UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/039/ JAB/2008/080
Judgment No.: UNDT/2010/080
Date: 3 May 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BERTUCCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
François Loriot

Counsel for respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. This case concerns the propriety of a decision concerning the non-appointment of the applicant to the post of Assistant Secretary-General (ASG) in the Department of Economic and Social Affairs (DESA), in respect of which a vacancy notice had been placed on the online UN jobsite, known as Galaxy. The applicant, a staff member, applied and was short-listed but not appointed. The person appointed was not a UN staff member.

2. Around the time of recruitment for the post, the applicant had been the subject of various investigations which had been widely publicized. It was not at any stage part of the case for the respondent that the applicant was guilty of any improprieties. He sought administrative review of the decision to select another person for the post. The Administration at first insisted that the decision not to appoint the applicant was that of the Secretary-General but changed its position to allege in the present proceedings that he was not short-listed and, accordingly, was not considered by the Secretary-General. The question as to who made the relevant decision is not the subject of evidence at present and (as will become clear) the respondent does not intend to present any evidence about it. The applicant's case is that the intensity and persistence of the adverse publicity was such that it was likely to have influenced the decision either not to short-list him for consideration by the Secretary-General or not to appoint him. His case is that the use of the adverse publicity to influence, or even determine, his application must be unfair, since ultimately no impropriety was found and consideration should have at least been delayed until the investigations had been completed. (In my reasons in Order No 59 (NY/2010) I described this case as the applicant's "first case".)

3. The applicant sought production of the relevant documents of the selection committee and of the Secretary-General's Executive Office. It was clear that these documents were relevant and an order for production to the Tribunal in the first instance was made. Objection was taken on the ground of confidentiality even of

production to the Tribunal, quite apart from any issue of access being given to the applicant. I rejected the claim and ordered production to the Tribunal (Order No 40 (NY/2010)). Production was refused. The history of what ensued is set out in my reasons for Order No 59 (NY/2010) and need not be repeated here. As mentioned in those reasons, the respondent on 24 March 2010 submitted an outline of the evidence that, if leave were granted, it would seek to adduce. The respondent has maintained its non-compliance with the Order for production and the ancillary Orders referred to in those reasons.

4. The applicant also claimed that certain funds were wrongly withheld upon his separation. The amount withheld was alleged to be owing by the applicant to the Organization in an audit. It was ultimately paid to him. This is the "second case" which will be dealt with by a separate judgment.

Note on evidence

5. The Tribunal has not yet promulgated rules of procedure governing the admissibility of evidence and it is necessary that I should state my approach to this issue. Given the nature of the Tribunal's jurisdiction, the governing rule in my view should be that all material rationally capable of assisting in the evaluation and determination of any issue of fact or law that is before the Tribunal is admissible, unless the due administration of justice requires it to be excluded because it is unfair to have regard to it. It follows that, merely because evidence is hearsay, it is not inadmissible (subject to fairness, since it may not be able to be tested by the other party) though the fact that it is hearsay must be taken into account when assessing its cogency. In this case, the applicant has led hearsay evidence in the form of statements by the then Under-Secretary-General of DESA (USG).

Inferences to be drawn from non-production of evidence

6. As pointed out in Order No 59 (NY/2010), the respondent initially submitted that the non-appointment of the applicant to the position of ASG was not justiciable

since it involved a decision of the Secretary-General. I understood this to mean that it was beyond the jurisdiction of the Tribunal to consider whether the decision was vitiated by conduct amounting to a breach of the applicant's contract. This understanding was later corrected and the respondent made it clear that it was not submitted that the Tribunal had no jurisdiction to consider the lawfulness of the decision but, rather, that the Secretary-General's discretion in relation to the appointment of ASGs was so wide that only very little evidence could be relevant. I am unable to understand how, as a forensic question, the scope of the evidence that was potentially relevant would be significantly affected by the width or character of the Secretary-General's discretion but this has not been further explained.

7. On 24 March 2010 the respondent pointed out that the applicant's evidence involved allegations in general terms about the conduct of the investigation and the propriety of the disciplinary case against him and submitted that, if these matters were material, further particulars should be provided of the precise criticisms so that the respondent was in a position to deal with them. However, the primary submission of the respondent in this respect is that the actual content and procedure of the investigation and the disciplinary case are irrelevant. It is conceded that an investigation was conducted between August 2007 and April 2008 and that there was publicity about it. It is not disputed that no improprieties were found and it is not sought to prove that the applicant was guilty of any misconduct.

8. In Order No 40 (NY/2010) I adverted to the fact that that the applicant was interviewed by a high-level selection panel constituted, amongst others, by the USG. The Chief of the then Administrative Law Unit (ALU) disclosed the following to the applicant in a formal response to his request that the decision on the appointment be delayed until the investigation had been completed –

> [The USG, who was a member of the selection committee] stated that he joined in the unanimous decision of the selection panel that your name be included on the short list of candidates submitted to the Secretary-General for his consideration.

That the applicant was short-listed and the recommendation went forward to the Secretary-General was also, in substance, admitted in the reply to the applicant's appeal to the Joint Appeals Board (JAB).

9. In the course of case management, I directed the applicant to indicate the evidence that he expected to adduce from the USG. The applicant submitted a document in question and answer form which clearly indicated what the USG told either him or his counsel. Although it is hearsay, it is first-hand and material that it is reasonable to rely on. The USG repeated his earlier statement to ALU that the minutes of the selection panel were submitted to the Secretary-General and that the applicant was short-listed. He added that he had discussed the applicant's candidacy with the Secretary-General and that the question of the investigation had arisen. Counsel for the respondent, during directions hearings, indicated that the respondent's case had changed, that the information earlier disclosed to the applicant and the JAB was mistaken and his case now was that the applicant's candidacy was not considered by the Secretary-General. Such a statement from counsel is obviously not evidence. The respondent also alleged, in his written response pursuant to the Tribunal's directions, that the applicant's name was not forwarded to the Secretary-General for consideration. As will become obvious (if it is not already clear) assurances of this kind made in this way cannot be accepted and must be supported by evidence before any credence can be given to them.

10. The admissions of the respondent in the response to the request for administrative review should be accepted as probably true. The principal reasons for so doing are: the ease with which the truth could be discovered; the identification of the source of the asserted fact, namely the USG with personal knowledge of it; and the purpose of the letter prepared by the Chief of ALU, namely an official response in the context of the internal justice system. A contradicting statement from the bar table without explanation as to how this extraordinary alleged mistake came to be made or information as to the source of the instructions or whether the instructions were made upon the basis of personal knowledge of the facts must be accorded very little, if any, weight. A bare allegation in a pleading has no evidentiary value. Nor is

it consistent with the logic of events. Since on the evidence it is indisputable that the selection panel produced a short-list of recommended candidates which contained the applicant's name, it simply must follow that the short-list went to the Secretary-General and the applicant's name was on it. The possibility that the recommendations were not sent to the Secretary-General cannot be rationally accepted. If this happened, there was such a manifest breach of the representations implied by the vacancy announcement (as to which see the discussion below) that upon this basis alone the applicant must succeed. The other possibility, that the Secretary-General did not consider the recommendations, must have the same consequence.

11. That there could be a contradiction in formal and important communications about such a fundamental fact is a very troubling feature of the case which the respondent at no point has sought to explain. It bespeaks either carelessness so gross that it is difficult to credit or, equally difficult to believe, deliberate deceit. I am unable to think of other explanations. This has raised a cloud of suspicion that the respondent, by withholding the material documents, has not only not sought to dispel but has also been content to leave be. The first and most obvious result is that *no* statement about *any* important fact made on the respondent's behalf can be taken at face value. The second is that there has been created a lurking and substantial doubt about the propriety of the selection process itself. It is one thing to examine a process where, at least on the surface, all appears to be in order but quite another where the respondent has made flatly contradictory statements about easily ascertainable, crucially significant facts concerning important decision-making at the highest level, without condescending to give any explanation or propose the slightest justification, especially in the context of proceedings in the internal justice system. This is a grave concern that brings the basic integrity of the entire process into serious question. It would be naïve in the extreme to treat it as a simple mistake.

12. The respondent's pleading asserts that the appointee, who was not a United Nations staff member, was interviewed. For the reasons already given, this is worthless from an evidentiary point of view. There is no evidence of any interview

and no evidence proposed to be led to this effect. Certainly, the appointee's name was not on the short-list submitted by the selection panel. I think it should be inferred from what the USG told the applicant (and received into evidence) that the appointee was not interviewed by the selection panel and there is not the slightest suggestion in any evidence that some other panel was convened. The fact alone that the respondent, who is aware of the truth of the matter, does not seek to establish that the appointee was interviewed, justifies the inference that he was not. This was, of itself, a substantial departure from the process that the Secretary-General represented he would undertake.

13. The next question is whether, in weighing up the applicant's candidacy, the Secretary-General complied with the requirements of good faith and fair dealing. These requirements were that he would not take into account any significant irrelevant matter, would take into account all significant relevant matters, his decision would not be affected by any significant error of fact or law and would not be manifestly unreasonable or plainly unjust (referred to for convenience as the rules of propriety, though they could – but are not, to avoid confusion – be described, and often are, as due process). This list is comprehensive and a number of the notions overlap but the essential considerations are clear enough. Although the discretion of the Secretary-General is necessarily wide when considering senior appointments at this level, it must nevertheless be lawful. Nor is this new law: see *Abbas* (1989) UNAT 447 (discussed more fully below). Of course, outside candidates do not have a contractual relationship with the Organization and have no legal recourse before this Tribunal if an impropriety of the specified kind occurred (subject, perhaps, to the existence of a legitimate expectation implied by the competitive process adopted for this appointment) but the applicant was a staff member with undoubted contractual rights. Those rights to good faith and fair dealing were not displaced because the appointment was that of a senior official or the Secretary-General had a wide discretion.

14. Put another way, the Secretary-General's discretion, however wide, must be exercised after having given adequate and appropriate consideration to all the

candidates put forward by the process he, after all, selected. The requirement of adequate and appropriate consideration is not in substance different from the insistence in the UN Administrative Tribunal jurisprudence that "the fullest regard" must be given to the claims of the candidates to appointment, since it is obvious both that consideration must be given and that it cannot be other than full – cursory or unfair consideration is neither adequate not appropriate. Provided the legal standards are met, which I have outlined above, the actual mode of consideration is for the Secretary-General to determine and he or she has a wide discretion in this respect also, provided it is not unreasonable or illegal. Furthermore, although the Secretary-General is bound by art 101.3 of the Charter to give paramountcy to the "necessity of securing the highest standards of efficiency, competence and integrity" (and see staff regulation 4.1) and this is language at a high level of generality necessarily entailing discretionary judgment, that judgment must take place as part of the process of undertaking adequate and proper consideration to the candidates.

15. Coming to the circumstances here, as has been mentioned, the position was advertised. (I mention, as an incidental matter, that the required competencies and qualifications contained no political requirements of any kind.) Amongst other things, the announcement stated –

> All applicants are strongly encouraged to apply online as soon as possible … Because applications submitted by United Nations staff members are considered first, providing the eligibility requirements set out in ST/AI/2006/3 are met and the application is submitted in a timely fashion, staff members should apply within 15-day or 30-day mark.

The announcement went on to require submission of the conventional Personal History Profile and copies of the two latest Performance Appraisal System (PAS) reports. Although it was not stated that there would be competitive interviews, it is clear that these were envisaged and that recommendations by the interview panel would be made to the Secretary-General. In short, this was precisely the process prescribed by ST/AI/2006/3 for appointments to posts up to D-1.

16. What, then, was the point of the reference to 15-day mark and 30-day mark candidates? This reference makes sense only upon the basis that the requirements of ST/AI/2006/3 with respect to these candidates were to be applied and, accordingly, were to have priority as provided by sec 7.1. Indeed, the notice specifically states that the candidacies of all UN staff members were to be "considered first", that is to say, in priority to external candidates. If the Secretary-General had intended to maintain his freedom to appoint someone who was not an applicant for the position, despite the identification of a suitable internal or even external candidate, this would have been fundamentally inconsistent with the clear implication of the notice and a concealment which was inconsistent with good faith and fair dealing. The reference to 15-day and 30-day candidates is, by necessary implication, a reference to the system of competency-based assessment and interviews as provided by sec 7 of the administrative instruction, though omitting the irrelevant elements concerning the interposition of the central review body, since otherwise it could have no significance. It also appears to me that it follows from this part of the notice that, by necessary implication, *all* candidates, whether internal or external, were to undertake the competency-based interview. Thus, not subjecting the appointee to interview and thus enabling him to avoid the scrutiny of the selection panel constituted a substantial departure from the representations expressed and implied in the vacancy notice. So far as the other candidates were concerned, it conferred on the appointee a substantial advantage.

17. In the response of ALU to the applicant's request for administrative review, it is conceded in substance that "it is indispensable that 'full and fair' consideration be given to all applicants for a post", citing Administrative Tribunal judgments for this rule. It is also admitted that the post was advertised, that applications were screened and reviewed in accordance with "established practice", that a short-list of candidates to be interviewed was drawn up and interviewed by an interview panel of senior officials, that the applicant was interviewed and "was short-listed along with two other candidates for the position". It was asserted, in effect, that "full and fair" consideration was given to the applicant's candidacy.

18. In my opinion, although the Secretary-General was not bound to approach the appointment of the ASG by this process, having done so, he was required to apply the process fully and fairly. So much seems to have been conceded, at least as at the date of the response to the request for administrative review, which maintained that the process was properly undertaken and did not suggest that the selected person had been appointed by some other process. The only available conclusion is that the vacancy announcement was, in substance and effect, a representation by the Secretary-General that he would appoint the ASG by adopting the essential characteristics of the process mandated by sec 7 of ST/AI/2006/3 (without the central review body involvement) and this representation was plainly calculated to induce persons, including the applicant, to apply upon the basis that the representation would be honoured. When the applicant applied, he was entitled to the legitimate expectation of a legally binding character that his candidacy and all candidacies, including that of the eventual appointee would be considered accordingly. It is apparent that this was not done.

19. A more specific focus on the way in which the applicant's candidacy was considered leads to the same conclusion, namely that it was not considered in accordance with the rules of propriety. I have already mentioned that it was necessary – however wide the discretion reposed in the Secretary-General might have been – to give the applicant full and fair consideration in accordance with these rules. In this case, although there is an admission that the selection committee put forward a list of candidates recommended for appointment, including the applicant and it is manifest that the Secretary-General decided not to appoint any of them, there is no evidence whatever that the Secretary-General even considered the recommendations of the committee, let alone that he gave the candidates adequate and fair consideration (cf, the "fullest regard").

20. Moreover, the respondent's statement of the case he would wish to make, were he given leave to do so, demonstrated that it was not intended to adduce any evidence at all on this point. Although the respondent's outlined case is that the applicant's name did not go to the Secretary-General for consideration, the evidence

that he indicated he wished to adduce did not touch on this matter, not even going so far as to produce evidence that the admission made by ALU or the evidence from the USG was mistaken. Accordingly, quite apart from the complication arising from his exclusion from the proceedings because of his disobedience, the case he would have wished to make would not have sought to establish either that the applicant's name did not go forward in the selection committee's report or that the Secretary-General gave any consideration whatever to the possibility of appointing the recommended candidates.

21. It is useful, in this context, to return to a consideration of the judgment of the UN Administrative Tribunal in *Abbas* (*infra*), which dealt with a D-2 appointment (in respect of which the Secretary-General possesses a wide discretion akin to that relevant to the appointment of an ASG). The UN Administrative Tribunal said –

> VII. … There has been much argument both by the Applicant and the Respondent about the Tribunal's jurisprudence as given in paragraph VII of Judgement No. 362 (*Williamson*) which reads:
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> "If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave the 'fullest regard' to it."
>
> It follows that the burden of proof of having given consideration is on the Respondent whenever a staff member questions that such consideration was given. Secondly, such consideration should to some measurable degree meet the criterion of "fullest regard" in a reasonable manner. And finally, there must be good faith and consciousness of all the circumstances surrounding any claim.
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> VIII. In this particular case, except for the assertion that the Applicant was considered for the post, there is no convincing evidence of any merit that the above criterion was met. Nothing is known about how the final selection was made, who were the candidates, how their worth was assessed and who assessed them and with what result. For appointment and promotion to D-2 level, the Secretary-General reserved to himself full discretion, but as the appropriate circular in this respect makes clear, his attempt is always to find the best candidate, howsoever defined. In the present instance, the Tribunal has not been given any indication how, where, when and by whom the Applicant's claim for this particular post (Director of the Division for Programme Support Services) was examined and with what

> consequence. In the circumstances doubts persist that the Applicant was accorded due process and that, in any event, the required degree of consideration was given to the Applicant; the Tribunal considers it self evident that even if the Applicant had been given full consideration, he would not have automatically been selected for the post [and, accordingly, awarded a relatively small amount of compensation for non-economic loss].

22. Three important points made in this passage are of relevance here. The first is that the rules of propriety (called "due process") apply. (This issue is discussed sufficiently above.) The second is that a candidate, even for a D-2 (and, hence for an ASG) position, must be given full consideration and the third is that the respondent bears the onus of proving that these requirements were satisfied. Although, for the reasons given in *Sefraoui* UNDT/2009/95, I would prefer to rest the respondent's obligation of proof on the ground that that this is a matter within the knowledge and province of the respondent and should be characterized as an evidentiary rather than an ultimate burden, this is a point in this case of theoretical rather than practical significance. It is clear that the respondent not only has refused to permit the applicant to prove the facts by refusing to supply the required documents but does not intend to adduce any facts about the process on its own behalf. He has therefore declined to prove that any, let alone, full and fair consideration, was given to the applicant's candidacy. On this basis alone, the decision of the Tribunal must be that the respondent breached the contract with the applicant.

23. I have not overlooked the entitlement of the Secretary-General, having given all proper consideration to the candidacies of those who responded to the vacancy announcement, to decide that none were suitable and appoint another person by a different process. But this could not happen unless he had first given that proper consideration to the claims of the staff members. This was especially the case since he had undertaken to do so by the representations in the vacancy announcement itself.

24. The applicant has pointed to the fact that there had been wide adverse publicity given to the investigations into his conduct and that, despite his attempts to have the decision delayed until the investigations were completed, the process had continued. He apprehends that his candidacy may have been adversely affected by

this publicity which was irrelevant to it. He contends that, in the circumstances, adverse conclusions that in fact he was guilty of some wrongdoing may have been drawn and placed unfairly in the scales against him. He has sought to discover whether this was what happened, but the respondent – who, of course, knows the facts of the matter – has refused to give him or the Tribunal access to the relevant records.

25. What inference can and should be drawn from the non-production? In my view, the only fair inference is that the material not disclosed would significantly assist the applicant's case and adversely affect the respondent's. Although the applicant has identified the matter he apprehends was wrongly taken into account, it is not necessary that he prove that particular error occurred. If the records happened on inspection to show some other significant impropriety, the respondent could not take advantage of the difference between the impropriety alleged and the impropriety disclosed, subject to being given a fair opportunity to respond to the changed case. Of course, the existence and character of the error is a matter peculiarly within the knowledge of the respondent, so a submission of surprise would be most unlikely to be taken seriously.

26. The respondent is not entitled to the benefit of any supposition that the withheld material would or might not significantly assist the applicant, since it has placed the Tribunal and the applicant in the position of being unable to assess its actual character. It is for this reason that I referred to the *fair* inference that should be drawn. This is not a matter of considering any possible actual motive – for a start, whose motive is relevant? This approach would be the more unreasonable where, as here, the respondent declines even to disclose, when ordered to do so, who is the person responsible for the decision in question, let alone adduce any evidence as to the reason itself. Accordingly, the conclusion rationally available as a reasonable possibility which most assists the applicant should be drawn and this is that the withheld material would significantly assist his case. This is the only conclusion that enables the Tribunal to do justice between the parties. After all, though aware that

this was the likely, indeed virtually inevitable, conclusion the respondent has not sought in any way to dispel it.

27. It is implicit in what I have said that I have disregarded as having evidentiary value anything claimed from the bar table or in submissions as to the reasons for non-disclosure. Without evidence, they cannot be relied on. Furthermore, it would be manifestly unjust to do so unless the applicant were given the opportunity to test the truth of the assertions, an opportunity denied him because of the non-disclosure of the identity of the individual responsible for the decision. No *evidence* has ever been proffered or sought to be proffered on the claim of privilege and as to the reasons for taking the legal point. It is not for the respondent (especially in the circumstances of this case) to insist that the Tribunal must act on the basis that his disobedience is not a tactic designed to prevent disclosure of material that would support the applicant's case. There is no good reason, in the absence of any evidence, to regard the claim of confidentiality other than as the tactical means to this end. I would not accept that a staff member can so insist and I cannot accept it – by exact parity of reasoning – from the respondent. His lawyers can claim that the Secretary-General should be considered as a head of state as much as they like, but he leaves his crown outside the courtroom. Furthermore, there is regrettably good reason quite apart from the question of principle to doubt both the provenance and the accuracy of submissions made on his behalf (a matter which is further discussed below).

28. It will be seen that this analysis of the material does not take into account any facts that are in real dispute except, perhaps, in relation to whether or not the applicant's name was put forward for consideration on the short-list. Even this fact, as the submission on further evidence makes clear, is not seriously disputed since there is no proposal to tender any evidence in support of counsel's submission at the directions hearing. Put more simply, in the result, there are no facts in genuine dispute. The only matters that the respondent indicated he wished to deal with by evidence was (apart from relating to compensation, discussed below), in the event that the applicant wished to dispute the *bona fides* of the investigation and actions taken in respect of it, he wished to tender the investigation reports. As it happened,

the applicant did give evidence about this matter but, as I have not relied upon it and make no findings one way or another about it, there is no occasion to consider the respondent's request. It is clear, therefore, that the respondent has not suffered any real prejudice from being refused leave to participate in the proceedings. This carries with it the irony that, accordingly, he was not troubled by this consequence of his disobedience.

29. It follows that the preponderance of evidence establishes that the decision of the Secretary-General as to the applicant's candidacy was vitiated by illegality and was made in breach of the applicant's contractual entitlement that it be considered fairly and in good faith.

Default judgment

30. For reasons that I will explain, it seems to me that in point of legal principle the approaches discussed above are very unfair to the applicant although, as it happens, they lead to judgment in his favour against the respondent. This unfairness is derived from the respondent's refusal to afford him what the Tribunal has ordered must be given (at least to the Tribunal), namely the actual records of the appointment process. Although there are good reasons for drawing an adverse inference against a party who possesses material capable of disproving the other party's case but declines to adduce it, this inference will concern only the matter capable of being disproved by the potentially contradictory material that is not adduced. The applicant still needs to demonstrate that the preponderance of evidence requires judgment in his or her favour, though with the advantage of the favourable inference. Where, as here, the favourable inference concerns a crucial fact, this will result almost invariably in a favourable judgment. However, for obvious reasons, this will not always be case: it depends on the significance of the favourable inference. In the present case, however, the respondent does not merely decline to adduce evidence that is in his possession in the ordinary course of conducting his case (which, of course, is his right), but refuses to obey an order requiring production of material that is potentially crucial to the applicant's case. This is a very different situation. It is one thing to

decline to lead evidence to prove a fact or refute an inference, but quite another to prevent the other party from proving facts relevant to his or her case and especially so when this is done by disobeying an order. As a matter of pure logic, it is theoretically possible that the withheld evidence would not assist the applicant but, since an order for disclosure would not be made unless the Tribunal was satisfied that it was at least capable of doing so, this is scarcely a real world conclusion. Nor would it be just or reasonable. If, upon inspection by the Tribunal, it appeared that the material not only would not assist the applicant but would assist the respondent, it could not properly be used by the Tribunal against the applicant unless it were disclosed to the applicant and the Tribunal would leave it to the respondent to decide whether it wished to adduce it or not. So, again, this possibility can be disregarded.

31. The manner provided by the law to resolve the issue of confidentiality, where that is the claimed basis for withholding material, is that it must be produced to the court or in this case the Tribunal. If the claim is upheld, the material will not be disclosed to the applicant but, if justice requires that it be taken into account because it assists his or her case, then it must be given due weight although, of course, in such a way as to retain its confidential character. If the claim is rejected, then the material should be provided to the applicant if it is capable of assisting his or her case. Sometimes part of the material is confidential and part is not, in which case the applicant will be given access to that part which is not confidential. This is frequently done by providing a redacted document. By this means, the law protects the interests of both parties and, of fundamental importance, the interests of justice are served. The point is that it is for the Tribunal to make these judgments, not the respondent.

32. If this procedure had been followed in this case, no question of judgment by default would arise. The manifest injustice of permitting the respondent to withhold relevant evidence and yet insist on the applicant establishing his case only has to be stated to be demonstrated. Yet this is precisely what the written submission made by counsel for the respondent amounted to. It was in the following terms –

> … the respondent submits that the applicant has not presented the case about his non-selection for the post of ASG/DSA that requires the respondent to provide evidence in response. The respondent does not dispute the fact that there was publicity and an investigation during the period of the selection process. The respondent has understood from the applicant's request for review ... and throughout the case management process before the Tribunal that the case under consideration was the impact of the existence of the investigation on his candidacy. The only reason the respondent has not requested summary judgment against the applicant in the non-selection case has been because the Tribunal's express reluctance to decide on a matter without an applicant having "his day in court". Accordingly, a default judgment against the respondent would penalise the respondent when the applicant's case, at its highest, did not require an answer by the respondent, other than by legal submissions.

This submission betrays several significant misconceptions. The first is as to the nature of summary judgment. It is true that, if a party's case taken at its highest could not result in a judgment in that party's favour, it is appropriate to grant summary judgment to the other party. Such a consideration does not involve fact-finding, but a consideration as to whether the allegations of fact identified in the pleading, if true, could arguably justify a judgment. The applicant in substance alleged, in his statement of facts filed pursuant to case management directions, that (amongst other things) the Secretary-General was under the influence, at the time of the appointment, of false media reports, smear campaigns against the applicant and pressures from certain (identified) governments and that the Secretary-General either assumed that he was guilty of the allegations being investigated or acted on the basis that he was guilty, when he was in fact innocent. If it be assumed that these allegations were true, which it would be necessary to do for the purpose of deciding an application for summary judgment, such an application for obvious reasons would have to be rejected. The respondent's submission in this respect lacks any merit.

33. Of course, it might have been that, if the matter had gone to trial, the applicant would not have been able to make good his allegations because the evidence he adduced was insufficient, in which event the respondent could then have sought summary judgment or otherwise proceeded to complete his case without producing any evidence. The evident problem with this scenario is that the applicant could not

finish his case without the documentary evidence that he had sought to be produced by the respondent and which the Tribunal had ordered to be forthcoming. Accordingly, the respondent would have been able to take advantage of a submission that the applicant had failed to prove his case whilst keeping in his pocket the evidence necessary for the applicant to do so. The effect is that the respondent relies on the failure of the applicant to adduce the very evidence that the respondent is withholding. This plain injustice cannot be permitted. Indeed, it would amount to a patent abuse of process. That it would unjustly penalize the *respondent* if this abuse were not allowed is absurd.

34. The applicable principle is not only clear but rests upon sound notions of procedural justice: the respondent cannot put an applicant to proof when material that is or may reasonably be thought to be a part of that proof is withheld from disclosure by the respondent despite an order for it to be produced. This would enable the respondent to profit from its own illegal actions in breach of its contractual obligation towards the applicant and its instrumental obligations to the Tribunal. To remove this profit is not to penalize the respondent in any relevant sense. It is not, in my view, a just or reasonable course to ask whether the applicant, on the material which he is able to adduce, is entitled to judgment, since this is to ignore the fundamental point that he cannot be justly limited to this evidence, but is entitled to adduce the material ordered to be produced. Although the content of that material is not known, except that *ex hypothesi* it must be relevant, the only fair assumption is that it would assist the applicant and the respondent cannot be permitted, by declining to enable the assumption to be tested by production to the Tribunal, to contend otherwise. In the arcane idiom invented by Joseph Heller, it would permit the respondent to rely upon a Catch-22. The submission made on behalf of the respondent is not only without merit, it is impudent.

35. The only just outcome is that the applicant must have judgment by default against the respondent.

The Tribunal is misled

36. On 10 March 2010 counsel for the respondent made the following written submission –

> The respondent notes that unlike the previous system of justice, the new system of justice provides the respondent with the right to appeal binding decisions of the Dispute Tribunal. When the respondent exercises his right to appeal, article 11.3 of the Dispute Tribunal Statute provides that the matter, which is otherwise binding on the respondent is no longer executable.
>
> The respondent has been informed that a Notice of Appeal has today been filed with the Appeals Tribunal with respect to … [the orders made in this case and that of *Islam*].
>
> Accordingly, the respondent respectfully submits that … the orders … are not executable pending the outcome of the appeal.

The reference to art 11.3 of the Dispute Tribunal statute is obviously a mistake for art 7.5 of the Appeals Tribunal statute. Art 11.3 provides that, "[in] the *absence* of … [an] appeal, … [judgments] shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal"; in effect, that judgments are not executable for 45 days. The suspension of execution of a judgment brought about by the filing of an appeal is prescribed by art 7.5 of the Appeals Tribunal statute. The final sentence quoted above makes this clear, since, of course, art 11.3 makes no provision beyond the initial 45-day or earlier filing of an appeal.

37. Since it is clear beyond argument that art 7.5 requires the actual commencement of an appeal in accordance with the procedure prescribed by the statute, I naturally assumed from this submission that such appeals had indeed been filed, and that the reference to "notice" was a mere conventional usage, that is, a notice of the actual appeal itself, and accepted the submission of counsel at face value, consonant with the usual attitude of trust placed by courts in submissions of this kind. Accordingly, I did not require the documents in question to be produced until sometime later. On 5 April 2010 I indicated that they should be produced when the *Islam* matter came on for hearing and Counsel for the respondent made an application for a stay of my Order refusing leave to appear in that matter. On 8 April

2010 the application was made and the "Notices of Appeal" were produced. It was then that I discovered that these "Notices of Appeal", which I had been informed had commenced the appeals in the Appeals Tribunal, turned out to be merely informal written communications to the registry of the Appeals Tribunal that it was *intended* to appeal.

38. The statute of the Appeals Tribunal makes specific provision for the mode of commencement of an appeal. Whilst one can accept that strict compliance with the requisite details might not be essential, it is patently obvious that there must be substantial compliance, before it could be suggested that the appeal had been commenced. At the hearing on 11 March 2010 I raised this matter with counsel who had co-signed the submission of 10 March. I assumed counsel were simply acting on the basis of instructions and, like me, trusted those instructions rather than inspecting the documents. I was informed that the new internal justice system was still not entirely understood and that this may explain the mistake.

39. The suggestion of misunderstanding lacks credibility as an explanation. It is scarcely possible to accept that any even slightly literate lawyer could have thought that the mere communication of an *intention* to appeal could amount to *commencing* an appeal. The very concept of *intending* to do something carries ineluctably the meaning that *it has not been done*. This does not require a law degree. A rudimentary knowledge of the English language is sufficient. Moreover, art 7.5 of the Appeals Tribunal statute is also in simple English. Its reference to the necessity for the filing of an appeal for the suspension of a judgment to take effect obviously *requires the appeal to be filed*. And, even worse, the false information was used for the purpose of seeking an outcome from the Tribunal, namely, not to proceed further with the cases.

40. Whether this came about because of deliberate calculation or such indifference to the need for accuracy as to amount to gross carelessness matters little. Neither approach complies with the ethical and professional responsibilities of counsel. I cannot say who was responsible for the misstatement. I must take some of

the blame myself for having trusted counsel. I do not intend to make the same mistake again. The history of this matter has demonstrated that the persons actually responsible for the decisions in the case, including the legal decisions, refuse to be identified and decline to take personal or professional responsibility for their actions, hiding behind counsel actually at the bar table who are their subordinates and not allowing them to name those giving them their instructions. It is regrettably now clear that the position of the Tribunal as a judicial entity is simply not accepted by important elements within the Administration and the assumptions of ethical and professional responsibility under which I, and I believe my colleagues, have acted are unwarranted, at least in respect of some of the Administration's lawyers. The notions of telling the truth and taking responsibility for decisions are not complicated and surely have a fundamental place in the very notion of the administration of justice. However, if there is something in the culture of the UN itself that does not accept that truth and personal responsibility are standards to be applied, indeed, to be embraced, but rather are obstacles to be avoided if possible, little, if anything, can be done and the Tribunal must just battle through as best it can, taking nothing for granted and assuming nothing without proof.

41. As for the situation in this case, I am at a loss to know what to do but I am prepared, because the issue is so important, to make one last effort to seek a resolution. Accordingly, I order that the persons who gave the instructions for and who prepared the submission to which I have referred (at para [36] above) to attend the Tribunal to explain how the submission came to be made and show cause why action should not be taken against them by the Tribunal within its inherent powers and/or a reference should not be made to the Secretary-General pursuant to art 10.8 of the statute of the Dispute Tribunal. They are to appear before the Tribunal at 10 am on Wednesday 12 May 2010. If they wish, they may be represented by counsel.

Compensation

42. The factual issues relevant to the assessment of compensation are also affected by the attitude of the respondent towards production of the material relevant

to the appointment process. In *Abbas*, as in most conventional appointment or promotion cases, the successful applicant was unable to establish that he would have been appointed had the process been properly undertaken. This, however, is not a conventional case. It is clear that the applicant certainly had a substantial chance of appointment. The compensation award for economic loss therefore falls to be considered as the value of the loss of the applicant's chance of appointment. On his case, the applicant (as at the time of application) had served with the UN at an increasing level of responsibility for 34 years up to D-2 level and, as the most senior D-2 at DESA, had acted from time to time as ASG and USG (as Officer-in-Charge); his performance had been evaluated as exceptional and outstanding in his annual PAS reports; the post was for ASG for DESA "policy coordination and interagency affairs"; and he was recommended (with two others) as suitable for appointment. If the applicant's qualifications for appointment made him the outstanding candidate, then apart from some attribute unrelated to professional accomplishment or integrity, his chances of appointment were obviously very high. I have not lost sight of the problem that he was under investigation for apparently serious misconduct at the time, which may have been troubling for his candidacy. On the other hand, these matters were known to the selection committee and did not prevent his being recommended. The respondent has not indicated that it was wished to make the case that, if the Secretary-General took into account the significance of adverse publicity, he would have been entitled to do so: he has taken the line that there will be no disclosure of what he did or did not take into account, indeed, whether he actually considered the recommendation of the selection committee or the applicant's candidacy at all. This supports the two conclusions that, in effect, the respondent does not wish to litigate the question of the likelihood of the applicant's selection and will not provide the information that would enable a comparison of the applicant's claims with those of the other candidates, including, of course, that of the ultimate appointee. What inferences, then, should follow from the withholding of the relevant documents in relation to compensation?

43. Before moving to the specific inference that, in my view, justice requires, I wish to clarify the discussion about the assessment of the value of the loss of a chance which is contained in *Koh* UNDT/2010/40. I indicated in that discussion that, although the prediction of future events is inherently speculative, justice requires a commonsense assessment of likelihood to be made in order to compensate a successful applicant for his or her loss in the event of a proved breach of contract, accepting that this can only be approximate. I wish to emphasise that the need to specify a probability with a number so that the amount of the award can be stated must not disguise the approximative, commonsense and practical character of the assessment. The starting point must be the opinion of the Tribunal that the applicant had a real and significant chance of appointment. Thus, if by some calculation the chances of appointment were, say, less than ten per cent, the Tribunal should, I think, step back and ask, as a matter of commonsense, is this chance such that in the real world its loss should be compensation or is it, in reality, practically non-existent, and thus to be disregarded. On the other hand, if the chance of appointment were, say of the order of ninety per cent, it would, to my mind, be necessary to step back and ask whether this made appointment practically certain, in which event the ten percent discount applied by calculation should be disregarded. In other words, the artificial precision of the numbers must reflect and not disguise the practical, commonsense realities which they are an attempt to denote.

44. It seems to me that, in the circumstance here (hopefully never to be repeated) the only fair inference which can in justice be drawn is that which is most favourable to the applicant, thus that he was indeed the outstanding candidate and, had all necessary and proper things been done, would have been so likely to have been appointed that his compensation should be awarded on the basis that he would have been appointed. I emphasise that this is in no way to punish the respondent. This is merely the logical consequence of the way in which the respondent has conducted himself. By its unlawful actions the respondent has denied to the applicant crucial evidence of his loss and it must follow that the assessment of loss which the Tribunal is obliged to make must take into account the fact that this material has been

withheld. The only way in which this can fairly be adjusted for is to infer that it would demonstrate the best case for the applicant.

45. The compensation for economic loss should be calculated, therefore, upon the basis that the applicant would have been appointed to the post of ASG/DESA had his contractual entitlements been satisfied. The applicant in his initial appeal to the JAB sought, *inter alia*, three years' salary in respect of this loss. The respondent has brought to my attention that the actual appointee was given a two year fixed-term contract. There is no other evidence on this point and no rational basis for supposing that, had the applicant been appointed, his contract would have been longer. It is true that he would have been placed in the position to have this initial contract extended as he contends, but I am unable to make any sensible assessment at all of the likelihood of this occurring and must decline to engage in this level of speculation. The amount that should be awarded for compensation for economic loss should be two years' emoluments including post adjustment for New York, plus medical and dental insurance contribution, less assessment and pension contribution. I will order the parties to make submissions on the appropriate calculation of this sum.

46. The applicant has also lost the reputation and status that being an ASG of the UN necessarily brings, quite apart in his particular case of the vindication that it might have provided in the face of the adverse publicity to which he had been subjected. The reputation and status of appointment to ASG is undoubtedly very valuable and includes one's "marketability" in roles able to be undertaken after leaving the UN at an ASG level. Although this head of damage is difficult to quantify, the mere difficulty of quantification cannot prevent an award from being made, since that would amount to refusing just compensation. The applicant should therefore also be compensated for loss of the enhanced reputation and status that appointment to ASG in the UN would have provided and make an assessment of the appropriate sum in accordance with commonsense and a realistic knowledge of the world. On the assumption that the applicant would have retired after two years as ASG (the assumption most favourable to the respondent) he would have then been about 64 years old, with many years of productive work ahead of him. In light of the

fact that salaries paid to senior-level UN staff are typically lower than at a commensurate level in private commerce, I consider USD200,000 to be a conservative estimate of the capital value of the enhanced earning capacity the applicant would have derived from having retired at ASG rather than D-2 level, together with some allowance for loss of the non-economic but nonetheless real benefit that comes with the prestige and reputation of service in the UN at ASG level. The extent to which this amount should be awarded, in light of the cap in art 10.5(b) must depend upon the calculations and evidence to which reference is made below.

47. Article 10.5(a) gives jurisdiction to the Tribunal to order specific performance including appointment, promotion or (where the applicant has been terminated) reinstatement. Where such orders are made, an amount must be specified which can be paid by the Organization in lieu of taking such action. Here, no order for specific performance can be made for the basic reason that the present occupant of the post cannot be removed from it, since he was not a party to the proceedings and an order to place the applicant in the post must require his removal. The decision to appoint the occupant was unlawful in the sense that, as I have found, the Secretary-General had not complied with the legal obligations attaching to the process of selection. However, this cannot in the present circumstances justify rescission of the decision to appoint the occupant, again, since he was not a party and consequently cannot be subject to any adverse order. Whether it might have been appropriate to have joined him to the litigation under art 11 of the Tribunal's rules of procedure is now moot but, in cases that potentially raise similar problems, consideration should be given to this issue.

48. The applicant is also entitled to have his pension entitlement readjusted (from the date of retirement) to be paid at the amount that would have been payable had he retired from the UN after serving two years at ASG level and, accordingly, the respondent is to pay into the pension fund such amount as is sufficient to effect this outcome. Since this payment is by way of specific performance in respect of a "contested administrative decision [that] concerns … promotion" it appears at first blush to fall within art 10.5(a) of the Dispute Tribunal statute and thus, as indicated in

the concluding phrase of that article, within the limit prescribed by art 10.5(b). However, upon reflection, I am satisfied that it does not. The amount falling within the latter paragraph is a sum that may be paid instead of undertaking an action, namely rescinding the wrongful decision or making the required appointment or promotion or, in respect of a termination, ordering reinstatment. There is no election possible where the specific performance involved is the payment of a sum of money. The sum of money to which paragraph (b) of the article refers is plainly a lump sum, not a periodical payment. A pension therefore is comprehended neither by the substitution mechanism prescribed by art 10.5(a) nor by the lump sum referred to in art 10.5(b). In *Beaudry* UNDT/2010/39 I assumed that the amount of a pension could be capitalized and paid as compensation under art 10.5(b) and thus implied that it might be paid out as it were under art 10.5(a). However, on further consideration, the latter implication does not logically follow. Certainly, if a lump sum representing the capital value of a pension were ordered to be paid (as it might well be) under art 10.5(b), it would be subject to the prescribed limitation. However, if it were simply ordered to be paid by way of accretion on the pension already paid or payable to the staff member, it is not an action such that an amount could be paid in lieu as provided in that paragraph of the article and, accordingly, the requirement to set an amount of compensation to be paid in lieu as provided in art 10.5(a) and thus subject to the cap in art 10.5(b) is not engaged.

49. The refusal of the respondent to comply with the orders of the Tribunal is a breach of the contractual obligations of the Organization to comply with the statute of the Tribunal, quite apart from its breach of its instrumental obligation. The right of the staff member to the respondent's compliance with this aspect of the contract of employment is a valuable right, although it cannot be quantified. However, since the Tribunal has made adjustments in the interests of justice to counterbalance the prejudice caused to the applicant, this award is relatively limited, if not nominal. I award USD10,000 for this breach.

50. If the applicant has earned an income from personal exertion since his retirement up to the imputed expiry of the additional contract, that must be fully

disclosed and the net sum (after tax) deducted from the sum awarded. In this regard, the applicant is ordered to produce to the Tribunal proof of income, as ordered below.

51. It is necessary to make adjustments to the amount awarded because of the provisions of art 10.5(b) of the Tribunal's statute. I have discussed the effect of this article in *Beaudry* and do not need to repeat that discussion here. The consequence is that, aside from personal circumstances of financial hardship or other substantial disparity such as to engage the exception, the total I have ordered to be paid must be reduced to the prescribed level. I am unable to determine the final sum without information as to the amount that is to be paid in accordance with my orders and the sum calculated by reference to art 10.5(b). If the applicant wishes to tender any evidence of substantial hardship resulting from the application of the cap imposed by that provision, it will be necessary for that evidence – initially in the form of a signed statement – to be filed and served.

52. I now come to the question of costs which, by virtue of art 10.6 of the Tribunal's statute, may be awarded against a party that "has manifestly abused the proceedings". It is clear that the respondent has done so in this case, for the reasons already extensively discussed in previous Orders and this judgment and which I do not need repeat here. This award is designed to pay for the actual out-of pocket legal costs paid or payable by the other party in the proceedings. The abuse of the proceedings is the trigger or precondition for the making of an order for costs, the costs ordered to be paid are not limited to that part of the case that might be directly attributable to the abuse. This is clear from the language of the article, which does not suggest that costs are to be so limited. That is not to say that the Tribunal does not have a discretion to limit the amount of costs or the items in respect of which they are payable, but in this case there is no reason in all justice to do so. I note for completeness that the amounts payable under this article do not fall within the cap specified by art 10.5(b).

53. The respondent is ordered to pay all the costs reasonably incurred by the applicant, including disbursements, directly incurred in undertaking this litigation from 1 July 2009. The level of costs should be that which is typically paid in the

State of New York for work of this character in a Court or Tribunal dealing with employment disputes. Counsel for the applicant has stipulated the sum of USD25,000 in respect of both the first and the second cases. Although I have only experience of the level of legal costs payable in Australia, I think it fair to say that this sum seems to me well below what an attorney would charge there and, I rather think, what would be charged in New York in a case of this kind. Overwhelmingly, the costs were incurred in connection with the first case. Accordingly, subject to what follows, I order that the respondent should pay the applicant the sum of USD22,000 for costs under art 10.6 of the Tribunal's statute. If the respondent requires a bill of costs, the respondent is to pay the cost of preparation and, if the amount is disputed, each party is to file evidence and submissions on the issues as directed below. The evidence and submissions are to be made in the first instance to the Registry for an assessment by the Registrar. In the event that one or other party disputes the assessment of the Registrar, the matter will be transferred to a judge of the Tribunal for determination. Unless the amount ordered to paid in that event is less than USD18,000 (disregarding the costs of assessment), I would (were I the judge) order the respondent to pay both the bill and the costs of assessment in order to discourage unproductive litigation. Of course, this approach will not bind another judge.

Orders

1. The decision of the Secretary-General concerning the appointment of the ASG/DESA is unlawful and in breach of the contract of employment of the applicant.

2. The respondent is to file and serve by the close of business 7 May 2010 a statement of the amounts payable to the ASG by way of emoluments as provided by para [45] of this judgment, together with a statement of two years' net base salary of the position.

3. The applicant is to file and serve by the close of business 11 May 2010:

    a. an agreement to the calculations of the respondent or, failing agreement, his own calculation, disclosing the method adopted;

b. proof of all of his earnings since retirement, including a signed statement under an affirmation to tell the truth as to the correctness of it; and

c. evidence, if any, relied on to establish exceptional circumstances.

4. The respondent is to inform the applicant whether he agrees to pay the costs of USD22,000 by the close of business on 14 May 2010.

5. If the respondent so requires, the applicant is to serve an itemized statement of costs and disbursements by 21 May 2010.

5. The respondent is to file and serve by the close of business on 2 June 2010 a response to the applicant's statement of costs and disbursements.

54. 6. If the parties do not agree the amount of costs by 9 June 2010, the Registry is to be informed forthwith. The Registrar will take appropriate steps to comply with the procedure specified in para [53] above.

(*Signed*)

Judge Michael Adams

Dated this 3rd day of May 2010

Entered in the Register on this 3rd day of May 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York