



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/085/
JAB/2009/049
UNDT/NY/2009/118
Judgment No.: UNDT/2010/087
Date: 6 May 2010
Original: English

Before: Judge Adams
Registry: New York
Registrar: Hafida Lahiouel

SPRAUTEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
George Irving

Counsel for respondent:
Salman Haq, UNOPS

Introduction

1. This judgment deals with two separate but closely linked cases, which were heard together. After an interview process the applicant, a longstanding UNOPS staff member holding a 200 series contract, was not selected for a P-4 position with UNOPS as another candidate (on a 300 series contract) was recommended for the job by the interview panel (case 1). In November 2008 he was informed that his contract in New York would not be renewed beyond 28 February 2009. He obtained an offer for another UNOPS position, but after discussions between the parties concerning the start date the Administration decided to withdraw it (case 2). The applicant is contesting both decisions.

Relevant legal instruments

2. Selection Policy for 2006 Transition Process, UNOPS/AI/DHRH/2006/4 of 28 April 2006 (in the following referred to as “the Policy”) provides as follows –

“Composition of the Selection Panel” –

16. The selection panel shall consist of the following members:

- a) One representative from the division/unit of the vacant post, with knowledge and expertise in the field relevant to the post, who will serve as the Chairperson of the selected panel.
- b) One UN staff member endorsed by the Staff Council.
- c) One UN staff member or one client representative with technical expertise in the field relevant to the post/function.
- d) One UN staff member with human resources expertise

All the members of the selection panel with the exception of the UN staff member with human resources expertise shall be voting members of the panel. The role of the UN staff member with human resources expertise is to oversee, facilitate and endorse the selection process. In particular, s/he shall ensure that the selection process is conducted in fair, transparent and expedient way, and advise on the application of

UN Staff Regulations and Rules, as well as UNOPS policies and guidelines.

“VI. Recommendation of the Selection Panel” –

37. The recommendation of candidates shall be consistent with the candidates’ scores obtained during the evaluation process (including any interviews), as depicted on the evaluation grid. Only on clearly justifiable basis may the panel recommend a candidate who is not the highest-scoring candidate, e.g. if such recommendation is made pursuant to paragraph 38. The reasons for such departure from the scores shall be fully detailed in the minutes.

38. In applying the Staff Rule 109.1(c), due regard shall be had for a staff member’s period of service with UNOPS and any obligations UNOPS has under the Staff Rules for long-serving staff members of the organization and other UN entities. Subject to the availability of suitable posts in which their service can be effectively utilized, UNOPS staff members and UNDP staff members seconded to UNOPS with 5 years or more of continuous active service will receive priority placement over equally qualified staff with less than 5 years of continuous active service with UNOPS.

39. Recommendations made by the selection panel shall, to the extent possible, be reached unanimously. If this is not possible recommendations require at least a simple majority of the voting panel members as specified in paragraph 16. If a majority is not possible, the Chairperson's vote is determinative, and this shall be reflected in the minutes. Dissenting panel members shall have the opportunity of having their opinions reflected in the minutes.

“VII. Selection Review Process” –

42. All recommendations shall, where required as dictated below, be reviewed by a Selection Review Panel which shall be composed in accordance with the established rules governing the Appointment and Promotion Board (APB) and Appointment and Promotion Panel (APP). Such a Panel shall constitute the body established as required by Staff Rule 104.14 and shall follow the established rules of the Appointment and Promotion Board (APB) or Appointment and Promotion Panel (APP).

“Final Approval of Selection” –

45. Once the successful candidates has been approved by the Panel stated in Paragraph 43 and 44 above, DHRM will provide one document summarizing all recommendations made by the selection panel for the approval of the Executive Director and will attach information on the list of applicants, the vacancy announcement and the applications documents of the successful candidate.

Facts relating to case 1

3. The applicant joined UNOPS in 1988 and served until his separation in various capacities at the L-4 level. Until July 2004 he served on a 200 series contract under the former staff rules and regulations, but his position was abolished and instead he worked on other short-term and temporary appointments. In January 2006 it was decided to move the UNOPS headquarters from New York to Copenhagen, which entailed the reorganization of many positions in UNOPS. The post encumbered by the applicant as a portfolio manager in the Mine Action Unit, North American Office, was to be abolished by 31 March 2007. On 6 November 2006 UNOPS staff was presented with a preliminary report outlining the envisaged organizational changes. Regarding the applicant’s field of work, it was stated in par 3 that –

It would appear that DPKO/UNMAS [United Nations Mine Action Support] will rely on UNOPS in the near future and business will be there at least at the present level ...

An organigram showed that “Mines” should be headed by a “Tadv” (whatever this means) at the P-5 level (P-4 was crossed out in the draft). This unit was to report to a “UNSEC G COORDINATOR P5”, which then again would report to the “Director”. In a series of emails in January 2007 the applicant informed the Director, North America Office, and the Human Resources Director about his concerns with this process of reorganization.

4. On 17 January 2007 the applicant applied for the P-4 post as Portfolio Manager (Mine Action) in Copenhagen. According to the applicant, this post had similar functions to his former post. The major UNOPS client in the area was United Nations Mine Action Support, UN Secretariat. In his Personal History Profile the applicant did not list any names under the section “REFERENCES: List three persons, not related to you, who are familiar with your character and qualifications”.

5. Four candidates were short-listed, including the applicant, who was interviewed on 6 February 2007 together with two other candidates, including the candidate who eventually received the appointment (“the successful candidate”). The panel comprised four members: the chairperson (from UNMAS); a technical expert (from UNOPS); a Staff Council representative (from UNFPA); and a human resources expert (from UNFPA). It appears that an additional unidentified person was also present at the interview. Only her first (female) name was mentioned and her role is unclear.

6. Before the interviews started, the panel noticed that the successful candidate had named the chairperson as a referee. There is conflicting evidence as to how this problem was resolved, but it is not in my view necessary to deal with this issue. It is sufficient to state that, after some discussion and obtaining external advice (including from the UNOPS legal department), the panel decided to continue with the interviews, essentially because the chairperson had been unaware of his nomination as a referee and should not be regarded as having pre-judged the successful candidate’s candidacy. He was also professionally acquainted with the applicant. Each of the panelists, including the human resources expert, used his own scoring grid listing the various competencies. After each interview the panel rated the candidates by negotiating a consensus “joint panel score”. In his evidence, the human resources expert admitted that he did not know the UNOPS rules at the time and that he only afterwards discovered that he was not allowed to participate as a voting member of the panel (by virtue of par 16 of the Policy). The members of the panel all gave evidence.

7. The evaluations of the candidates, and particularly that of the applicant, incurred lengthy discussions among the panelists. The three other panelists all indicated in their evidence that during these discussions they felt that the staff representative demonstrated bias in favor of the applicant. In addition, the human resources expert stated that after the interview he learned that the applicant and the staff representative were professional acquaintances, which led him to conclude that the staff representative had “an agenda” at the interview. Eventually, the applicant and the successful candidate received exactly the same scores and the panel could not agree on a final recommendation. The staff representative testified, in effect, that he knew the applicant as a critic of the Staff Council which he (the staff representative) did not appreciate and they were not friends or professional acquaintances. I accept that the staff representative appeared to be a strong advocate for the applicant’s candidacy and was not in favour of that of the successful candidate. I accept that it may be that the staff representative expressed his views in such a way as to lead the other panelists to feel that he was biased. However, I do not accept that the staff representative was in fact biased. Members of a selection panel are not only permitted but are bound to express their conscientiously held opinions about the qualifications of the candidates and, though they should remain objective and fairly consider what is said by the other members, they are not obliged to qualify their views or defer to the others. Although it appears that reaching consensus in respect of the applicant and the successful candidate was hard fought, the other panelists scored the applicant and the successful candidate in accordance with their conscientiously held opinions. I also conclude that the fact that these scores turned out to be the same was accidental (as all panel members averred) and did not represent a deliberate adjustment designed to achieve this outcome.

8. Following the interview, the applicant complained to the UNOPS Human Resources Director raising (*inter alia*) concerns about the chairperson’s having been a referee for the successful candidate. It was decided to disregard the interview and conduct another. No formal record appears to have been made of the cancellation of

the interview and no reasons were formally provided. Several different explanations, all given *ex post facto*, are referred to in the evidence, including the tie between the candidates, negative “comments from the panelists” to senior management about the staff representative’s approach, the chairperson being a referee for the successful candidate, and feedback from the human resources expert. When the applicant was informed of the decision, he replied that he would “give this some thought”.

9. A new and second interview was scheduled for 14 March 2007, but after his interview had started the applicant declined to further participate, since the staff representative (from UNFPA) who had originally been placed on the panel could not be reached and was replaced with another UNFPA staff member. The interview was not completed. As with the first panel, the chairperson was from UNMAS.

10. A third (and final) interview process was conducted on 30 March 2007. The panel comprised four members: the chairperson (from UNMAS); a technical specialist (from UNICEF); a human resources representative (from UNOPS); a staff representative (from UNFPA, the person who had been was unavailable for the second interview). The successful candidate received 79 out of 100 points, while the applicant only got 76. In its report the interview panel report stated –

The Panel agreed both candidates were experienced in managing geographically-dispersed teams, and that the final scoring demonstrated both candidates had the overall skills required with which to perform the tasks of the vacancy in question.

The Staff Representative suggested that [the applicant] was the better communicator, and as such that he would better serve relations with stakeholders and larger teams. However, the other Panel members felt that [the applicant] displayed a negative attitude and did not take responsibility for performance in his current post, instead blaming institutional deficiencies. The other Panel members also felt [the successful candidate] extended finance management proficiency, practical field experience, and ability to understand the duties and needs of both the HQ Portfolio Manager and the field Project Manager were convincing abilities in his favor. The Panel, excluding the Staff Representative, felt these abilities would better meet the needs of the

vacancy, and on the whole more accurately reflect current UNOPS business strategies.

The panelist for technical qualifications also pointed out during the deliberations that there should be concern for [the applicant]'s limitations in mine action. To this point, and by his own admission, [the applicant] mentioned during the interview that he has only one and a half years of mine action experience, whereas the qualifications listed for the position require that the candidates possess at least two to three years of experience in mine action.

The Panel with the exception of the Staff Representative agreed that the best overall candidate for the position would be [the successful candidate].

The Staff representative disagreed with such recommendation, stating that both candidates are qualified for the post and in such cases 100 series contract holders should be given preference over ALD [Appointments of Limited Duration] holders. [This appears to have been a mistake, since the applicant in fact did not have a 100 series contract.]

In its conclusion the panel, except for the staff representative, agreed to recommend the successful candidate for the post.

11. On 23 April 2007 the Appointments and Promotions Board (APB) reviewed the interview panel's recommendation and reported –

The members discussed in detail the rules pertaining to long-serving staff members and the applicability of such rules in this particular case. After lengthy discussion and direct review of the applicable rules, the members felt that at the time they could not properly review the case without further information on the suitability of each candidate.

Subsequently, it was decided that the original panel would obtain reference checks on the two candidates and revert to the panel with their recommendations on the most suitable candidate for the post.

12. While the other interview panel members agreed to this, in an email to a human resources representative (and copied to the other panel members) of 23 May 2007, the staff representative declined to “sign nor endorse the process”, and asked the human resources representative to reply to the APB accordingly, since –

... this performance puts down performance of a staff member who has been with the organization for over two decades ... [It] is unclear to me why I have to sign a protocol on reference checks, when, in fact, I did not check any references, but just have been given a paper to sign.

The human resources representative replied (copying the other members) that he would communicate the statement to the APB, but also stated that –

Concerning the protocol for reference checks, this was a request by the APB.

We will proceed with the APB meeting based on the fact that the majority of the panel, including the Chair, are of the same opinion.

13. In the reference checks, a reference from the Director of UNMAS was obtained. In his evidence, the UNMAS chairperson from the first interview agreed that he had provided input for this reference since he had a detailed knowledge of the successful candidate. He also said that, while the UNMAS Director had a general overview, he had also formed his own opinions. The following is an extract from an undated amendment document to the Interview Panel Report –

Upon submittal of the required reference checks, the following can now be concluded:

1. Both [the successful candidate] (the top-scoring candidate) and [the applicant] (the second highest scoring candidate) received good-excellent rating on the personal reference checks.

...

3. Reference check (attached) for both candidates from [name], Director of the UN Mine Action Service, and a key UNOPS client in connection with the position, expresses concern that [the applicant]:

... has had a strained relationship with colleagues from UNMAS with whom he is supposed to interact, largely because of the perception within UNMAS that he ([the applicant]) is not capable of effectively managing mine action activities related to UNMAS ...

... There have been many instances where [the applicant] has been unable to provide UNMAS with timely and relevant information on where the Sudan programme stands from a financial perspective, leading to frustration and delays in UNMAS dealings with other key

partners including within DPKO itself and the UN Controller's Office

...

... [the applicant] possesses neither the required knowledge of mine action nor mine action programme management skills to serve UNMAS from a position in UNOPS. UNMAS has severe reservations regarding his suitability to supervise, mentor, and advise subordinate mine action Portfolio Officers in Copenhagen ...

... if he ([the applicant]) were to be appointed to the position in questions, UNMAS would have to insist to UNOPS Senior Management that he is not responsible for managing UNMAS portfolios ...

In his reference check, the UNOPS senior portfolio manager & cluster coordinator, Mine Action Unit (the applicant's immediate supervisor) rated the applicant's level of performance as "very good" (second out of five rating options). He made the following comments concerning how well the applicant got along with colleagues, managers and clients with respect to resolving interpersonal conflicts on the workplace and working with a diverse workforce –

[The applicant] gets along very well with his colleagues. Some negative feedback has been received from project staff but upon review the issues are either outside of [the applicant]'s control; are policy and procedure related; or derive from staff requests being declined. He did, however, allow himself to be swamped by day-to-day critical demands of his portfolio, at the expense of investing more time in client relations. By the time corrective measures were attempted by [the applicant], the damage was already done. He is supportive of his project staff and Mine Action Unit colleagues. Apart from client relations, and unlike most other colleagues, I have never had to intervene to resolve interpersonal conflict involving [the applicant] within the unit. Conflicts of late, are not limited to [the applicant]. He is outspoken and critical of lapses of management integrity, real or apparent, and breaches of correct procedure has the courage to voice what others may fear to say [sic].

Under the category of "Describe her/his ability to prioritize work and how is he/she in handling tight deadlines, problem-solving and competing priorities", the senior portfolio manager wrote –

Initially, [the applicant] had difficulty adjusting to the high pace and urgency of actions in mine action. I have reviewed with him work priorities regularly (weekly and daily) and found that he generally has the correct perspective. It was just that the volume was too high for one person. There was also a problem that affected his work productivity but that was resolved. Overall, key delivery deadlines have been met as per the Mine Action Unit's business plan targets. When there are competing priorities he always seeks advice.

In a range of ratings concerning the applicant's personal competences, the senior portfolio manager rated the applicant as either "very good" or "excellent" (first out of five rating options) and added –

The staff member has health concerns that have been exacerbated by the prevailing office situation. This has affected his performance in recent months and has required me to be more supportive at my level.

[The applicant] worked on the OFF [unknown abbreviation] Orphan contracts and Business Development. He joined MAU in Sept. 05 and the circumstances of his appointment unfortunately set him off on the wrong foot with the client. His appointment was not cleared or discussed by the Division Chief with the client as the client desires and he was unknown to the client. Also, it is well-known that the client favors military backgrounds.

When [the applicant] joined MAU [unknown abbreviation] he was assigned the Sudan portfolio which at the time was \$25M. Over the course of 05-06 the portfolio grew to be \$50M without any additional support. He single-handedly worked on this portfolio – also with only partial support of an Operations Assistant. Furthermore, the handling of donor allocations for the VTF [unknown abbreviation] project had been complicated by the budget setup and he was personally targeted for a situation created by his predecessor and the inability of UNOPS systems and tools to meet the donor demands. [The applicant] was unfairly, personally targeted by the client for budget and financial management problems, including non issuance of, or late, financial statements from UNOPS Finance.

During his time with the mine action team, he has been an invaluable resource on procurement issues a major part of our business.

It is important to note that [the applicant] functioned as Chair of PRAC [unknown abbreviation] for most of 2005 and a member to June 06 which siphoned his time which we could not afford to lose. Overall, [the applicant] upheld his commitment and met the delivery and

income goals set. In this way, he is reliable and a respected member of the mine action team.

14. After considering these reference checks, the interview panel upheld their initial recommendation of the successful candidate.

15. On 23 May 2007 the APB reconvened to review the selection process and held that –

Upon reviewing the additional materials submitted, the Board was satisfied with the references and PRAs [assumedly referring to “Personal Review Appraisals”] the supporting the selection recommended by the interview panel. However, the Board was not able to find the same supporting information for [the applicant]. In particular, the Board noted the fact that HR department does not have [the applicant]’s PRA on file. [The applicant] was asked on 27 April 2007 to submit the PRA, but despite HR follow up did not do so.

In conclusion the Board agreed that they understand and support the recommendation of the first Board to conduct reference checks, and the Board felt that it was in a position to endorse the recommendation of the Selection Panel and recommend [the successful candidate] as the selected candidate for the position ...

16. On 31 May 2007 the applicant met with the UNOPS Executive Director who informed him of the APB’s decision, but also offered him a six-month temporary assignment in Nairobi. The Executive Director also informed the applicant that UNMAS had assessed his performance negatively. Following up on the meeting, the applicant wrote an email on 8 June 2007 to the Executive Director in which he (*inter alia*) stated that –

In fact, since joining the MAU 20 months ago, I have NEVER been provided with any specific performance complaint, neither from UNMAS, nor my superiors.

On 15 June 2007 the Executive Director responded by email (copying the Human Resources Director and two other persons) that this criticism related to the applicant’s “support on the Sudan portfolio”. The same day the applicant replied (copying the same persons as in the previous email) –

I am not much wiser now, except knowing the complaint came from the head of UNMAS (who does not know me, other than through receiving input from [chairperson from the first interview], I must presume.

...

17. A statement of the senior portfolio manager was tendered by the applicant without objection from counsel for the respondent, who said that he did not wish to cross-examine him. This material must therefore be treated as undisputed, at least so far as the matters within the manager's own knowledge are concerned. So far as the applicant's relationship with UNMAS was concerned, the senior portfolio manager said –

The financial management problems [the applicant] experienced with the Sudan portfolio in handling multiple donor allocations were not unique to [him] or [his] portfolio. I experienced similar problems with the projects that I was managing for UNMAS plus the UNDP Cyprus project. To varying degrees, other portfolio managers had similar difficulties. The situation was compounded due to the nature of the Sudan portfolio, particularly its size, and the repercussions of UNOPS failures for UNMAS's donor relations. There was a systemic problem in UNOPS to adapt or apply the ERP (Atlas) to the financial management and reporting requirements of mine action clients (particularly UNMAS) and the nature of the mine action projects accepted by UNOPS for implementation. I engaged in numerous meetings and email exchanges with [a named UNOPS staff member] on this matter, starting well before [the applicant's] involvement in the Sudan portfolio. Initially (even before [his] involvement) promises were made that attention would be given to the Mine Action Unit to provide us with guidance on how to manage multiple donor allocations in Atlas. Despite numerous reminders, also brought to the knowledge of the Division Chief, there was an absence of clear guidance and follow-up from [the mentioned UNOPS staff member] ... [The] key to good financial management and reports in Atlas is tied to the initial set up of the project in Atlas. For most of the Sudan projects, setup was completed before [the applicant] joined the unit. We struggled on our own to find ways to use Atlas. By the time [he] took over the Sudan Portfolio, most of the projects were already set up and, as it turned out, messed up. Some responsibility for this would rest with [his] predecessors ([name] and [name]), but they were also doing their best under the circumstances. I am convinced that inaction on the part of

the Division Manager and [name of the same UNOPS staff member] were a combination of avoidance (due to lack of knowledge of how to use Atlas and of our needs), and later, deliberate [sic] to make [the applicant], as well as myself, look bad professionally. Related to this matter was the subsequent inability of UNOPS to provide support to the Mine Action Unit to meet its (increased) financial reporting obligations to the clients. This was linked to the negative audit report on UNOPS ... [P]reparation of financial statement was the responsibility of the Finance Division. This worked relatively well until mid-2006. Responsibility for financial report preparation became unclear and then dumped on the unit with no resources or capacity. Coinciding with the poor audit report on UNOPS overall, the client (UNMAS) became very unhappy with the inability of UNOPS to produce financial statements and in response, increased the reporting requirements. It is clear to me that both [the applicant] and I were professionally and deliberately compromised by the irresponsible behaviour of UNOPS management, namely the Division Chief, in not addressing the matter of financial reporting. We were not supported and we were exposed, without the protection and support of our organization. This matter was raised by me numerous times with the Division Chief and even the EO, to no avail. I could only conclude that it was deliberate since the Mine Action Unit was generating sufficient income to cover the cost of financial and reporting support for the Mine Action Unit.

2. [As to the successful candidate]

It was clear to me before the start of the “re-structuring” of the Mine Action Unit in 2006–07 that [the successful candidate] was an ordained candidate from UNMAS ... In 2006, I learned informally through UNMAS that [the UNMAS chairperson from the first interview] wished to bring [the successful candidate] to New York. When I first learned of this, I dismissed the matter since I assumed it was for an UNMAS position. However, I subsequently learned that UNMAS wished to bring him to New York, through his UNOPS project contract, sooner rather than later and in trying to do so some HR administrative limitations that arose relating to him reaching the end of his ALD contract time limit and would have had to be converted to fixed term. However, at the time there was not yet a post of sufficient duration or project funds for him to have a fixed term appointment ...

Although I do not doubt that the manager was indeed relating information that had been given to him through UNMAS concerning the successful candidate and that he believed it to be true I do not accept it as more than his opinion.

Nevertheless, as I discuss below, this perception demonstrates – together with the difficulties faced by the applicant in dealing with the problems with his portfolio not of his making – a significant conflict, not only of interest but also as to knowledge of the actual responsibility of the applicant for the matters complained of in such strong, indeed, unmeasured, language.

Facts relating to case 2

18. In June 2007 the applicant accepted the offer of a reassignment to Nairobi, but due to his extended sick leave from 6 August 2007 to 7 October 2008 he returned to work in New York. Preparation then started for him to report to Nairobi, but on 31 October 2008 a team leader from Human Resources advised him by email that the assignment was out on hold until the 2009 budget had been finalized and his appointment was extended until the end of 2008. On 28 November 2008 the UNOPS Human Resources Director informed him that UNOPS had decided to reduce its Nairobi office and thus he would not be assigned there. Instead, his appointment in New York was extended until 28 February 2009. He was further informed –

I must also regretfully provide with formal notice that your appointment with UNOPS will not be extended further, and you will be separated from service with UNOPS effective that date. Should you be successful in securing and would you accept another post in UNOPS, the foregoing would of course cease to be applicable.

I would encourage you to actively apply for vacancies at UNOPS and elsewhere. In this connection, I note that UNOPS had recently announced several vacancies as part of its 2009 staff rotation exercise. In view of the special circumstances described above, you may exceptionally submit applications for these posts at the very first round. Please note, however, that under the rotation policy staff cannot apply for posts in their current duty stations.

UNOPS will continue to provide any other assistance you may require in your search for alternative employment

19. The 2009 annual staff rotation exercise in UNOPS was presented as –

UNOPS' annual rotation exercise is part of the Staff Rotation Policy (Organizational Directive 24), with the aim of increasing mobility of staff across the organization.

This Staff Rotation Policy and its [sic] implementation are outlined in Organizational Directive 24 and the AI/OEC/2008/05.

...

The cover letter may include a brief explanatory statement regarding the reasons why you believe you are particularly qualified or professionally interested in the post, e.g. the substance or functions of the post, your past relevant experience, career development goals etc.

The cover letter may also indicate any special circumstances relating to personal circumstances and conditions at the duty station.

20. On 4 December 2008 the applicant applied for three different positions, including a P-4 procurement specialist post in Johannesburg, South Africa. In this application, the applicant stated the reasons why he believed he was suitable for this position, though he did not mention his personal circumstances. On 19 December 2008 the Human Resources Director informed the applicant by letter that he had been selected for the position and stated that –

The start date for this assignment is to be determined, but with reporting for duty in Johannesburg, South Africa no later than 1st February 2009.

...

I look forward to your response, confirming the date of your reassignment for this position, by return email to [the Human Resources Director's email address] within five working days i.e. by COB Tuesday 30th December 2008.

21. By email of 29 December 2008 the applicant replied the Human Resources Director by email (copied to the Africa Regional Office Director, to whom the applicant apparently thought he was to report in Johannesburg, and two other unknown persons) –

I am glad to learn of the selection and will accept.

Note, however, that there is a problem with regards to timing.

It was my understanding that the UNOPS rotation would be effective in June 2009 to accommodate families with school age children.

My daughter started college this fall. However, my son is in 9th grade at UNIS and I do not want to uproot him in the middle of the school year.

Alternatively, if the rest of the family remains in NY for him to finish school, I will be burdened with 2 sets of household costs – which would cause financial hardship.

I hope that we can find a solution acceptable to everyone. E.g., I could go on mission to Johannesburg for a month, or so in the later part of the first quarter. Then work from NY until June, if necessary with an additional mission during that period.

22. On 31 December the General Counsel and Ethics Officer of UNOPS replied to the applicant's email as follows –

...

We need this post operational as early as possible. 1 February 2009 is the latest date, for operational reasons. We noted that you applied for this vacant post – not in the list for rotational reasons, as you know – presumably knowing it was needed urgently, and I think, if my memory serves me right, you had indicated (in relation to the Nairobi post) that you could be available in November 2008.

In any event, this is a crucial post operationally. It is also a good post for you to get back into the mainstream after your sick-leave, it's a post where your services are urgently required, and it is a UNOPS-regular one year contract. Whilst we must insist on 1 February 2009 as the latest starting date, I'm sure that a flexible approach would be applied to short periods of advanced leave, if you needed to be in New York for your children at any specific time in the near future.

Please give me a yes or no to the offer that was made to you ... I sincerely hope the answer will be yes, as I don't want you to miss this opportunity.

...

23. On 2 January 2009 the applicant replied to General Counsel (copying the Africa Regional Office Director and the applicant's counsel) –

Thanks for your response ...

Obviously, I am disappointed.

You have a couple of wrong assumptions in it.

First, I was not aware that this was advertised outside of the rotation exercise. As you know, I received a termination letter on 1 December 2008, which also suggested that I could apply in the rotational exercise for which the deadline was a few days later. I clicked on the 'rotation exercise' link on the intranet and printed the TORs that were of interest to me. Nowhere did I notice that the Procurement Specialist post in Johannesburg was to be treated differently on the web page – if it was actually specified. I regret having not noticed – however, the TOR do not stipulate a unique start date.

Hence, my impression that normal rotation will take place in June.

I have indicated my willingness to accommodate the organization as per my previous message. In response, you give an ultimatum.

You also reference my earlier acceptance for Nairobi. The cases simply cannot be compared. The prior case was for a 6-month non-family assignment. The current one is a 1-year family assignment. Accordingly, I would appreciate to receive the direct input of the Regional Director with regards to finding a practicable solution to the timing. My proposal would actually allow becoming operational early, and as previously stated, I am open to a discussion in finding an acceptable solution for everyone.

24. On 13 January 2009 the Africa Regional Office Director replied to the applicant's email (copying the persons in the applicant's email and adding the Human Resources Director) –

...

Apologies for the delays in responding this message. I was on AL. Following up on the a.m. issue, I would like to reiterate what I have been mentioning before.

You might know that, the position of Procurement Specialist for Africa regional office is vacant and needs to be filled urgently in order to meet our 2009 business targets. This position is the only regional procurement resource and already presents a major gap in our operational resources, so we cannot agree to a later start date nor in short term missions.

I have also called the attention o [sic] the Senior Management in UNOPS to the implication and severe consequences that the lack of such specialist in the region had created so we can no longer afford to operate without having the selected candidate on board in

Johannesburg in order to (establish the AFO LCPC [unknown abbreviation]; provide advice and support to AFO procurement activities, including the transition of SOOC to AFO and provide procurement services to existing and new AFO clients and projects etc . [sic]

These are key Business targets adequately perform these tasks critical within the services area in Q.1 2009 and we are unable to adequately perform these tasks until the position is filled, so an early start date is critical.

I hope I am clear in this regard, so any effort to ensure that we could start regular operations no later than 1st of February would be greatly appreciated.

25. On 15 January 2009 the applicant forwarded the following reply to the Africa Regional Office Director (copying the persons from the previous email and adding the UNOPS Executive Director) –

We do have a problem with this!

To briefly recap:

Early December I applied for several posts listed under the rotational exercise, an exercise planned for implementation in June to accommodate families.

Notice of my selection received just before Christmas, giving me 5 days to respond, and informing of a start date now determined to be 1 February, not June as previously informed by the organization.

I respond with acceptance, but with exception to the date – and point out the detrimental conditions to the family, I make a reasonable proposal that should accommodate both parties.

In response, the Chief Counsel arrogantly states that I should have known that the post was to be filled urgently. Though, no credible explanation has been provided by anyone to demonstrate how this would have been possible. And then gives an ultimatum: yes or no!

In response, I point out to him the shortcomings of his argument and request your input. I maintain my proposal for solution.

And now, regrettably, you simply repeat the previous, faulty arguments and again I get an ultimatum. Keep in mind that it is UNOPS that has changed the requirement – and therefore should be accommodating. But there is not even an attempt. Quite a disappointment.

In any case, the above issue has now been overtaken by something of far greater significance, I am sure [the UNOPS Executive Director] can confirm to you that I have good reason to remain in New York to defend myself against a current, nasty situation of defamation against my person by UNOPS. So far, UNOPS has taken no action to actually repair this situation, and though the action may have been accidental initially, it is becoming malicious simply due to the detached, unconcerned and much delayed response. The information now available seems to suggest dissembling (or worse) by one (but possibly others, future will tell) senior manager.

There is no point in discussing a start date until this issue is satisfactorily resolved.

26. On 23 January 2009 the Africa Regional Office Director replied to the applicant's email and stated (copying as in the previous email) –

...

Related to your e-mail as I have explained to you when we met in NY, it is very difficult for me to reconcile the Africa regional office's needs, especially the starting date for this position. I am also surprised to notice that somehow it had been understood differently from what I have communicated to HQs. You have said in your e-mail to [the first name of the General Counsel] of 2 January that you believe that normal rotation will take place in June – I have consulted about this issue, and been told that the rotation AI does not set any firm date, but instead says that UNOPS will have staff rotate around that period “as far as possible”. I believe it was clear from my last e-mail to you that the consequences of not having this position filled in February will severely affect the Africa regional office performance. June is simply not possible.

In light of the above, could you please let me have your answer by next week? I would still like to have you onboard in early February. However, if you are not able to start in February, I will have to restart the recruitment process to have another person onboard asap – if you change your mind before another person is recruited, I will stop the process-. [sic]

I am really sorry that things have not worked out, at least for now. I can only wish that a quick resolution of the current situation would be soon accomplished by all parties involved.

27. On 26 January 2009 the applicant replied the Africa Regional Office Director (copying as in the previous email) –

Thanks [first name of the Africa Regional Office Director].

Yes, I know that in a parenthesis under para. 3.7 of AI/OEC/200S/05 it is stated: (As far as possible, rotational movements should occur in the third quarter of the year, during which the staff member completes his/her tour of duty to take into consideration leave periods and school calendars).

In this case, no consideration is given to the staff member, though I have made a reasonable proposal (which can be adjusted) that would enable operations in this quarter.

I note that the relevant AI (under para 3.6.1 (d) also requires the ASB to consider the “special circumstances” ... relating to school/family ...

Please provide the records for such considerations. I presume the ASB has minutes and that [the Human Resources Director] can provide them.

28. On 28 January 2009 the General Counsel replied to the applicant’s email and stated (copying as in the previous email) –

... I note that the AI says “special circumstances on the application form”, not just “special circumstances”? Were there any special circumstances mentioned on the application form? If so, please give a reference.

29. On the same day the applicant wrote the General Counsel back (copying as in the previous email) –

In [sic] was advised that I could apply for the Rotation in [the Human Resources Director]’s termination letter to me on 1 December – giving me 3 days to respond. I made an online application based on the instructions posted on the web page. I saw no reference to an application form, thus could not mention any special circumstances, and having the assumption that the rotation would take place in June, I saw no reason to mention that issue.

But UNOPS HR is very much aware that I have children in school, since I apply for Ed Grant and I presume that my HR folder has all that info. Did the ASB consider my case?

30. On 29 January 2009 the General Counsel answered the applicant (copying as in the previous email and adding two UNOPS legal officers) –

Thanks for confirming that the special circumstances were not included on the application form. It follows that ASB was not obliged by the AI to consider those special circumstances.

Yes, of course, the appointment to the post you have been offered, was considered by ASB, as are all appointments to 100 or 200 series posts. Although I am the Chair of ASB, I did not chair on that day, and thus I cannot tell you what was discussed, and the discussion is, of course, confidential.

I was, however, personally pleased that you were offered this post, in spite of not being perhaps totally qualified for it, since I wanted you to have a chance to get back to work after your illness in a new position, where you could have a fresh start. I think [first name of the Africa Regional Office Director] is of the same view, but you will know that with a portfolio such as he has to control, he cannot wait for ever for a Procurement Officer.

I believe that the time has come for you to make a decision. You were offered the post effective 1 February 2009 – it seems unlikely that you will actually meet that, but please come back with a sensible date in early February, or we will have to assume you are declining the offer.

31. On 2 February 2009 the applicant wrote back to the General Counsel (copying the persons in the previous email) –

I must take exception to your condescending message below.

In particular, I find this sentence objectionable: “I was, however, personally pleased that you were offered [t]his post, *in spite of not being perhaps totally qualified for it*, since I wanted you to have a chance to get back to work after your illness in a new position where you could have a fresh start.” [my emphasis]

First of all, the issue of my qualifications is of no relevance to the ongoing discussion. Bringing it up at all is a classic example of subtle power abuse and I will not accept it. It is stunning to observe such behavior by an Ethics Officer. Furthermore, you know perfectly well that I am over-qualified for most aspects of the post.

More disturbing, however, is witnessing the time and energy you expend on this exchange – about a distinctly mundane issue of a transfer date, while you totally neglect responding to a much more pressing subject. More than 4 weeks have passed since I notified you of a nasty breach of confidentiality by UNOPS. You have yet to provide a satisfactory response to most of the issues I have raised

including who is responsible, on the contrary, you have provided dissembling responses that were intended to deceive.

I will make a commitment on the post once you have satisfactorily dealt with the confidentiality issue. Recall that you wrote to me on the 24th:

“The document is not googlable if it is still on ODS (which we will check on Monday), we will rectify that ([first name of a UNOPS legal officer], please investigate this with IT help on Monday).”

What specific actions have been/will be taken? The document is still there in multiple languages.

32. On 6 February 2009 the Africa Regional Office Director replied to the email (copying as the previous email) –

I have been following the below e-mail exchanges with regret. I appreciate that this is part of a long-running dispute between you and the Organization which remains to be resolved. I do not know enough to offer a solution to this dispute. What I do know is that AFO urgently needs a procurement specialist in Johannesburg and, if you wish, you could make a big contribution to AFO and UNOPS, as well as development in the Africa region, in this capacity.

Consequently, kindly advise on or before Monday (9 February 2009) whether you will relocate and start working in Johannesburg by 1 March 2009. Please note that if you do not confirm that you will relocate and start by 1 March 2009, I will ask HR to put alternative arrangements in place on Tuesday.

33. On 9 February 2009 the applicant answered the Africa Regional Office Director back by email (copying as in the previous email) –

You are right that there is an ongoing dispute which turned for the worse after UNOPS breached my right to confidentiality and also prejudiced my future employment prospects. I am saddened that we both have become hostage to the lack of courage in senior management as demonstrated by the lacking response, and much regret how this affects your operational needs.

A full five weeks have gone by since I notified UNOPS of a problematic internet posting, yet, the organization acts as if no damage is caused and that I am a nuisance having the audacity to request clarifications and accountability. I'm not sure if you have seen all the relevant exchanges, but to date UNOPS has totally ignored to respond

to me (with the exception of a couple of dissembling and confused messages). My queries are basic and could have been replied to in a matter of a few days if UNOPS was acting in good faith.

Unfortunately, I have to repeat my earlier response as given to [the General Counsel]. In other words, I will respond to you as soon as UNOPS has clarified the situation. A clarification would:

- Acknowledge full responsibility for the breach of confidentiality
- provide an outline for how it intends to satisfactorily repair the damages caused
- assess responsibility and accountability for the persons involved
- provide a guarantee that the document will not reappear on the web some time in the next few months (it seems that UNOPS is of the opinion that it will not reappear, against all advice to the contrary)
- advise on what specific steps have been made to date to have the document removed from the UN database

Since UNOPS has already had more than a month to review all these issues and to take corrective actions, I trust that HQ will respond accordingly to the above by Monday 9th. Otherwise, if there is no proper response, I will have to request an extension of the deadline you stated.

34. On 11 February 2009 the new UNOPS General Counsel (formerly one of the legal officers copied with part of the email correspondence) wrote to the applicant (copying the Africa Regional Office Director, the Human Resources Director, the UNOPS Executive Director and an unknown person) –

I am writing to provide the clarifications you have sought from UNOPS, as reiterated by you this last Monday in your email to [the first name of the Africa Regional Office Director], with respect to the inclusion of your name in Note 15 of the UNOP5 Financial Statements for the Biennium ending 31 December 2007. I have made this matter a priority since taking up my position as General Counsel on 1 February.

I would like to place on the record my sincere apology on behalf of UNOPS for the circumstances that led to the inclusion of your name in the Note to the UNOPS Financial Statements, and the consequent hurt that it has caused you. It was an error for UNOPS to have included such information, as it is generally the practice to keep personal information of individuals and companies confidential.

Last week I wrote to the United Nations Board of Auditors formally requesting that the original Financial Statements be redacted to eliminate your name from Note 15 in the version that appears on the United Nations ODS. I will be following up with them so that our request can be addressed as quickly as possible. As you already have been informed, UNOPS has redacted the document that appears on the UNOPS site in a manner such that any new searches referencing your name will not lead to that original document on our site. I understand that the issue of the cached original will resolve over time.

I am also exploring the possibility of including some written statement on the website with the redacted text to explain the redaction, and, without mentioning your name, identifying that an error was made with the disclosure and also explaining the UNOPS position with respect to contingent liabilities for open claims and cases; i.e., that legitimate disputes may arise from time to time between UNOPS and either companies or individuals, but that no inference may be drawn from the mere existence of a dispute. I am prepared to personally respond similarly to any individual who raises the matter to the attention of UNOPS.

I am not in a position to guarantee that the document will not reappear on the web at some point in the future. Where it comes to my attention that it has reappeared, I will also write directly asking the individual who made it available to remove it or replace it with the redacted version and disclaimer.

I have looked into how this happened in the first place. I have learned that the original table was prepared by UNOPS Finance for a letter that is sent biennially from the UNOPS Director of Finance to the UNOPS General Counsel so that the General Counsel may make a representation for the UN Board of Auditors as to the accuracy and reasonableness of the description of contingent liabilities identified by the management of the Organization. Contingent liabilities must be disclosed in the notes to the Financial Statements – it is required by the UN Board of Auditors. The table of contingent liabilities [sic] was part of the representation letter, not the Financial Statements. However, after the representation was made by the General Counsel, rather than providing a summary of the total values of contingent liabilities contained in the representation letter or redacting out identifying information concerning the specific cases, Finance [sic] evidently cut and pasted the whole table into the Note. That went undetected in the final review of the Financial Statements that were ultimately sent to the UN Board of Auditors. I am therefore satisfied that this was a mistake and not an action driven by improper motives on the part of

anyone in UNOPS. In this regard it is noteworthy that the table contained all cases with UNOPS and not just yours.

Once again, I am sorry that this has happened. I am somewhat relieved by the fact that the disclosure involved an administrative dispute rather than anything that would have pointed to character or other aspect that could have impugned your name and reputation. This latter point, [the first name of the applicant], is not meant by me to excuse the mistake, and I do want to assure you that I will be diligently following this matter closely, should external factors unfold in a manner that could cause some potential for harm to your name or reputation through disclosure of the original text.

I hope that you now will be able to move forward with respect to the offer from UNOPS to assume the Procurement Officer position in South Africa by 1 March 2009, which I understand is quite critical for the operations of that office, and for which you have been selected. [The Africa Regional Office Director] will expect your definitive answer to his email by close of business, New York time, this Friday, 13 February 2009.

35. On 12 February 2009 the applicant replied to the new General Counsel (copying in the Africa Regional Office Director and his own counsel) –

I'll address the internet issue separately, but would like to share some thoughts on the Johannesburg assignment.

Until 2 weeks ago, I was communicating with [the former General Counsel] in his capacity as a senior official. His conduct was, in my opinion, not appropriate on several levels. I don't think there is much point in rehashing the issues here – it is spelled out in earlier exchanges. However, one of the issues I found problematic was that the Johannesburg assignment became a 'political' tool that he abused. He was well aware that the JAB had requested additional information from the parties that was due mid-February (in fact, today, I believe). There was also the confidentiality issue to deal with, though he showed little intent in resolving it. My point is that forcing me to do a quick relocation in February would seriously distract me from attending properly to my own case.

Now, I know very well that [first name of the Africa Regional Office Director] has no such motivation. We met here in NY 3–4 weeks ago and I understand well his predicament. Yet, I find it unfair to be forced to relocate in 2 weeks if we at the same time are to do good faith negotiations to find an agreement. Actually, I think it is a bad solution for all parties.

Assumption 1: Good faith negotiations to find mutually agreeable terms for separation from service. It is my understanding that UNOPS wishes to pursue this and I would like to do the same. Why risk the considerable mobilization cost to relocate me 1 March, if an agreement is in place by then or shortly after.

Assumption 2: That we can commence substantive discussions on the subject very soon (next week?) and that an outline for agreement can be determined by me end of the month. There may be practicalities and details to iron out after that – but it would be clear by then whether an agreement can be reached or not.

Outcome A: No agreement. I will proceed to Johannesburg by 10–15 March. Given the recent treatment I have received by UNOPS, I hope you will consider one accommodation – also since the assignment takes place before other rotation, with consequent need to maintain 2 households to the end of the school year.

It is a somewhat modified version of what I had suggested earlier:

That I initially go on mission, say for 4–6 weeks. Return to NY mid-April to prepare relocation to Johannesburg by early May. In this scenario, I would only have to maintain 2 households in May and June, and I cannot see that it would have major impact on operations.

Outcome B: An agreement is reached by early/mid March. Depending on practicalities, separation could maybe be as early as end March.

I would assume that [first name to the Africa Regional Office Director] is already considering the consequence of a possible agreement and is making contingency plans for such eventuality. I have one more suggestion in this regard – obviously, UNOPS and [first name to the Africa Regional Office Director] has no obligation to consider:

[First name to the Africa Regional Office Director] has emphasized his urgent need for this capacity. If we come to an agreement for separation, I am still willing to postpone the effective date until later in the spring if this could help the Regional Office. I could go on mission for 4, 6 maybe 8 weeks to get the job started (assess capacities, conduct training and capacity building) while a permanent person is mobilized (assuming this takes 2–3 months to mobilize).

36. Later the same day, the applicant and the new General Counsel spoke by telephone. According to the respondent, during this conversation it became clear to the new General Counsel that the applicant's primary objective was to reach a settlement and separate from service; alternatively he would accept the Johannesburg

post and relocate by mid-March. The applicant also sought a one month's extension of his contract. In an email from the applicant to his counsel subsequent to the telephone conversation the same day, the applicant stated –

I just had a long talk with [the new General Counsel].

Very positive. He will support what I suggested in the other messages.

...

37. Even later on 12 February 2009, the applicant wrote the new General Counsel (copying his own counsel) –

...

One more issue

I don't know if you are aware, but my current contract expires on 28 February. For the last 2 years, I have been given 1, 2 or 3 months extensions and I find it a bit degrading (there are also several practical consequences). Anyway, it would be uncomfortable for me to negotiate with my back against the wall, so to speak. Hence, I'd like to suggest that UNOPS extends my contract until the end of April (at least). If, based on the scenario I described in the other message, we come to an agreement, the extension can be foreshortened. And if there is no agreement, I will in any case be on my way to Johannesburg.

Can this be arranged?

38. On 17 February 2009 the applicant and the new General Counsel continued settlement discussions, and the latter stated that he would convey the applicant's positions to the UNOPS senior management. On 19 February 2009 the new General Counsel informed the applicant that since the applicant had not responded to the 13 February 2009 deadline concerning the job offer, this offer was withdrawn. In addition his contract would not be extended beyond 28 February 2009. According to the respondent, another person was assigned to the Johannesburg post from 1 March 2009.

39. On 20 February 2009 the acting Human Resources Director wrote the applicant by email (copying the new General Counsel and the Human Resources Director) –

Further to [the first name of the new General Counsel]'s e-mail of 11 February and your reply (reproduced below for ease of reference), which [the first name of the new General Counsel] kindly forwarded to me: as [the new General Counsel] had indicated, [the Africa Regional Office Director] and AFO needed answer by 13 February 2009 as to whether or not you would be joining as a procurement specialist by 1 March 2009.

As you know, AFO have long needed the position to be filled, and have demonstrated tremendous patience by waiting well past the 1 February 2009 starting date that had originally been set. However, we have reached the point where AFO must move forward, even if it means without having you at AFO as you have not committed to the starting date.

It is against the above background that I must inform you that OEC/HR and AFO have identified another staff member to immediately take up the position of AFO procurement specialist. That person has just accepted this position.

Unfortunately, this means that the AFO position is no longer available to you. You will recall that [the Human Resources Director] had sent a memorandum to you on 28 November 2008 extending your appointment to 28 February 2009, and also providing you with formal notice that your appointment will not be extended further, unless you secured and accepted another position in UNOPS.

I regretfully note that the foregoing remains applicable. As [the Human Resources Director] is currently on annual leave, I must inform you that you will be separated from service with UNOPS effective end of 28 February 2009. UNOPS will, of course, continue to provide any assistance or guidance you may require in your search for alternative employment. If UNOPS is able to provide any other assistance to you during the next few weeks, such as providing documentation in support of any application you may wish to file with the authorities for a change of USA visa status, please do let us know.

40. On 24 February 2009 the applicant responded (copying as in the previous email and adding his own counsel) –

Please take note that proceeding with my separation at this point would be illegal and would increase UNOPS' liability in this case. I therefore suggest that you retract your communication immediately.

I had long suspected that the interview that took place two years ago and the subsequent decision making process was not properly documented. Upon receiving a specific request from the JAB secretariat, UNOPS has now been forced to admit that no contemporaneous record exists (confirmed to me yesterday, though HQ staff would – or should – have been aware of the situation since well before your message was prepared – presumably with assistance from a legal officer). This admission will have a profound impact on UNOPS' case, as well as for the senior managers and other staff that were involved in covering up a botched recruitment process.

Further, I would like to state for the record an observation on the “internet issue” (you have not been included in the previous e-mail threads, I will forward separately to you the relevant communication). UNOPS has admitted responsibility for breach of confidentiality. My claim in this regard will include financial compensation for:

- general defamation due to the nature and content of the published information: 3 months net salary
- the cavalier attitude, unnecessary delays in taking appropriate action and attempts to deceive by the (previous) UNOPS Ethics Officer (and General Counsel): 3 months net salary
- for potential future earnings loss and potential exclusion from consideration for positions of special personal interest: a lump sum – TBD

Last week, as your message was being prepared, I was given an ultimatum in this regard. UNOPS offered me a one month contract extension until 31 March as full and final compensation for the wrongful post (all the while the document remains in the public domain on the UN ODS, thus creating additional damage as we speak).

This type of extortionate behavior is beyond the pale – in particular because those making the decision on this “offer” (presumably the ED and/or the OED) must have been aware that the UNOPS case was unraveling – and therefore, that a separation at this time would be illegal.

You are probably aware that I have filed a request for SOA with the JAB. A hearing is scheduled for Thursday morning. You may want to avoid the additional embarrassment to UNOPS that a hearing and subsequent records/recommendations will cause.

Applicant's submissions

General

41. The respondent has not been able to provide documentary material to substantiate the lead up to the abolishment of the applicant's position in the North American Office in 2006. Only rudimentary and preliminary proposals were presented to the UNOPS staff, and the person who was apparently the Human Resources Director at the time never responded to an enquiry by the applicant. The abolition of his post was questionable, the subsequent selection process was procedurally flawed and influenced by extraneous consideration, which led to the applicant's eventual termination. The opening of a job fair to ALD staff (whose post were not abolished) was an anomaly, and it is not proved that the policy change as expressed in the Policy was consulted with the Staff Council before being implemented or that the established policy on order of retention in service was respected.

Relating to case 1

42. The first interview process was flawed as: the chairperson was not from the division/unit concerned and was external to UNOPS; the chairperson was a referee nominated by the successful candidate and he declined to withdraw; the human resources expert was allowed to score the candidates; no minutes were produced and none of the deviations in the process were recorded or justified; the human resources expert discussed the details of the process with person outside the panel; no reasons were provided explaining why the process was cancelled; and the human resources expert had not familiarized himself with the specific rules applicable to the UNOPS restructuring. The respondent has not been able to satisfactorily explain these irregularities. UNOPS would not have been able to proceed with the recommendation and selection of the successful candidate at this stage, since minutes would have been necessary and the Staff Council representative would have objected. Although not quite expressed in this way, I understand counsel's submission to be

that, in the alternative, the successful candidate should not have been selected since, the scores being equal, the applicant should have been selected as a long-serving staff member with five years or more of continuous active service in accordance with par 38 of the Policy.

43. Again, in the second round of the interview process, the chairperson was not from the division/unit concerned as he was external to UNOPS. In addition, the human resources representative also scored the candidates. Finally, the staff representative was not designated by the Staff Council but by management.

44. The panel for the third interview was again chaired by a person external to the division/unit concerned and the human resources representative again scored the candidates. In general, the candidacy of the applicant did not receive full and fair consideration at the interviews because of UNMAS' explicit dissatisfaction with the applicant, which was misdirected since the problems were of systemic nature. At the same time both the applicant's immediate supervisor and UNMAS wanted the successful candidate to move from his previous position.

45. Concerning the APB review process, the APB was not informed that there had been a first interview round which had been cancelled. During the second APB review, a reference check was undertaken and the Director of UNMAS was contacted in respect of the applicant even though the applicant had not listed him as a referee. The second APB was not appropriately constituted since none of its members were, as required, at the same or higher level than the applicant. The appropriate authority had not waived this requirement, and the members' youth and lack of experience made them more susceptible to be manipulated or influenced by presentations made by the Administration. The critical information from the reference checks was never shared with the applicant, who therefore could not address or rebut it. The UNMAS Director's negative comments amounted to an attempt to veto the applicant's candidacy.

Relating to case 2

46. The respondent did not provide any information concerning the process leading to the cancellation of the applicant's appointment to the Nairobi position as set out by the Human Resources Director in her letter of 28 November 2008.

47. The new General Counsel offered the applicant the possibility of a global settlement of all his claims in which the applicant expressed his general interest. The applicant therefore suggested postponing his move to Johannesburg until 10–15 March 2009 to allow time for negotiation. The applicant never rejected deployment on 1 March 2009, but was simply awaiting management's decision on whether it agreed to the short postponement for which the new General Counsel had expressed support.

Respondent's submissions

General

48. UNOPS' Organizational Directive No. 11, "HR Framework for the UNOPS Transition", set out the procedures applicable to the process of staff selection in respect of UNOPS' restructuring and transition process, including that all UNOPS staff members holding 100, 200 and 300 series letters of appointment were eligible to apply for vacant posts. This took effect from the first version of the policy of 1 March 2006 to the third version of 28 December 2006, which applied to the applicant. Contrary to the applicant's assertion, the opening of the job fair to ALD staff members (300 series staff members) was not an "anomaly".

Relating to case 1

49. The decision to cancel the first interview was reasonable because of the alleged bias of the chairperson and the staff representative and the tied score. Even if the interview were to be upheld, the seniority rules did not apply, since at all relevant

times the applicant's contract was governed by the 200 series staff rules and was inherently temporary (contrary to the applicant's assertion that he was a "core staff member"). UNOPS' obligations in situations concerning abolishment of posts only relate to the 100 series and not 200 series rules: UNAT 1163 *Seaforth* (2004) and UNAT 885 *Handelsman* (1988). No seniority provisions in the Policy are relevant, since par 38 expressly refers to staff rule 109.1(c) (a 100 series rule) and is limited in scope to where 100 series staff members are equally qualified – the one with more seniority is then given priority. Accordingly, the rule does not give priority to 200 series staff members (the applicant) over 300 series staff members (the successful candidate), which UN Administrative Tribunal also stated in UNAT 1254 (2005). Even if seniority rules gave preference to the applicant, he still would not have been awarded the post since it is doubtful that the first interview would have been the only step in the recruitment process.

50. The second interview was properly constituted, but the applicant refused to participate, for which reason the respondent could have removed him from the selection process but it instead held a third interview to ensure fairness and transparency. In the third interview round, only the results of these interviews were used. Since a majority of the panel members recommended the successful candidate over the applicant and the remaining member (the staff representative) dissented solely because of his mistaken assumption that the applicant held a 100 series appointment, this amounted to a unanimous recommendation of the successful candidate. The references and performance evaluations for both candidates, which the APB instructed the panel to obtain, only confirmed the panel's initial recommendation.

51. The decision concerning UNMAS staff members participating as chairpersons for the UNOPS interviews was made with the express intent of following the purpose of the Policy. As a result of the restructuring of UNOPS the applicant's North American Office was abolished and all its staff members needed to be interviewed to continue with UNOPS. It was unreasonable to ask NAO staff members, who were

experiencing the stress of the restructuring exercise, to shoulder the additional burden of reviewing applications and candidates. The only exception was the NAO Director, but she did not possess a mine-action background and did not have the required “knowledge and expertise” as stipulated in par 16 of the Policy. With no NAO staff members available, the best alternative was to seek the assistance of other senior UN persons who not only had mine action expertise, but also a reasonably good knowledge of UNOPS operations. The UNMAS staff members that were selected as chairpersons all satisfied these criteria. The applicant never expressed any concern to the interview panels about this. As for the human resources expert scoring the candidates this had no influence on the selection, and at the time it was common practice that the human resources expert participated in the scoring.

52. That UNMAS vetoed the selection is a mischaracterization of the nature, role and power of a selection panel: *Sefraoui* UNDT/2009/095 –

A selection panel is not a judicial or quasi-judicial tribunal having the duty of impartially determining a case between litigating parties, each of whom must be made aware of and have the opportunity to respond to the evidence upon which the case is to be decided.

53. Requesting references and performance evaluations is proper, since these provide useful information to be considered by a selection panel and such information is often more valuable than the answers that a candidate gives in an interview. To allow a candidate to filter or prevent adverse information from being considered by a selection panel would deprive the panel of relevant information. The UNMAS Director’s reference contained relevant comments about the applicant’s performance and there is no evidence that the UNMAS Director was personally biased against the applicant. That some of this information was in fact provided by the UNMAS chairperson from the first interview made no difference, since it would have weighed in forming the UNMAS Director’s opinion in any case. UNMAS did not veto the selection process since “veto” means overturning or refusing to endorse a particular decision, rather the information from the reference confirmed the selection already

made. As for asking the UNMAS Director for a reference this was appropriate since the applicant had not provided any references himself as he was otherwise required to do.

54. The APB instructed the third interview panel to obtain performance evaluations for both candidates, but the applicant did not provide his 2005 and 2006 performance review reports as requested. The UN Administrative Tribunal found in UNAT 962 *Bruer* (2000) that a staff member, who through his own fault fails to prepare performance evaluation reports, and thereby precludes the Organization from assessing his performance and making a decision based thereon, cannot complain of prejudice or improper motivation if his contract is not renewed. (Since the absence of the performance reviews was not an issue as the matter ultimately unfolded, it has not been necessary to deal with this submission. Moreover, *Bruer* is not relevant to any issue in this case).

55. Both APBs were properly constituted. First, when the APB first convened, it decided not to simply endorse the selection panel's choice of the successful candidate but rather to seek further information through references and performance evaluations, which shows its objectivity. Secondly, the APB's composition was consistent with the APB composition for numerous other posts, which reflected the small pool of senior professional staff at UNOPS Headquarters in Copenhagen and was not influenced by any prejudice against the applicant.

56. The Executive Director's selection of the successful candidate was not flawed and the applicant was informed about this at the meeting of 31 March 2007. The Executive Director simply advised the applicant that he intended to follow the APB recommendation, but he had not yet made a final decision. Even if the Executive Director had made up his mind, staff members do not have any entitlement to meet the Executive Director prior to him deciding on whether or not to accept an APB recommendation. In this case the meeting was a mere courtesy and not envisaged at any stage of the selection process.

Relating to case 2

57. The 1 February 2009 start date was a bona fide operational requirement and in accordance with UNOPS' Staff Rotation Policy and the implementing administrative instruction AI/OEC/2008/05 in which par 3.7 states –

Reassignment action: The staff member should be reassigned to the new duty station, subject to successful government, medical and other clearances, as may be required. (As far as possible, rotational movements should occur in the third quarter of the year, during which the staff member completes his/her tour of duty to take into consideration leave periods and school calendars.)

In other words, while rotation should ideally take place in the third quarter of the year, operational requirements, such having the Johannesburg post filled immediately, may dictate otherwise and the applicant was aware of this. Both the Rotation Policy and AI/OEC/2008/05 instructed applicants to indicate special circumstances for their applications, such as schooling/family or residence/employment of a spouse at a duty station. However, the applicant did not mention any such special circumstances and is therefore estopped from claiming that he should not have been forced to relocate in February or March.

58. The respondent did not unlawfully rescind its offer to the applicant for the Johannesburg post. No contract was created because the offer was not unconditionally accepted. The applicant refused to accept a fundamental condition of the offer, namely the start date of 1 February 2009. This date was later revised by the respondent in view of the applicant's refusal to accept the dates offered by the respondent. The latest date offered by the respondent was 1 March 2009 with a deadline for the applicant to respond by 13 February 2009 (see the new General Counsel's email of 11 February 2009), but the applicant never did. The applicant was initially offered the position on 19 December 2008 which specified the starting date as no later than 1 February 2009. The applicant was told several times in writing about the urgent operational necessity of filling the post by that date. Nevertheless, the applicant would not and did not unconditionally commit to the offer. In total, he

was given four deadlines by which to unconditionally accept the offer, but in each case he did not. The former UN Administrative Tribunal stated in UNAT 519 *Kofi* (1991) that –

... an offer creates a power of acceptance, which, if exercised within a reasonable time, operates to form a contract even though the acceptance states terms additional to or different from those offered or agreed upon, unless the acceptance is expressly made conditional on the offeror's assent to the additional or different terms.

The Administrative Tribunal concluded that it –

... cannot accept the view of the Applicant that one can simultaneously accept an offer while making it clear that a modification will have to be made in the date for commencement of his professional teaching duties. That date was plainly of the essence for an academic institution ... and the offer did not invite further negotiations with respect to it ... When an offeree acts as the Applicant did, his behavior indicates that a counter-offer is being made or contemplated and, therefore, no legal basis exists for finding that a contract was formed ...

59. Even though the offer automatically lapsed once the deadline of 13 February 2009 had passed, as no agreement was reached within in a reasonable period of time after the initial offer of 19 December 2008, the respondent was within its rights to withdraw it. The applicant attempted to renegotiate a fundamental condition of the offer to which the respondent could not agree for operational reasons. The respondent kept the offer open for several weeks, but since no agreement was reached, it was eventually withdrawn. An offer can be withdrawn if it is not unconditionally accepted within a reasonable period of time: UNAT 433 *Ziegler* (1988).

60. The applicant had no right or expectation of renewal of contract, even if negotiations for a new contract are undertaken, as he held a 200 series contract. The applicant's contract expired on 28 February 2009, which he was informed about on 30 November 2008, and neither the offer nor the negotiations concerning the Johannesburg post created a right or an expectation of renewal. When the applicant

did not accept the offer concerning the Johannesburg post, his contract was not terminated but simply expired. The fact that there were ongoing negotiations with respect to the new offer created no expectations of renewal. In *Ziegler*, the former Administrative Tribunal noted that –

It is well settled that employment under a fixed-term appointment with the UN ceases on the expiration date of the contract. A controversy about the terms of an offer of a further appointment does not create any expectancy beyond its terms and the offer can be revoked if not accepted and confirmed before it is withdrawn. Cf. Judgment No. 96, *Camargo* (1965) and Judgment No. 297, *Panis* (1982) ... Accordingly, the Applicant had no further entitlement to employment with [the Organization] after the expiration of his fixed-term appointment ...

At no time could the applicant have interpreted negotiations over the start date of the proposed Johannesburg post as creating any expectation of a new contract. He was several times advised that if he did not unilaterally accept the offer UNOPS would recommence its search for a suitable candidate. The former Administrative Tribunal in UNAT 885 *Handelsman* (1988) stated that, even if there is no express promise –

... the Administration's conduct may mislead staff into creating expectancy, calling for compensation.

However, the discussions between the applicant and the new General Counsel did not create such an expectancy of a later start date, and it became clear during their discussions that the applicant's primary objective was to reach a settlement to separate from service. The new General Counsel's communications did not amount to an agreement on extending the deadline of 1 March 2009 for the applicant to report to Johannesburg, instead he simply advised the applicant that he would raise the various issues with senior management who alone had the authority to approve any settlement and decide on the Johannesburg posting. In UNAT 342 *Gomez* (1985) the Administrative Tribunal stated –

V. ... [T]he Administration must behave responsibly in its administrative arrangements and refrain from expressing hopes or intentions it has no expectation of fulfilling; but, in the absence of

special considerations that do not appear in the record of this case, failure to realize plans expressed in inter-office memoranda of this type will not give rise to legal responsibility or financial liability.

61. The “internet confidentiality issue”, which concerned the applicant’s name being inadvertently included in the UNOPS Financial Statements for the Biennium ending 31 December 2007 and publicly posted on UNOPS internet site, was irrelevant to the applicant’s failure to accept the offer, even if the applicant was not satisfied with the respondent’s steps to rectify the error. (This is an irrelevant matter and is therefore no discussed in this judgment.)

62. The applicant’s actions raised doubt on whether he ever intended to accept the Johannesburg offer. First, even when reminded of the urgency of the position and faced with the possibility that the respondent would put his recruitment on hold the applicant did not accept the offer. Second, the applicant illogically and unreasonably cited the “internet issue” as a reason for delaying his start date in Johannesburg. Third, the applicant utilized settlement negotiations with respect to the earlier 2007 case in which he was seeking an extension of contract solely for the purpose of settling the dispute and leaving the Organization rather than go to Johannesburg. Fourth, when the applicant commenced a Suspension of Action on 24 February 2009, he did not ask the JAB to suspend the respondent’s impending transfer of another staff member to fill the urgent Johannesburg post.

Considerations

General

63. It is worth making two initial points at the outset. The first is that the propriety of the restructuring of UNOPS and its ensuing policies is not a matter that arises for determination but, rather, provides the context in which the selection process involving the applicant is to be examined. Although the decisions under consideration are separate, they are connected in the sense that, if the evaluation of

the applicant's candidacy had not been affected by illegality and he had been appointed, the applicant would never have been in the situation he faced in case 2.

Case 1

64. The legitimacy of the first interview process was called into question by both the applicant and the respondent for reasons that appear sufficiently described above. The applicant did not at the time suggest that, because of the tied scores, he was entitled to priority as a long-term employee whose post had been abolished. It is too late for him to raise that matter now. In substance, he acquiesced in the decision to conduct another interview. The Administration's reasons for deciding to start again were influenced by inappropriate complaints about conduct of the staff representative but also by the problem, highlighted by the applicant, that the chairman was a referee who, as it appeared, was nominated by the successful candidate whose score equaled that of the applicant. Absent a patent legal, factual or procedural error, it is necessary to establish that the decision of the Administration was manifestly unreasonable before it can be regarded as a breach of the applicant's contractual rights. The mere fact that the Tribunal might or would have made a different decision in the circumstances does not satisfy this test. In my view the evidence does not establish any such manifest unreasonableness and the cancellation therefore did not breach the applicant's entitlements.

65. The decision to disregard the outcome of the first interview, however, affected the applicant and, as an administrative decision, should have been properly recorded by the decision-maker with a brief statement of the reasons for it. Quite apart from being necessary for efficient management, these records are essential to safeguard the staff member's rights of review and appeal under the internal justice system. In short, the applicant, certainly for the purposes of seeking administrative review and litigating in the Tribunal, was entitled to have a record made of the decision and the reasons for it so that, if it became necessary, he could have access to it. In this sense, the process was flawed.

66. It was clearly proper for the second interview round to be disregarded and no discussion is needed.

67. The third and crucial interview is more problematical. It is evident that, as a major client of UNOPS, UNMAS had a substantial and, in a general sense, legitimate interest in appointments to the post in question. Whilst one uses the terms “client” and “provider” to describe the way the relationship between UNMAS and UNOPS has been structured, it is imperative not to allow this “management-speak” to disguise the reality, namely that these are limbs of one body, namely the United Nations which have, where their functions interact, the same fundamental purpose, namely to foster, manage and deliver the objects which they were designed to serve. They are not to be thought of as competing independent entities. On the other hand, their different roles naturally and rightly influenced their priorities and could well lead to conflicts in which, say, the staff of UNOPS would need to refuse or qualify demands made by UNMAS. Although cooperation and mutual understanding were no doubt highly desirable traits of interacting management, the attributes, knowledge and experience they were required to have were not and could not be identical. In short, the attributes which UNMAS would prefer for an official of UNOPS with which they needed to interact at this level to have would naturally give first or at least significant importance to that Organization’s perception as to how effectively it could perform its own functions. On the other hand, UNOPS had to take into account the management of all its other affairs, which inevitably did not only involve its relationship with UNMAS.

68. As is apparent from the material disclosed in the reference checks, the view of UNMAS was focused entirely upon its own interests, which it perceived were not adequately served by the applicant. It is legitimate that it should have this focus but the conclusions needed to be tempered, in the interest not only of fairness to the applicant but objective rationality, by understanding the situation in which the applicant was placed and which was tellingly described by his supervisor. However, I infer from the fact that these strongly worded and uncompromising complaints

were not (according to the applicant whose evidence on this point I accept) brought to the applicant's attention that the relevant UNMAS personnel were simply concerned with outcomes as it affected their (undoubtedly very important) work. It is not that they were not entitled to this view but it plainly did not, by a considerable margin, give the whole picture. Had this picture been presented to an independent chairperson, not only a more fair but also a more objective and reliable assessment of the conflicting presentations could have been made. But it is very difficult to accept that the senior UNMAS official on the interview committee, who must have been aware of the UNMAS viewpoint, would have been able, even if he were willing, to assess the conflict of evidence in an appropriately independent manner, especially because the reference that is so critical of the applicant – indeed, it is couched as almost a personal attack on his competence – was written by a senior official and signed by the Director. It would have required more than usual fortitude for the chairperson to have favoured the opinion of the applicant's supervisor over such a strongly worded statement from such a source. The natural inference is that the chairperson did not bring an independent mind to evaluating this crucial conflict, an inference which is strengthened by the failure of the respondent to lead any evidence from him as to what considerations he regarded as important and how he actually went about his task, including, of course, whether he shared the view expressed in the reference which was his task to evaluate. In the absence of such refutational or explanatory evidence, one should act upon the commonsense conclusions indicated by the objective evidence supports. It should be appreciated that the reference from UNMAS is significant, not only because of its capacity for unreasonably weighting the scales against the applicant's claims but because it discloses very strong opinions that, it is reasonable to infer, were widely held within UNMAS and, therefore, shared to a greater or lesser extent by the chairperson.

69. It follows that compliance with par 16(a) of the Policy which provided that the chairperson should be from "the division/unit of the vacant post" was even more important in this case than it might otherwise have been. The UNMAS chairperson

clearly did not qualify. An important objective of this requirement appears to reflect the proper consideration that the relevant division/unit of UNOPS had in selecting the best person for the post. What happened here was that, so far from that interest being served, priority was apparently given to the interest that UNMAS had in the selection. In many cases, this might not matter but the substantial conflict in viewpoint evident from the competing references gave this matter particular importance in the present case. Even though the Policy requires that the chairperson should have “knowledge and expertise in the field”, there is no evidence that no one other than from UNMAS was available. The submission of counsel of the respondent that it was necessary to appoint an UNMAS staff member as chairperson since no competent UNOPS staff were available because of the cumbersome and burdening restructuring process of UNOPS is, in the absence of evidence, unable to be accepted. It would be especially unfair to act upon this submission since it was a matter of considerable significance that could not be tested by the applicant. The absence of any evidence that the Policy requirement as to the identity of the chairperson was even considered when setting up the interview panel gives additional support to the conclusion that appointing someone from UNMAS was avoidable.

70. Mere knowledge of or acquaintance with one or more candidates by a panel member does not disqualify her or him from being on the panel. It would be otherwise, of course, if there were a personal relationship (such as family or friendship) with or personal antipathy for a candidate. The impropriety here is the practical apprehension that objective and independent assessment will be adversely affected, quite apart from any issue of fairness. Where the member has another interest that could significantly affect his or her assessment this also should require exclusion from the panel. Here, the UNMAS chairperson, it appears, had an axe to grind from the point of view of the perceived disadvantage for UNMAS of selecting the applicant. From UNMAS’ perspective, this would no doubt have been regarded as legitimate but, for the purpose of maintaining the integrity of the selection process, such an interest – especially where (as appears from the references) its legitimacy

was based upon a misconception of the facts from UNOPS' point of view – deflected the process, which was, after all, to select the best person suitable for appointment to UNOPS.

71. The respondent argued that, as the applicant had not objected to the presence of the UNMAS representative on the interview panel, he is estopped from now relying on that point. However, he did not know until these proceedings that UNMAS – or, at least, a number of its senior officials – had such a strongly negative opinion about his performance. In such a case it is scarcely fair to hold against him the fact that he made no objection at the time: there would have been no grounds for him to do so.

72. Accordingly, the decision to place the chairperson in the interview panel was both contrary to the Policy and adversely affected the reasonableness and independence of its deliberations. It may be that departure from the Policy is not necessarily and of itself unlawful – after all, it is a policy and thus inherently capable of variation in particular circumstances – however, a staff member is entitled to have the Policy implemented unless there are demonstrably good reasons for not doing so and the nature of the departure is not such as to undermine the fairness or objectivity of the process.

73. An additional departure from the Policy in this case was occasioned by the voting participation of the human resources representative. It is not obvious to me why the Policy denies him or her this role but – absent any evidence – it should be inferred that there is some significant aspect of that person's responsibilities that renders it inappropriate, the most obvious being the "role ... to oversee, facilitate and endorse the selection process ... [and] ensure that the selection process is conducted in a fair, transparent and expedient way ...", in short, the conflict between being a player and a referee. This person's vote on the panel must be disregarded.

74. The result is that the chairperson should not have sat on the panel and the human resources representative should not have voted. There were thus two

substantial and unwarranted departures from the Policy, one of which significantly undermined the integrity of the panel's conclusions and the other which simply should not have occurred. They were not merely formal in character but had substantive effect on the outcome.

75. I should add the additional comment that I do not accept the submission of counsel for the respondent that the dissent of the staff representative was based only on the mistake about the nature of the applicant's contract. I think it is clear that he considered the relative qualifications to be so closely matched as to require the priority which he mistakenly thought should apply.

Case 2

76. The crucial issue here is whether respondent's offer had been accepted by the applicant and, thus, a binding agreement created. In this regard, it is important to note that the applicant was already a UN employee when this occurred and rather than recruiting him for a new position the Organization was therefore offering a variation to an existing employment relationship. This is demonstrated by the UNOPS Human Resources Director in the letter of 28 November 2008 stating –

I must also regretfully provide with formal notice that your appointment with UNOPS will not be extended further, and you will be separated from service with UNOPS effective that date. Should you be successful in securing and would you accept another post in UNOPS, the foregoing would of course *cease to be applicable*.
[Italics added.]

I mention, as a footnote, that when the applicant then secured such a position, parallel to the discussions concerning his start date, the parties were also engaged in negotiations concerning the possibility of a "separation package" for the applicant. This would not make sense unless both parties acted under the assumption that although negotiations about the start date were on foot, the applicant was still employed.

77. The present case therefore significantly different to the issue in the judgment in *El Khatib* (United Nations Appeal Tribunal case no. 2010-034), which dealt with the withdrawal of an offer of appointment given to a *non* UN staff member. The instant case concerns whether a binding agreement had been entered into by the parties and the content of its terms, *El Khatib* was about the effect of non-compliance with the UN staff rules which governed the appointment since the applicant was employed in the same line of command as her spouse.

78. From this point of view, the situation in this case can be approached in two ways: the first is that the applicant accepted the original offer from UNOPS, but that he subsequently attempted to re-negotiate the start date without withdrawing or qualifying his acceptance; the second is that the applicant only partly accepted the respondent's offer which could then be withdrawn. The choice between these characterizations of the events depends upon the interpretation of the correspondence which is set out in full above.

79. In its original offer, while setting a deadline for the applicant's response on COB Tuesday 30 December 2008, UNOPS stated that –

The start date for this assignment is to be determined, but with reporting for duty in Johannesburg, South Africa no later than 1st February 2009.

80. In the applicant's first email (of 29 December 2008) in response to the offer he states –

I am glad to learn of the selection and will accept.

Note, however, that there is a problem with regards to timing.

In my view, in light of this unqualified acceptance of the offer, the mere identification of this ought not to be regarded as anything more than indicating a desire to discuss the timing of the start date. There is no suggestion that, absent agreement on this issue, the applicant would decline to comply with the specified date. In my judgment, the contract came in existence by this exchange although the applicant was attempting

to negotiate a variation of the start date. The ensuing discussion at no point involved the applicant repudiating the employment relationship by stating that he would not comply with the start dates as they were successively proposed. The indication of the deadlines simply meant, in my view, that the respondent intended at that time to end negotiations and insist upon compliance with the specified dates, the last of which was 1 March 2009. Although, following the email of the new General Counsel on 11 February, further negotiations occurred, the applicant did not say that he would not start work on the specified date of 1 March. The assertion that there was an expectation of a definitive answer by 12 February was plainly departed from because negotiations involving the start date continued and necessarily amounted to such an implicit departure. The respondent could not, in good faith, rely upon the specification of that date without notifying the applicant that it intended to do so.

81. It follows that there was no repudiation of the employment contract by the applicant and the refusal to employ him in the promised post was a breach of the contract by the respondent.

82. Another approach is to consider that the respondent had made an offer which was accepted subject to an agreement on start date, about which question negotiations then followed. In my view there was an implicit representation that the respondent would hold open the offer for the purpose of those negotiations. This gave rise to a legitimate expectation that the respondent would not unilaterally withdraw its offer without giving notice of its intention to do so to the applicant. Although it threatened this from time to time by imposing various deadlines, the last of these was departed from by the negotiations with new General Counsel as discussed above. Accordingly, this deadline was implicitly revoked and none was in place at the time when the respondent purported to withdraw its offer in breach of its representation upon which the applicant and, for that matter, the respondent's Counsel were then relying. For the respondent, in the midst of these negotiations to simply appoint another person to the very post about which they were then negotiating with the

applicant was a serious breach of its obligations of good faith and certainly of its implied representations.

Conclusion

83. As to case 1 –

The panel recommendation cannot stand and the decision of the APB, based as it was upon a fatally flawed process, was in breach of the applicant's contractual rights to have his candidacy adequately and properly considered.

84. As to case 2 –

The respondent was in breach of its contract with the applicant to appoint him to the post in Johannesburg at P-4 for the term of six months.

Compensation

85. The parties are to file and serve submissions on the issue of compensation by 26 May 2010.

(Signed)

Judge Michael Adams

Dated this 6th day of May 2010

Entered in the Register on this 6th day of May 2010

(Signed)

Hafida Lahiouel, Registrar, New York