her appointment. It is evidence of an unlawful motive.

⁶ Applicant's Annexes 7 and 8.

54. Further, the memorandum of Hassena Yasin of 18 November 2014 requested FPD assistance in placing staff members who would otherwise be terminated because of the restructuring. At the time that the Applicant was being excluded from the comparative review for supply assistant posts, her former post of Administrative Assistant in the CAS was vacant. The Applicant had performed the functions of this post with excellent performance appraisals for a period of almost seven years.

55. The failure to consider the Applicant for a transfer to her vacant former post demonstrated that the intention in excluding her from the IRP was to ensure her separation from the Mission.

56. Also, had the Administration's stated motivation for her initial forced lateral transfer to the Supply Section been accurate, moving her back to that post would have been the obvious way to mitigate the impact of the restructuring.

57. The comparative review from which the Applicant was excluded considered years of United Nations experience, relevant professional experience and the last two e-PAS evaluations. It is the Applicant's case that using these transparent comparators would have ranked her candidature most favorably in the comparative review since she had nine years of relevant experience with the United Nations and had received excellent evaluations in her last two e-PASes.

58. The Applicant requests that if the Respondent is minded to contest this claim, he should disclose the criteria used by the CRP along with anonymized results for all participants to assist in calculating the likely result.

59. The Applicant additionally requests that she be compensated for her unlawful termination rather than for the loss of opportunity to compete in the comparative review.

The Respondent's case

60. The Applicant has not adduced any evidence to prove the improper motive that she alleges.

61. In September 2013, the Applicant was moved from a post that supported functions to be carried out in Iraq to a post that supported functions to be carried out in Kuwait to align posts with the approved budget. Therefore, contrary to the Applicant's contention, there was a legitimate operational reason for placing her against a Kuwait post (AMILL632). Moreover, the change in posts had no effect on the Applicant's functions, which ultimately determined whether she would be included in the comparative review.

62. There is no merit in the Applicant's claim that placing her against a different post in September 2013 "was a calculated move to distance her from the actual functions she performed" and to "justify her exclusion from" the comparative review, established more than one year later. The Applicant also has not adduced any evidence that her termination resulted from her challenge to her 2012 lateral transfer.

63. The evidence does not support any finding of harm. The Applicant's functional title did not reflect her actual duties. Based on the functions she was performing; she should have been included in the comparative review of Supply/Warehouse Assistants. Even if the Applicant had been included in the comparative review, she would not have been retained.

64. The IRP evaluated staff based on the following criteria: United Nations experience; relevant professional experience; and the average ratings for the core values of Integrity and Professionalism and the overall rating as recorded in the 2012-13 and 2013-14 e-Performance reports.⁷ The Applicant agreed that these criteria were

⁷ Respondent's Annex 5.

“transparent.” Four staff members were reviewed to determine who would be retained for the two GL-5 Warehouse Assistant positions in the new mission structure.

65. The Applicant was excluded from the comparative review of Supply/Warehouse Assistants in error. But even if she had been included in the comparative review, she would have been ranked the lowest.

66. She would have received the following score: United Nations Experience – 9; Relevant Professional Experience – 2; average e-Performance ratings – 8.5.⁸ Her total score would have been 19.5, which would have been lower than the total scores of 24 and 25 of the staff members who were retained and the lowest among the GL-5 Warehouse Assistants. Therefore, the Applicant would not have been retained even if she participated in the review.

67. Contrary to the Applicant’s contention, she would not have been the first ranked staff member in the comparative review. With nine years’ experience, she had just slightly more United Nations experience than her comparators. However, only two of the nine years would have been considered “Relevant Professional Experience” as determined by the review criteria, which considered “Relevant Professional Experience” to be experience performing “the function to be assessed.” Since the Applicant had performed Warehouse Assistant functions for only two years, she scored relatively low compared to the other staff members, who had performed Warehouse Assistant functions for a longer period.

68. Following the Applicant’s separation, UNAMI advertised a vacancy for a GL-4 Warehouse Assistant.⁹ The Applicant did not apply for the position and did not adduce any evidence of efforts to mitigate any potential damages she claimed.

⁸ Respondent’s Annex 6.

⁹ Respondent’s Annex 7.

Further submissions by the Applicant

69. The Respondent now concedes that the Applicant was performing the functions of a Warehouse Assistant and should have been included in the relevant comparative review. Had this been accepted at the management evaluation stage, the reversal of the decision not to include the Applicant would have allowed for the damage done to the Applicant to be corrected.

70. The Respondent's contention that the Applicant would not have been retained even if she was included in the comparative review is untrue.

71. All the participants for the comparative review for Warehouse Assistants were required to provide updated PHPs containing their complete work history. Since the Applicant was never part of that exercise, she did not provide such an updated PHP with which she would have been reviewed.

72. The Respondent claimed that the Applicant's work in the office of the CAS would not have been deemed relevant professional experience. He failed to consider whether any of the Applicant's previous work experience might have been relevant. The Applicant had a long professional history working for several different organizations and performing a diverse range of functions. The Respondent was not in the position to judge whether the IRP would have considered those functions relevant professional work experience. His conclusion that the Applicant would not have been retained in the comparative review was without foundation.

Deliberations

73. The principal issue in this case is whether the decision to separate the Applicant from service was lawful. Did the Respondent exercise his discretion judiciously when he excluded her from the comparative review exercise which served

to determine which staff members would be retained? Was the decision to exclude her tainted by extraneous factors?

74. A determination of these questions must be based on the evidence before the Tribunal which is largely made up of the testimony of witnesses presented by both parties whose credibility would need to be assessed and evaluated.

75. In the case of *Applicant* UNDT/2016/022, the Tribunal elaborated on its power and role to properly assess and evaluate evidence before it thus:

As a trier of facts, a first instance judge has the means and power to assess the veracity and accuracy of a witness. There is no particular rule or formula that can be used in the assessment of credibility. In a jury trial, jurors are told to use their varied experiences in life to assess the credibility of witnesses. The same applies to a judge as a trier of facts. The judge should use his/her own varied experiences in life to engage in that exercise.

76. The Applicant's case is that she was unlawfully excluded from the comparative review pool for Warehouse Assistants. The Applicant was transferred to the Supply Section despite her repeated protests and the explanation given was that the move was made to improve her career prospects.

77. The Applicant alleges that the lateral transfer from the CAS office was imposed on her following a conflict between her and her supervisors. That conflict was the subject of a separate application in which judgment was rendered in her favour.

78. The Applicant contends that the decision to exclude her from the comparative review exercise was deliberate and made in bad faith. In other words, the conflict which was the subject of her previous application resulted in the Respondent's decision to exclude her from the comparative review process.

The exercise of discretion must not be tainted by extraneous factors

79. The exercise of discretion is integral to being a manager. When a manager makes an administrative decision, he/she must exercise his/her discretion judiciously and therefore lawfully. In other words, the latitude of choice open to a manager in decision-making is not unfettered.

80. In *Contreras* UNDT/2010/154, this Tribunal noted that “discretion” is not synonymous with “power.” The Tribunal stated further that discretion while being the power or right to act according to one’s judgment, by its nature involves the ability to decide responsibly. It also held that power cannot be exercised for its own sake or for other extraneous reasons but only in furtherance of the institution’s interest.

81. In *Haroun* UNDT/2016/058, the Applicant’s previous case, the Tribunal also underscored the need for the decision-maker to be free from bias and prejudice.

An administrative decision therefore must be based on the facts of a particular situation viewed objectively. This presupposes that the decision maker should be free from bias and prejudice; the person affected by the administrative decision is entitled to a full and fair consideration in the process;¹⁰ the decision maker should not exhibit any discrimination towards the individual affected by the decision;¹¹ there must be compliance with existing rules and regulations.¹²

82. The Tribunal’s power to review the discretion exercised by the Respondent constitutes a significant means of checking arbitrary action on his part, so that staff members subject to his discretion are always assured of objectivity, impartiality, fairness, and transparency in the processes they are subject to, and the rules and regulations that are applied to them.

83. Even though organizational restructurings are purely administrative matters and involve administrative prerogatives with which the Tribunal will not normally

¹⁰ *Sefraoui*, 2010-UNAT-048; *Charles* 2012-UNAT-242.

¹¹ *Planas*, 2010-UNAT-049.

¹² *Abassi*, 2011-UNAT-110.

interfere, the appearance of an absence of fairness and transparency in the process provides an *open sesame* for the Tribunal's review. In the matter of *Hersh* 2014-UNAT-433, the United Nations Appeals Tribunal (the Appeals Tribunal/UNAT) held:

The Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.

84. In *Diallo* 2014-UNAT-430, the Appeals Tribunal noted with approval the observations of the Advisory Joint Appeals Board (AJAB) which underscored the gravity of any decision to abolish a post regarding its effects on affected staff members when the AJAB stated that: “[...] the abolition of a post is always a traumatic experience for the incumbent, and therefore greater objectivity, care, good faith and transparency were required.”

85. A review of how the relevant managers at UNAMI exercised their discretion to exclude the Applicant from the comparative review process for two posts in the Warehouse Section where she was working and instead separated her, will naturally depend wholly on the evidence before the Tribunal. Does evidence before the Tribunal show that relevant matters were ignored and irrelevant ones considered? Also, was the decision absurd or perverse?¹³

The background of bias and unfairness in the treatment of the Applicant

86. It is an uncontroverted fact that the Applicant was transferred on 10 July 2012 from the Office of the Chief Administrative Services (CAS) in Kuwait, where she worked as an Administrative Assistant, to the Supply section of the UNAMI Warehouse also in Kuwait to work as a Warehouse Assistant.

¹³ *Sanwidi* 2010-UNAT-084.

87. The circumstances of that transfer have been exhaustively discussed and pronounced upon in UNDT/2016/058. In sum, the Tribunal held:

The Tribunal finds that the Applicant was moved not so much in the interest of the Organization, or in the pursuit of using the best resources of the Organization, but in the interest of Mr. Arumugham and Ms. Nandkumar. Had they been more mindful of the rule that the paramount responsibility in the Organization is to ensure compliance with avowed objectives of the Organization, and had they been more objective, the Applicant, even if she had to be reassigned, would have been entrusted with responsibilities more commensurate with her skills and experience. It is obvious to the Tribunal that the process thus undertaken was a waste of material and human resources. The evidence is clear that this move was ill-conceived, clumsily effected and most certainly made based on extraneous factors.

88. This context is important because it is central to the Applicant's present case that the decision to exclude her from the comparative review exercise which led to her separation, was made in bad faith, and that it stems from the conflict surrounding the decision to transfer her from the CAS Office to the Supply Section.

Was it fair, proper and lawful to exclude the Applicant from the Comparative Review Process?

89. The Supply Section in UNAMI was made up of two sub-sections - the Contracts Service and Warehouse Units, and these Units are distinct both in their locations as well as in their functions. The Applicant was assigned to the Warehouse Unit upon her lateral transfer in July 2012 but, unbeknownst to her, she had since September 2013, encumbered the post of a Contracts Management Assistant in the Contracts Services Unit (CSU). As far as the Applicant knew, she held the title of Administrative Assistant within the Warehouse Unit and she performed functions identical to her colleagues at the GL-5 level within that Unit.

90. In the restructuring process, all four of the Applicant's colleagues at the GL-5 level were subject to a comparative review exercise to determine who would continue

to stay in Kuwait on the two Warehouse Assistant posts that remained in that location.

91. In his reply to the application, the Respondent initially argued that the Applicant had not been performing the functions of a Warehouse Assistant. Indeed, the Management Evaluation Unit upheld the impugned decision on the ground that the Applicant was not performing the functions of a Warehouse Assistant.

92. For completeness, the relevant part of the Respondent's case is hereunder reproduced:

Contrary to her assertion, it was proper and lawful not to include her in the comparative review. The evidence demonstrates that the Applicant's primary functions were different from the primary functions of a Warehouse Assistant. The comparative review for the two warehouse assistant positions compared staff carrying out the same functions at the same grade.

93. On 10 November 2015, shortly before the oral hearing, the Respondent sought leave to file further submissions and substantially amended his pleadings thus:

- a) The applicant performed the same or similar functions of a Warehouse Assistant, although her functional title was Administrative Assistant;
- b) The applicant should have been included in the comparative review; and
- c) Had the applicant been included in the comparative review, she would have been the lowest ranked staff member and, therefore, she would not have been retained.

94. The Respondent also argued that the Applicant did not adduce any evidence of harm suffered as a direct result of any actions of the Organization.

95. The Respondent's subsequent admission that the Applicant was indeed performing the functions of a Warehouse Assistant and should have been included in

the comparative review raises significant concerns as to the quality and *bona fides* of the instructions of the Respondent to his Counsel upon receipt of the application.

96. Given the factual nature of what was being conceded, and bearing in mind that the details of the Applicant's role and functions must have been readily available when the reply was first filed, it is disturbing that both the Management Evaluation Unit and Counsel for the Respondent would so readily and stridently rule and plead that the Applicant was excluded from the comparative review because she was an Administrative Assistant and not a Warehouse Assistant.

97. Whenever the Respondent files a reply before the Tribunal as part of the process of a legal defense of his administrative decision which is the subject of an application, it is incumbent upon him to do so carefully and with the highest sense of responsibility. In fact, the Respondent, as the custodian of the best values in the workplace, cannot afford to be carelessly represented in stating his position nor tolerate such an attitude in representations made by those who act on his behalf.

Did Ms. Nandkumar play any role in the non-inclusion of the Applicant in the Comparative Review Process?

98. The Applicant was not included in the comparative review process. The Respondent had admitted that this non-inclusion was an error. The Applicant, however, contends that the decision to exclude her from the comparative review exercise was not done in error but was rather ill-motivated.

99. The CAS, Ms. Padma Nandkumar, who supervised Human Resources within the Mission provided the Tribunal with a written statement as to her role in the comparative review process, and later testified before the Tribunal. While her written statement said nothing about her specific role in the process, she testified that although she supervised the process, she was not part of the review process regarding who was to be included or not included in the comparative review.

100. The involvement of Ms. Nandkumar and her central role in the process is easily gleaned from correspondence and testimonial evidence. Correspondence exists to show that Ms. Nandkumar examined the functions of various staff members vis-à-vis their functions and titles and essentially corrected errors where staff members were wrongly included or excluded from the list of those to be comparatively reviewed.

101. On the morning of 15 November 2014, Ms. Nandkumar sent an email to Ms. Pamela Gidali, Officer-in-Charge of Human Resources,¹⁴ who was working with her on the then on-going restructuring in UNAMI. In that email, she instructed Ms. Gidali to prepare three different templates for different categories of staff members including those for the IRP, those to be moved to Iraq and those to be separated. She also stated that she would send an updated list of staff members.

102. Later the same day, Ms. Nandkumar again emailed Ms. Gidali and instructed that the names of four staff members who were “ladies” in the Supply Section be added to the list of those who were to be separated. The Applicant was one of the four ladies. There is no doubt that this instruction was part of the updated staff list.

103. Regarding the decision to separate the Applicant rather than include her in the list of those to be comparatively reviewed, Ms. Nandkumar stated under cross-examination that she made that decision based on discussions with section chiefs which were not documented.

104. Still in cross-examination, it was pointed out to the witness that the only document before the Tribunal authorizing the exclusion of the Applicant from the comparative review, and therefore her separation from the Mission, was her email of 15 November 2014 to Ms. Gidali indicating that she made the decision. Ms. Nandkumar replied that she did not single out the Applicant but included her in a group of four other staff members.

¹⁴ Transcript 2 February 2016.

105. In answer to a question from the Tribunal as to how records were kept by the participants (which the witness claimed included chiefs of the affected sections) at the important meetings in which decisions were taken about which staff members would be separated and those to be retained or comparatively reviewed, Ms. Nandkumar stated that only decisions taken were recorded. There were therefore no records of the deliberations.

106. When pressed for an answer as to who exactly made the decision to exclude the Applicant from the list of those to be comparatively reviewed, the witness gave a long-winded answer and claimed that the decision was arrived at during the meetings of section chiefs and the CMS although there were no minutes of such meetings.

107. When during cross-examination it was brought to her attention that the exclusion of the Applicant from the comparative review process was done in error and that this point had been conceded, she challenged the Respondent's position thus:

I don't know who said that. I still stand by what is here, that she should be included for separation because her position of administrative assistant, she was performing the functions of an admin assistant within the supply warehouse. Yes, she was not a contract management assistant [...] [the Applicant] was put on that post specifically to perform the admin assistant position in the warehouse to the warehouse chief, who was Mr. Courcay Holder. She was not performing warehouse functions. [...] at no time or do I ever, ever recall there was a single communication from anyone who was supervising [the Applicant] that she was not an admin assistant.

108. In reviewing the exclusion of the Applicant in the comparative review process, the email of 15 November 2014 from Ms. Nandkumar to Ms. Gidali instructing that the Applicant be included in the list of staff members to be separated is the only relevant document provided to the Tribunal. It is apparently the only existing record on the issue. It clearly shows that the separation of the Applicant was the sole decision of Ms. Nandkumar.

109. Her strenuous denial that the decision was made with the Applicant's section Chief is not borne out by any evidence. Instead, an email dated 14 November 2014 from Mr. Canonidazo then Chief, ICTS in Kuwait to Ms. Gidali appealed to Ms. Nandkumar to reconsider the proposal to abolish two critical posts in his section. Ms. Gidali informed Ms. Nandkumar in a subsequent email that she advised the ICTS Chief that any action on his request was subject to discussions and approval with Ms. Nandkumar and the CMS. It is therefore correct to assume that even section Chiefs needed the approval of Ms. Nandkumar to retain critical staff.

110. It is the Tribunal's finding that Ms. Nandkumar played a pivotal role in the impugned decision. The scrutiny she seems to have applied in respect of other staff members, their posts, functional titles and functions was absent in respect of the Applicant. Again, a simple cross-reference with the Applicant's supervisor and her performance appraisal should have revealed she was a Warehouse Assistant. Ms. Nandkumar's failure to do this could have been regarded as an act of negligence if she had not challenged the Respondent's admission that the exclusion of the Applicant from the comparative review process was an error.

111. The Tribunal finds also that Ms. Nandkumar's testimony was convoluted, emotional and evasive. She went to great lengths to explain and reduce her role in the decision-making process, and absolve herself from any blame. She disagreed with the Respondent's position that the Applicant ought to have been included in the comparative review instead of being separated. The tone and tenor of her testimony as a whole was both unfortunate and disturbing given the senior level at which she serves the Organization, and the managerial role that is entrusted to her at that level. The witness was simply not credible.

Is there merit in the Respondent's claim that even if the Applicant participated in the comparative review process, she would have had the lowest scores?

112. In the Respondent's reply of 2 June 2015, it was his case that the Applicant was not included in the comparative review with other Warehouse Assistants because she was a GL-5 Administrative Assistant performing different functions from them.

113. However, on 10 November 2015, the Respondent changed his position when he filed further submissionsan amended reply. He admitted and conceded that the Applicant performed the same or similar functions as a Warehouse Assistant even though her functional title was Administrative Assistant. He also admitted and conceded that the Applicant ought to have been included in the comparative review exercise and that she was excluded in error.

114. Despite these admissions, the Respondent submitted further that even if the Applicant had been included in the comparative review process, she would have been ranked lowest and would therefore not have been retained. According to the Respondent, he reached this conclusion because she would only have received a score of 2 for relevant professional experience having only spent two years as a Warehouse Assistant.

115. The Applicant responded to these submissions in further pleadings. With the permission of two of three GL-5 Receiving and Inspections Assistants (MAK and JAL) who participated in a comparative review for one post and who provided witness statements, she tendered their PHPs and e-PASes. The Applicant pointed out that in JAL's case, and contrary to the Respondent's argument about relevant professional experience, JAL's work as a Human Resources Assistant and as an Administrative Clerk were counted as relevant professional experience in the comparative review for the post of Receiving and Inspection Assistant.

116. During the hearing of this case, the Respondent called Mr. Thomas Woanya, who had earlier given a witness statement. The witness was a member of the Comparative Review Panel that reviewed the GL-5 Warehouse Assistants in which group the Respondent admitted that the Applicant was excluded from in error.

117. In his witness statement, Woanya stated that he had reviewed the Applicant's PHP and that the only relevant professional experience listed is the Applicant's experience as an Administrative Assistant. With regard to one Mr. FH who participated in the comparative review, he stated that the Panel determined that his non-UN experience was relevant professional experience because the job descriptions listed had aspects related Warehouse/Supply Assistant functions.

118. The witness, in cross-examination, told the Tribunal that the Panel members were given terms of reference for the review. He stated also that they were provided with the PHPs of the staff members who were to be reviewed. He then admitted that the Panel was not provided with the PHP of the Applicant but only with PHPs of four men who were to be comparatively reviewed against each other.

119. He stated that the criteria used in the Panel's review were: (1) United Nations experience irrespective of the nature of work, (2) relevant professional experience for the function being assessed, and (3) ratings on core values of integrity, professionalism and overall performance in the previous.

120. In his answers in cross-examination, the witness admitted that for relevant professional experience for the function being assessed, the experiences of candidates in the comparative review outside the United Nations were assessed and counted where they were considered to be relevant.

121. The witness was asked specifically why experience as a Human Resources Assistant, as in the case of JAL mentioned above, was counted as relevant professional experience for the post of Receiving and Inspection Assistant. He

attempted to evade the question and when the Tribunal insisted that he give an answer, the witness said he could not remember.

122. Still under cross-examination on the same issue, the witness stated that an administrative clerk's experience in "organizing and maintaining filing system both in electronic and hard copy" and experience "providing guidance on administrative procedures for new staff members," were each counted as relevant professional experience for the post of Receiving and Inspections Assistant.

123. Even though he stated in his witness statement that he had reviewed the Applicant's PHP, and that she had scant professional experience, he admitted when cross-examined, that he only saw the PHPs of the four male candidates.

124. There is unchallenged evidence that only the staff members who were included in the comparative review were asked to submit updated PHPs. FH, who participated in the comparative review for Warehouse Assistants, confirmed in his witness statement that each participant was asked to provide an updated PHP reflecting all previous employments. The Applicant never submitted her updated PHP which would have shown all her working experience within and outside the United Nations.

125. More than that, a review of the PHP of FH shows that he received a score of 10 for relevant professional experience. Clearly his work outside the United Nations as an Administrative Assistant in a medical center and as an Assistant Manager in a hotel, none of which involved performing the functions of a Warehouse Assistant, were counted as relevant professional experience.

126. The Tribunal finds as a fact that the Respondent did not ask for and was never in possession of the Applicant's updated PHP. He was therefore not in a position to review it, or to come to the ridiculous and false conclusion that even if the Applicant

was included in the comparative review in the Warehouse and Supply section, she would have scored the least marks.

127. The Tribunal also finds that the Panel which reviewed candidates for the Warehouse Assistant posts gave a broad definition to relevant work experience as shown in their review of FH. It is likely that if this was applied to the Applicant, contrary to the Respondent's claims and efforts to prove a narrow definition by the Panel, she could have scored 10 in relevant professional experience outside the United Nations and earned the scores to be retained.

128. The Tribunal additionally finds that the position taken by the Respondent in UNDT/NBI/2012/071 where he urged upon the Tribunal that the Applicant's experience working as Administrative Assistant in the office of the CAS made her a good candidate for work in the Warehouse is being countered in this case by the same Respondent when he now urges the Tribunal that the Applicant's work experience in the CAS office would not count for retention as a Warehouse Assistant. The Respondent cannot approbate and reprobate!

Observations

129. It is pertinent to underscore the unnecessary and embarrassing somersaults, of the Respondent's managers in this case. Their first reaction to this application was to claim that the Applicant was not qualified to be included in the comparative review which was to determine which staff members would be retained in the Kuwait duty station of UNAMI following the restructuring.

130. Subsequently, and despite not obtaining the Applicant's updated PHP, the Respondent admitted in amended pleadings that the Applicant was excluded in error; but that even if she was included in the comparative review, she would not have scored highly enough to warrant her retention.

131. The Tribunal's review of the PHPs of a few staff members who were comparatively reviewed and retained shows that the Respondent's submissions on the Applicant's putative score to be misleading and untrue.

132. The Respondent's witness Ms. Nandkumar who took the impugned decision to exclude the Applicant from the comparative review process challenged the concession and admission of her principal, the Respondent, that the Applicant was excluded from the process in error. She maintained in her testimony before the Tribunal that the Respondent was wrong to admit that the Applicant ought to have been included.

133. This was scandalous behavior which betrayed the extent of Ms. Nandkumar's personal bias against the Applicant. It is also curious that counsel for the Respondent did not think it necessary to have this point addressed in her re-examination of the witness.

Compensation

134. The Applicant requests compensation for her unlawful termination.

135. The law, as laid down by the Appeals Tribunal, is that compensation cannot be awarded in the absence of "actual prejudice."¹⁵

136. It is instructive to recall the position taken by the Appeals Tribunal in respect of this Applicant in *Haroun* 2017-UNAT-720:

In his appeal, the Secretary-General claims that the justification for such an award of compensation for damage to Ms. Haroun's career prospects was the separation from service, of which the UNDT Registry was informed while the Judgment was pending. The Secretary-General also claims that the UNDT erred on a question of law and procedure by taking into account the separation from service, since its connection with the contested decision was established as an

¹⁵ *Bertucci* 2011-UNAT-114. See also *Oummih* 2015-UNAT-518.

inference not previously argued, nor proved or commented on by the other party. To the Secretary-General, this amounts to a breach of his right to due process and a fair hearing.

The Appeals Tribunal notes that the separation from service was the sole ground for awarding compensation for damage to career prospects. However, there is no evidence on the record with respect to the exact reasons for separating Ms. Haroun from service and the circumstances of such separation. The Secretary-General, in violation of his right to due process and a fair hearing, was not given an opportunity to present his views on the possible reliance of the UNDT on the separation for an award of damages. In fact, the separation decision is challenged in a separate application pending before the UNDT under Case No. UNDT/NBI/2015/051. *It will be incumbent upon the Dispute Tribunal to determine in that case whether the separation was lawful and whether Ms. Haroun suffered harm including to career prospects as a result*(emphasis added).

137. The Tribunal has considered the circumstances surrounding the Respondent's decision to separate the Applicant from service. The decision to exclude her from the comparative review exercise, which then formed the basis of the decision to terminate her employment with the Mission, was clearly unlawful. The Tribunal further found that the Respondent's careless submissions in his reply on this point, and the Management Evaluation Unit's similarly careless review of the impugned decision, to be unbecoming given their respective roles within the internal justice system.

138. The Respondent's submissions of no prejudice in respect of her exclusion from the comparative review exercise has also been found to be both untrue and misleading, based on the testimony and written statements of the Respondent's own witnesses and the documentary evidence tendered in this case.

139. The Tribunal has also made factual findings on the extraneous factors that led to the impugned decision. The decision to exclude the Applicant from the comparative review process was clearly made by Ms. Nandkumar, who insisted in cross-examination, that the Applicant was not reviewed against the other staff members because she was an Administrative Assistant and *not* a Warehouse

Assistant. The Applicant's role within the Supply Section is an objective question, easily and conclusively verifiable by reference to her workplans and performance appraisals. The CAS' decision to separate her from service, without reference to those documents or verification of the role she actually played, and the cavalier manner in which she contradicted the Respondent's submission leads the Tribunal to the irresistible inference that her decision was tainted with bad faith and improper motive. For the Applicant, this resulted in the dire consequence that is the loss of her livelihood.

Accountability

140. The Tribunal finds that it must comment on conduct of the Mission's Chief of Administrative Services, both as a manager within the Organization and a witness before this Tribunal. She has fallen short of her duties and responsibilities as a manager within the International Civil Service, and made decisions that show little regard for the "dignity and worth of the human person and respect for the equal rights of men and women of nations great and small."¹⁶ The witness' poor judgment in her managerial decisions reflect poorly on an Organization committed to upholding the highest standards of efficiency, competence and integrity of its staff members in the discharge of their functions as international civil servants.

141. The Tribunal therefore **directs** the Registry to serve a copy of this judgment on the Secretary-General and the Under Secretary-General for Field Support so that their attention is drawn to the conduct of the staff member under their charge.

JUDGMENT

142. The Application is **GRANTED**.

¹⁶ Standards of Conduct for the International Civil Service 2014.

143. The Tribunal awards the applicant **six months' net base salary** as compensation for unlawful termination of her appointment. Together with compensation, interest is to be paid at the US Prime Rate “from the date on which the entitlement becomes due” and an extra five percent shall be added to the US Prime Rate if the judgment is not executed within the deadline.¹⁷

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of August 2018

Entered in the Register on this 28th day of August 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

¹⁷ *Warren* 2010-UNAT-059.