Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
George Irving

Counsel for respondent:
Kong Leong Toh, UNOPS

Introduction

1. The applicant contends he was the victim of a pattern of harassment and abuse of authority which constituted retaliation for his reporting of alleged wrongdoing and that this resulted in his eventual separation from service. The applicant requested review of the decision not to extend his contract beyond 30 November 2008 on this basis. At the time of the reporting, the applicant was a Portfolio Manager (P-4) for Argentina in the United Nations Office for Project Services (UNOPS) in New York.

Note

2. As the instant case refers to multiple recruitment processes, each post has been numbered as per the parties' submissions for ease of reference:

Post 1 – Regional Director (D-1)

Post 2 – Senior Procurement Officer (P-5)

Post 3 – Senior Partnership Manager (P-5)

Post 4 – Manager, Argentina Operations Centre (L-5)

Post 5 – Deputy Regional Director (L-5)

Post 6 – Procurement Specialist – Transactional Catalogue Procurement Unit (TCPU) (P-4)

Post 7 – Business Process Specialist (P-4)

Post 8 – Team Leader (P-4)

Post 9 – Business Process Specialist (L-4)

Post 10 – Procurement Specialist (P-4)

Post 11 – Procurement Specialist (L-4)

Facts

3. In autumn 2005 the applicant reported the alleged wrongdoing of another UN staff member to the attention of his supervisor, the Regional Director, Latin America and the Caribbean (LAC) Regional Office (Regional Director). The applicant alleged that a Project Management Specialist of UNOPS was facilitating a "gnocchi" scheme whereby consultants who were collecting salaries on a monthly basis were not rendering any services. (The term "gnocchi" was used as it is traditionally eaten once a month on the twenty-ninth day.)

4. On 8 December 2005 the Project Management Specialist in question wrote an email to an acquaintance (role not specified) stating:

> In my office, things are becoming almost unsustainable and my contract comes to an end at the end of the year…
>
> Do you know a Chilean by the name of [Interim Executive Director (ED)'s name] from the United Nations??? He has been appointed by the ED of UNOPS (my office) in New York and now … I am betting all my chips on his forthcoming visit to Buenos Aires on 16 [December 2005].

5. On 24 January 2006 the Senior Portfolio Manager wrote to the Project Management Specialist, stating:

> I would like to take the opportunity to tell you that [the Interim ED] has confirmed what we discussed in Buenos Aires regarding your "strait-jacket" situation, which he will surely taken care of once he addresses other important item she is currently handling.
>
> For the time being I would like to reaffirm the willingness of the Lima Office to support you in anything at all. I have not advised [the Regional Director] of our meeting and I do not intend to do so unless he brings up the subject so as to keep myself out.
>
> …

6. Following a trip to Argentina in December 2005, the newly appointed UNOPS Interim ED decided to remove the applicant from his post, as confirmed by his oral testimony.

7. On 1 March 2006 the Interim ED announced the decision to replace the Regional Director with a new Interim LAC Regional Manager (the former Senior Portfolio Manager), effective 15 March 2006.

8. On 3 March 2006 the Regional Director notified the Project Management Specialist that his contract would not be extended beyond 31 March 2006 and advised the United Nations Development Programme (UNDP) Office in Argentina accordingly. The Regional Director also requested the revocation of the Project Management Specialist's delegation of authority for approving financial decisions.

9. On 8 March 2006 the applicant reported the alleged wrongdoing of the Project Management Specialist to the Deputy ED. On 10 March 2010 the Deputy ED endorsed the Regional Director's decision not to extend the Project Management Specialist's contract upon its expiration.

10. In March 2006 the applicant reported the alleged wrongdoing of the Project Specialist to the Office of Audit and Performance Review (OAPR) of UNDP.

11. On 17 March 2006 the new LAC Regional Director informed the applicant of his decision to extend the Project Management Specialist's contract and asked him to formalise the contract. On querying why the decision had been reversed, the applicant was told by the Deputy ED to "Please stay out of this". Given his knowledge of the case and stating that he did not consider it to be in the best interests of the Organization, the applicant explained that he did not wish to be associated with such an extension.

12. On 24 March 2006 the Deputy ED suggested a meeting with the applicant. The applicant raised the issue of why, as he had been led to understand, his portfolio might be removed from him. On the same day the Deputy ED emailed the applicant as follows:

> Most of the staff who are relocating to Copenhagen have already received letters to that effect. If you are to move on 1 July you will need to decide next week, or at least before 31 March, at least 3

> months before the relocation date. This was already communicated to all staff some time ago.
>
> I will find out what [the Interim ED]'s thinking is about the Argentina/Uruguay portfolio next week. Certainly if there is to be continuity the portfolio could be managed out of Copenhagen initially, however I do not know that this will be conclusion of the review.

13. On 29 March 2006 the Regional Director informally advised the applicant to seek urgent legal advice given that he was being relocated to Copenhagen without his post.

14. On 30 March 2006 the Deputy ED offered the applicant an assignment of the position of Senior Portfolio Manager at the P-5 level in Lima, Peru, with no specified duration. The applicant, *inter alia*, questioned why the offer was only a temporary six-month assignment (end-date December 2006), as he had been led to believe that all relocated staff would have an end-date of December 2007. An email of April 2006 of the Portfolio Manager/Staff Council Representative also shows that she also queried why the Peruvian assignment would not have had the same end-date as the locations to Copenhagen.

15. On 5 April 2006 the applicant was advised he would have to hand over his portfolio.

16. On 6 April 2006 the Regional Director, the applicant's former supervisor, recommended to the Interim ED that the applicant be relocated to Uruguay.

17. By letter of 6 April 2006 the Interim ED advised the applicant that he had to accept his relocation to Copenhagen without his portfolio to a post of L-4 Procurement Officer post by noon the following day or be terminated. The letter read as follows:

> In line with Executive Board resolution 2005/36 and the present UNOPS Transition, UNOPS will establish its new Headquarters in Copenhagen, Denmark as of 1 July 2006.

> Following recent discussions between yourself and the Deputy Executive Director, you have been assigned to the post of Procurement Officer at the L-4 level with a duty station of Copenhagen, Denmark.
>
> In line with your status as an international professional staff member, you are hereby requested to relocate to Copenhagen effective 1 July 2006.
>
> I would therefore appreciate if you could please inform DHRM Whether you intend to move to Copenhagen by signing the below Statement of Intent. Please sign the below Statement of Intent and email it to hrtransition@unops.org by no later than noon 7 April 2006.
>
> Should you agree to relocate to Copenhagen, kindly note that your appointment will be extended until 31 December 2007.
>
> If you do not agree in writing by noon 7 April 2006 to relocate to Copenhagen effective 1 July 2006 you will not be offered a renewal of contract and you will separate from service with UNOPS effective 30 June 2006.
>
> …

18. By email of 6 April 2006 the applicant requested further time to decide, stating:

> You told me verbally yesterday that I was going to be given a reasonable amount of time to consider the offer to relocate to Copenhagen. As is, I am being given less than 24 hours to decide; a deadline which I find to be extremely tight, especially when as you know, the offer for Lima did not have the clarity that I needed to make a well informed decision and there appeared to be some confusing information as to the conditions of the transfer and the assignment.
>
> In many occasions, I have reiterated my desire to cooperate with you despite of the numerous concerns that I have with the process that is being followed. To wit, it seems to me there was a legitimate expectation of renewal of my contract based on the current portfolio. This legitimate expectation would only be repudiated if the portfolio ceased to exist. It could only cease to exist if the client cancelled the projects. The client has not cancelled the projects – so what happens to the portfolio. It seems it is to be removed from me. In which case, there must be some strong justification, which I have never received, since it has the effect of extinguishing the legitimate expectation. It is the same as the organization putting a letter in your file saying "we will renew your contract" – then purging my file and claiming that as a result you no longer have an expectation for renewal.

> At this point in time, the least I could ask is to grant me more reasonable time frame to assess properly this juncture.
>
> …

19. On 6 April 2006 the Portfolio Manager/Staff Council Representative noted that

> … the problem is that in [the applicant's] letter, [the expiration date of his contract in Peru] was specifically mentioned 31 December 2006. Moreover, his portfolio is transferring to Peru but he is not going with his portfolio. (looks like they are planning to hire someone else there) He is going on another post, the TORS [Terms of References] of which he has asked for and has not been given to date. Wasn't it stated by [the Interim ED] that all professionals "whose portfolios are being transferred will be offered the post"? then why is [the applicant] not being offered to go with his portfolio. I smell something real fishy.

20. On 21 April 2006 the applicant wrote to the Interim LAC Regional Manager asking for justification for what he termed the "constructive discharge" from his position.

21. On 15 May 2006 the applicant submitted his claim of retaliation to the Interim Ethics Officer for review.

22. On 19 May 2006 the Interim LAC Regional Manager noted by email that, despite having asked the applicant to provide him with information regarding all pending issues of his portfolio, nothing had been received by him yet and it should be sent to him "immediately". The email specified:

> [The project management specialist] decision has been taken under my instruction. More than one month ago I requested you to send me all pending issues related to your portfolio. Nothing has been received until now.
>
> On the other hand, copying a government counterpart messages dealing with internal operational matters of UNOPS is certainly unprofessional, to say the least. Your behaviour is certainly not contributing to a smooth operation.
>
> …

On the same day, the Interim ED emailed the applicant as follows:

> You are hereby instructed to immediately transfer your responsibilities related to the LAC region to [Interim LAC Regional Manager]. By Monday 22 May C.O.B. all the files should be sent to Lima. Any delay will result on disciplinary action. You are also instructed to stop any further contact with any client.

According to the applicant, at this time the Interim LAC Regional Manager and the Project Management Specialist had impeded his ability to conduct normal business that involved attending to clients' requests. According to the respondent and the Interim ED's testimony the applicant had inappropriately copied an ANSES (Argentinian National Administration for Social Security) official on internal communications criticising a UNOPS official.

23. On 24 May 2006 a representative of the Argentinian Ministry of Education wrote to the Interim LAC Regional Manager, expressing surprise that the applicant would not continue to be their interlocutor.

24. On 13 June 2006 the Interim Ethics Officer emailed the Interim LAC Regional Manager as follows:

> [The applicant] alerted me that you were in Buenos Aires last week and that, in a meeting with UNOPS staff, mentioned that I was investigating a case brought by [the applicant]. I called the office in Buenos Aires and the information was corroborated – staff mentioned that you had alerted them to the case, that the case was brought by [the applicant] and that I was investigating it.
>
> In our conversation last week, I repeated several times the importance of confidentiality of this investigation. I remember you giving me assurances that you would not discuss this case. Unfortunately, you did not comply with this which affects all parties involved in the investigation, including yourself. I request, once again, as the Interim Ethics Officer, to please comply with all aspects of this investigation, including the absolute necessity of maintaining confidentiality.

25. On 15 June 2006 the Interim Ethics Officer submitted her preliminary report concluding that there was no link between the applicant's removal as portfolio manager and his reporting of wrongdoing. The report made the following explanation to the applicant, *inter alia* –

> My main line of questioning was focused on when the decision to move the Argentina portfolio was made and why. The four separate interviews I conducted revealed that his report of alleged misconduct was not linked to the move of the Argentina portfolio nor to the decision to ultimately offer you a position in Copenhagen. Rather, the decision to move the Argentina portfolio pre-dated your complaint and was based on management's perception that clients were unsatisfied with you. All my interviews independently confirmed that management had been concerned for some time with your ability to manage clients in Argentina and had expressed a desire to change the manager of the Argentina portfolio. While your report of misconduct was a protected activity, I did not find that the fact that you reported it caused retaliation or threat of retaliation since the portfolio decisions had been suggested long before you submitted the allegations of misconduct by the [Project Management Specialist]. I understand that it would appear the decision to move the Argentina portfolio happened soon after you filed a complaint against [the Project Management Specialist] but based on information I gathered from the interviews, I do not find a credible link between the disclosure of wrongdoing and alleged retaliation.

The applicant raised a number of shortcomings and requested clarification on various elements of the report pointed out a number of shortcomings in the analysis contained therein and requested further clarification.

26. On 7 July 2006 the applicant reported his complaint to Office of Internal Oversight Services (OIOS).

27. In July–August 2006 the applicant brought the matter to the attention of OAPR.

28. On 5 September 2006, upon his arrival in Copenhagen to take up his new assignment, the applicant found there was no post of Procurement Officer as had been offered in his agreement to the transfer. The respondent disputes that there was no post. The applicant was assigned as a Business Process Specialist in the Organizational Effectiveness Centre (OEC).

29. In September 2006 a restructuring of the UNOPS headquarters began.

30. In September 2006 the applicant, as a member of the Procurement Review and Advisory Committee (PRAC), said he noted irregularities in a presentation made by the Interim LAC Regional Manager. The case was rejected. (On 30 October 2006, the applicant reported receiving a call from a high-ranking government official alerting him that the Interim LAC Regional Manager had called to inform him that his submission to PRAC had been rejected and that the applicant was personally responsible for the rejection. The ED conveyed that he was afraid both the applicant and the Interim LAC Regional Manager had "demonstrated poor judgment in commenting on the PRAC meeting" to government authorities. The applicant contends that this event and the applicant's involvement in the procurement audit of the Lima were the reasons behind his removal from the PRAC. This is contested by the respondent.)

31. By email of 22 November 2006 to the chair of PRAC, the applicant stated –

> It now seems rather obvious that the invitations for members to attend PRAC are being dispensed on a very selective basis. While this may remain an effective action, it is not a very transparent. I wish to state for the record, that after the controversy that arose from PRAC meeting 37 item 4, and for reasons not properly explained to me, I am being excluded from participating in PRAC as a member.

32. On 27 November 2006 the applicant, along with the other members of the Integrated Business Support (IBS) team, was advised that their title was Business Process Specialist but the job description had still not been drawn up.

33. On 8 January 2007 the applicant had submitted an application for the D-1 post of Regional Director (LAC) (post #1). The applicant was not short-listed. The applicant claims no Appointment and Selection Board (ASB) review took place. The ED, who was on the selection panel, endorsed the ultimate appointment. The ED has explained that he felt it was unrealistic for the applicant to apply for a post two levels higher. On 6 February 2007 the applicant requested a clarification from the Director of OEC&HR as to the reasons why he had not been successful for this position. She

never replied in writing but the applicant claims she verbally advised him that the then Deputy ED did not think that he was a team player.

34. On 2 April 2007 the OIOS report into the applicant's allegations of wrongdoing was transmitted to the ED. The report stated:

> 3. The OIOS notes that the allegation concerning "no-show" consultants contracted by ANSES was brought to the attention of the Office of Audit and Performance Review (OAPR) of the United Nations Development Programme (UNDP). After an assessment of the allegation, the Director of OAPR concluded that it was a low risk/low priority matter that did not warrant investigation, and that the matter be closed regardless of "potentially sufficient material to support the allegation".
>
> …
>
> 13. The OIOS concludes that despite indications of possible mismanagement concerning the ANSES consultancy contracts, no evidence could be found that [the project specialist] was involved in selecting consultants while he was in the employment of UNOP; or that he received kick-backs from consultants as alleged by [the applicant].
>
> 14. The OIOS concludes that [the Project Specialist] is in breach of Staff Regulation 1.2(m) in that he actively associated with the management of [company name] a company that he and his wife owns, as admitted by him during his interview with the OIOS.

The cover memorandum from the Under-Secretary-General for OIOS to the ED summarised the findings of their investigation as follows:

> The investigation found no evidence that [the Project Management Specialist] received any kick-backs from ANSES consultants. However, the OIOS found that [the Project Management Specialist] had a financial interest in a profit-making concern. Further, the OIOS found no evidence of retaliation against [the applicant].

The applicant has pointed to evidence, unnecessary to detail, that indicated local staff reported negative repercussions from their assistance to OIOS. The material is not cogent and does not justify this submission.

35. On 7 May 2007 the applicant was informed that his performance was to be evaluated by the Interim ED. The Director of OEC&HR testified that she had suggested this because she thought he was the applicant's supervisor. The applicant claims that he and the Interim ED had never even spoken.

36. On 23 May 2007 the applicant was informed that he was not required for the APB session that day.

37. In May 2007 the ED visited Argentina in the company of the Interim ED, the LAC Regional Manager and the Project Management Specialist.

38. On 6 June 2007 the LAC Regional Manager wrote to the ED referencing the past investigation of the World Bank project involving ANSES consultants managed by UNOPS in Argentina and proposed administering 600 consultants for five years at the request of UNDP Argentina. By way of a response, in an email of 11 June 2007, the Team Leader, Corporate Strategy, expressed his surprise at the proposal given their "problematic experience" with ANSES.

39. In July 2007 the Deputy ED raised concerns that the applicant was going on mission to China (as had been requested by the former Regional Director) given that he was "seriously behind" on some work, amongst other issues. The delays are referred to in email correspondence of the time and appear to be due to delays in certain offices providing data. The applicant further clarified that the missing data remained the key issue delaying progress with the Director of OEC&HR in his communications dated 18 and 19 July 2007. (A similar situation arose in September 2007 where the Deputy ED refused the applicant's release due to delays which he attributed to the applicant which were mainly due to a lack of asset data coming from field offices. The applicant has submitted evidence to show that such delays persisted throughout the period and into 2008.)

40. According to the applicant, on 28 September 2007, following the announcement of the restructuring, he was verbally advised by the Director of OEC&HR before the process began that he was not going to be matched to any

position. This is disputed by the respondent. The evidence of the applicant as to this is unconvincing and most unlikely. I do not accept it.

41. On or around 10 October 2007 the applicant met with ED. The ED had been a colleague of the Interim ED whilst they were in UNDP although he could not recall if they had personally met. They did have some personal communications. He briefed the ED when he took the assignment on a range of human resources issues, including that involving the applicant, telling him that the applicant had some interpersonal problems with colleagues involving sour relations with staff in South America, though not so much with the Interim ED. The ED said that he considered, however, that he should make his own independent judgment about the applicant and I accept this evidence. After all, this was the only sensible course to take when he had no personal knowledge about the matter and even the Interim ED was talking about it second-hand. The applicant claims that at this meeting he was told by the ED that he had gone against the interests of the Organization. On the other hand, the ED said he offered support in guiding the applicant's career, specifically:

> While I certainly do not remember every detail of our conversations, I recall that the applicant was keen to convey his conscientiousness and loyalty to the organization. He did so convincingly. I know for sure that I never said he had gone against the interest of UNOPS. I do recall that already in our first meeting, which according to the Applicant took place in October 2006, we discussed his relationship issues with members of the Latin America team and his feeling that he should not have been transferred to UNOPS' new HQ in Denmark. Indeed, this became a common feature of his discussions with me. As these matters had occurred over several years before I joined the organization I could not offer an opinion. Mostly, I remember seeking to counsel the Applicant on how to get beyond the past, how best to get on with his UN career, and above all to be an effective member of his current team. We did on one occasion discuss the outcome of the OIOS study and I did get the impression at the time that he had accepted the outcome, albeit reluctantly.

It seems to me in the highest degree unlikely that, even if the ED harboured the notions about the applicant that it is said he expressed, he would have stated them to the applicant. It would have served no purpose and could only have exacerbated the

situation. However, I accept the evidence of the ED that he did not have the view that the applicant had in fact acted contrary to the interests of the Organization. To the contrary, he believed the applicant when he said that he had acted in the interests of the Organization.

42. In October and November 2007, following the issuance of position-matching guidelines, the Staff Council raised concerns over, *inter alia*, the lack of transparency in the process. In October 2007, the job description for the applicant was still being finalised. The post matching exercise involved matching old job descriptions with new ones. Where the job descriptions did not change by more than forty per cent, the old and new posts were matched.

43. On 25 October 2007, the applicant applied to the position of Senior Partnership Manager (P-5) (post #3) and claims his candidacy was not acknowledged.

44. On 29–30 October 2007 the post-matching panel met and decided that the Business Process Specialist posts, one of which the applicant encumbered, should be advertised as follows:

> Regarding the three Business Process Specialist posts, the Panel concluded that the TORs of their current incumbents are of generic nature and their actual duties and responsibilities ramified into specialised areas of expertise overtime. Thus technically, the Panel concluded that the degree of distinction is beyond the allowed 40% margin and decided that all the three positions have to be advertised to ensure equality and transparency of the process.

45. By letter dated 31 October 2007 from the Deputy ED, the applicant was informed as follows:

> … based on the review of the new job descriptions that have been created against current job descriptions, I regret to advise you that the Position Matching Panel was not able to recommend a match between your current post and any posts in the new Headquarters set-up. This recommendation has been approved by the ED. To reiterate, the position matching exercise was conducted by looking at posts rather than individuals.

> We request you to submit applications for positions in the job fair that will be advertised on 5 November 2007 …
>
> You are given formal notice that your present post with UNOPS will be abolished and your current contract will expire on 31 January 2008 with your separation from service being effective as of that date if you are not successful in obtaining another position at UNOPS.
>
> …

46. On 16 November 2007 two vacancies for Business Process Specialist (P-4 and L-4) (posts #7 and #9) and one for the Team Leader (P-4) (post #8) were announced, each with separate job descriptions. The applicant applied for each vacancy.

47. On 16 November 2007 the applicant applied for the position of Procurement Specialist, TCPU (P-4) (post #6) and was not considered eligible.

48. On 21 November 2007 the applicant applied for the position of Senior Procurement Officer, P-5 (post #2), a position for which he was not short-listed.

49. In November 2007 the applicant met with the ED and asked for his support in his career at UNOPS. The applicant wrote a letter to the ED to which he did not receive a reply.

50. By email of 23 November 2007 the Director of Organizational Effectiveness Centre and Human Resources (OEC&HR) assured staff that internal candidates would be considered prior to consideration of any external candidates:

> I hear regarding the HQ realignment [as written] that some of you may be concerned that you will be competing with external candidates for the OEC advertised positions. I assure you that OEC staff who has not been matched by the realignment shall be considered for the vacant posts prior to consideration of external candidates.

51. By email of 29 November 2007 the Director of OEC&HR requested a Human Resources Associate to integrate a specific candidate in that recruitment process.

52. In December 2007 the applicant was interviewed for the post of Business Process Specialist (P-4). It was determined by the interview panel that he did not meet the minimum threshold of points required for that position.

53. By email of 10 December 2007, the Director of OEC&HR decided not to shortlist the applicant for a second interview for the position of Business Process Specialist (L-4). The applicant claims he was not aware that one interview panel was interviewing for both the P-4 and the L-4 positions until confirmation from the Portfolio Manager/Staff Council Representative in 2008.

54. In her response of 3 March 2008 to the ASB request for clarifications on the restructuring light posts, the applicant points out that the Director of OEC&HR did not include the information that the applicant was the incumbent of the post or that separate interviews were not held for each position. In her testimony before the Tribunal, the Director of OEC&HR stated that she did not recall if she had told the interview panel that the applicant was the incumbent of the post but that she thought they were all aware. This belief was, as it seems to me, quite reasonable and likely to be accurate. The applicant was the only one of the three incumbent Business Process Specialists not selected.

55. In January 2008 the applicant was not short-listed for the position of Manager, Argentina Operations Centre (post #4). An external candidate was selected. In February 2008, the ASB did not endorse the proposed appointment for reasons which included “the poor quality of the interview report”, “none of the interviewed candidates met the minimum years of work experience as stated in the Vacancy Announcement”, “the incumbent should be fluent in English as well as Spanish” and “no reference checks were submitted”.

56. On 24 January 2008 the applicant also applied for the position of Deputy Regional Director for Latin America (post #5). The then Regional Director for LAC confirmed that she did not shortlist him because he, along with the other internal candidates, did not have the profile for which she was looking. The ASB noted that

the recommended candidate did not meet the position's relevant experience requirements of 15 years of progressively responsible professional experience, his skills as a team player were "inconsistent" with his stated work experience as a consultant, his background did not meet the requirements, "no reference checks were submitted", "his English was poor" and there was a disappointment in the "poor quality of the interview report". The Board also requested guidance on whether it is permitted for a former (retired) ED of UNOPS to sit on the interview panel and recommended the position be re-advertised. On 9 April 2008 the ASB Chair agreed that, further to receiving additional information from management, there was sufficient evidence to satisfy the ASB, to proceed with the recruitment of both positions (posts #4 and #5).

57. In March 2008, the former Regional Director proposed that the applicant be assigned to a project in Uruguay, but both UNDP Argentina and UNDP Uruguay objected.

58. On 30 April 2008 the applicant applied to the position of Procurement Specialist (Team Leader, Global Procurement Support Unit) (post #10) and he was interviewed but not selected. The Director of OEC&HR had encouraged the applicant to apply and the Manager of the Global Service Centre had said she would "think about it". On 19 June 2008 the ASB recommended that the case be "rejected", as the second round of interviews was "invalid". The ASB had noted in its minutes that:

> Though an apparent conflict of interest existed with all the other panel members including HR representative being supervised by the chair, the first interview had clear outcome with a female candidate emerging with the top score of 94 compared to the proposed candidate's 92.
>
> The technical expert on the first panel who is the supervisor of the position, chaired the second panel, and was the previous supervisor and a reference of the proposed candidate. She is also the direct supervisor of the technical expert on the second panel.

> Both interview reports do not declare that the technical expert/chair had informed the panel prior to commencement of the interviews of her previous professional relationship with the proposed candidate
>
> No technical question was asked at the second round of interviews, yet the proposed candidate was scored 10/10 and [redacted] scored 5/10 for technical knowledge.
>
> The scoring for [redacted] on all of the selection criteria in the second interview is remarkably inconsistent with the panel's report on the similar selection criteria from the first interview.

On 19 June 2008 the ED endorsed the decision to proceed with the recruitment as per the recommendation of the interview panel.

59. On 29 June 2008 the applicant was informed that he had not been selected for the post #10.

60. From February until September 2008, the applicant worked on a roster project which developed into UNOPS e-recruitment project.

61. By email of 31 July 2008 the applicant received notification that his post would be abolished.

62. On 2 October 2008 the applicant applied for an L-4 Procurement Specialist post in South Africa (post #11) for which he was interviewed but not selected.

63. On 10 November 2008 the UN Office of Human Resources requested the applicant's services under a non-reimbursable loan for six months. The respondent declined, stating, *inter alia*:

> [The applicant's] present post is unfunded from 1 December 2008, and, although we could extend his post administratively whist he was on loan, we would not be able to hold his post for his return. It would seem inappropriate, therefore, to use the loan mechanism in this situation – much better would be a transfer, or if that is not possible, a new contract (albeit explicitly temporary) from 1 December 08 through 30 June 09.

64. On 30 November 2008 the applicant's contract with UNOPS expired. The ED gave evidence about the decision not to renew his contract along the following

lines. The decision not to renew was a difficult decision. The applicant had been held on payroll, moving from task to task, some below his qualifications and he had been making unsuccessful applications for other posts. He was too focused on the past and did not contribute to the work of the office as much as he could have or the ED expected he would. There were discussions amongst management about encouragement and the ED had spoken with him along these lines himself but the applicant just did not rise to the challenge and decide that he would make a contribution. The ED said that his decision was not influenced by the report to OIOS and did not believe that this was or could have been a factor in any of the selection processes. The Interim ED had no involvement or influence in the decision as this was a corporate issue and he was involved in business development in Latin America and the Caribbean. I thought the ED was candid and I considered that his evidence was cogent and truthful.

65. The submissions of the parties that are summarised below set out and discuss a substantial quantity of evidentiary material in addition to that which I have dealt with above. It will be seen that, so far as direct evidence is concerned – as distinct from inferences – there is no real dispute as to by far the greater part and those disputes are not of such significance as to warrant discussion in a judgment that is already far too long. The disputes as to certain conversations between the applicant and various officials are difficult to resolve, in the nature of things, since they involve assertion and counter-assertion. However, I am bound to say in fairness that in every instance the logic of events favours the official's evidence and not the applicant's. Given the complexity and volume of evidence, I do not repeat the material cited in the submissions in indicating my conclusions about the issues in the case, though in several instances I have thought it desirable to add some further evidence.

Applicant's submissions

Scope of application

66. The applicant was the victim of a long pattern of harassment and abuse of authority because he reported alleged wrongdoing and this resulted in his eventual separation.

67. The scope of the case includes the following decisions which culminated in the final decision not to extend his contract:

> 1) Removal of the applicant's functions as Argentina Portfolio Manager after reporting of financial irregularities
>
> 2) Failure of the respondent either through the Interim Ethics Office or OAPR (Internal Audit) to conduct a thorough investigation into the Applicant's allegations of financial impropriety and retaliation
>
> 3) Failure of the respondent to honour the contractual commitment to transfer the applicant to a suitable procurement post in accordance with the written undertaking to relocate to Copenhagen
>
> 4) Failure of the respondent to address the applicant's allegations of retaliation for having reported his complaints to OIOS
>
> 5) Refusal of the Respondent to accord the applicant the full and fair consideration to which he was entitled for the vacancies to which he applied
>
> 6) Removal of the applicant from his position as Business Process Specialist through a procedurally flawed and biased process
>
> 7) Non-renewal of the applicant's appointment
>
> 8) Failure to afford the applicant his rights under Staff Regulation 4.4 following the abolition of his post.

Applicant unfairly characterised as "not a team player"

68. The respondent labelled the applicant as not being a team player, terminology which has a "very special connotation" with regard to whistleblower cases. Management should have been sensitive to this, particularly with regard to the

Organization's policies on this issue. This characterisation being taken up by other managers was prejudice, as described in the UN Administrative Tribunal Judgment No. 1128, *Banerjee* (2003) as follows:

> The Tribunal is satisfied that acting upon an unverified notion about the character of a staff member without giving him the opportunity to refute that notion is prejudicial. Acting on prejudice is discrimination.

Respondent breached its contractual obligations under the relocation agreement

69. The respondent did not honour its agreement with regard to the offer of the non-existent procurement officer post in Copenhagen. The offer and acceptance of a post inducing the reliance of the staff member in relocating to a new station is an "enforceable claim" that the respondent has an obligation to honour. An offer and acceptance without reservations constitutes a valid contract of employment binding the parties as per UN Administrative Tribunal Judgment No. 519, *Kofi* (1991), and reaffirmed in judgment *Castelli* UNDT/2009/075, which states:

> The contract was created when the Administration's offer was accepted by the applicant ... the correct conclusion is, in accordance with the principles of contract law, that the contract was valid and fully enforceable once the unconditional offer was unconditionally accepted.

70. The post to which the applicant was assigned in Copenhagen, which had no procurement functions and no job description, was a "functional demotion, violating his right to fair treatment". The respondent must ensure "due regard is paid to the personal interest of the staff member concerned" (UN Administrative Tribunal Judgment No. 518, *Brewster* (1991)) with regards to transfers.

71. While the respondent has broad discretion in matters of assignments, that authority is not absolute, as per UN Administrative Tribunal Judgment No. 1029, *Banguora* (2001) which held: "Although the Administration has discretionary power, which means, necessarily, that staff members do not, strictly speaking, have a *substantial right* to secure a particular decision that should be protected, they do,

however, have a right to *fair and equitable treatment* because the Tribunal monitors the way in which that power is exercised".

Series of decisions based on false or misleading reasons

72. The series of decisions which are the subject of the instant case removed the applicant from a decision-making position, rendered him unassigned and led to his separation. The principal rule followed in investigation practices with respect to whether an act can be considered retaliatory is whether the Organization would have taken the same decisions absent the improper motives. The lack of explanation for the decisions and that they had no foundations in good management practice was indicative of retaliation:

> Put another way, ordinary management practice would have dictated that an organization that repeatedly solicited candidates for positions requiring his mix of skills and background would eventually find a suitable placement for a successful portfolio manager with 10 years of progressive experience with UNOPS with excellent performance reports.

73. If a false and misleading reason is given an action, it may be challenged and the giving of a false reason is of itself a breach of the right to be treated fairly, honestly and honourable and can be, of itself, the basis for compensation:

> The giving of a false or invalid reason for a discretionary decision is, in itself, maladministration which may breach a staff member's right to be treated fairly, honestly and honourably. A breach of such a staff member's right may entitle the staff member to compensation for that very wrong, rather than on the basis that the giving of a false reason is evidence in itself that, had it not been given, the staff member would have enjoyed an extension of contract or some other benefit that was "lost" because of the falsity of the reason proffered. (UN Administrative Tribunal Judgment No. 1238, *Albert* (2005).)

Removal of the applicant's duties and portfolio

74. The applicant's removal from his former duties occurred shortly after his official reporting of wrongdoing in Argentina. He reported to his Deputy ED on 8

March 2006. By April 2006, he was advised of his imminent reassignment and advised to hand over his functions and the initial decision to discontinue the Project Management Specialist's contract had been reversed. His portfolio was removed from him. In addition to not being allowed to take his portfolio with him, the applicant was offered a six-month appointment which was noted by the staff council representative as "fishy", a recommendation from the former Regional Director to reassign the applicant to Uruguay was rejected and then he was given a 24-hour ultimatum to relocate to Copenhagen or be terminated. Four days after the applicant filed a formal complaint of retaliation the Interim ED threatened the applicant with disciplinary action if the applicant did not immediately transfer his responsibilities to the Interim LAC Regional Manager and to cease contact with clients. These actions were justified by the Interim ED as in the interests of the Organization but any complaints about the applicant's performance were not properly recorded nor shared with the applicant and therefore their use is "suspect".

75. In a comparable UNOPS case, the Administrative Tribunal found in Judgment No. 1191, *Aertgeerts* (2004):

> In the present case, it is clear that professionally the Applicant had been highly regarded by his superiors for several years. In fact, in every aspect other than his relationship with clients, the Applicant consistently received praise from his supervisor. When the decision not to renew the Applicant's fixed-term appointment was then explained by his poor relations with clients and the financial risks involved with it, the Administration had to be able to substantiate these claims with the facts. As stated above, the Applicant had provided evidence to the contrary. The Tribunal therefore finds that the reason which served as the basis for the decision not to renew the Applicant's appointment had been disproved by the Applicant. Moreover, the Tribunal believes that the problems as identified in the report of the Rebuttal Panel, especially the failure of the Administration to document the Applicant's shortcomings and to counsel, guide, support and advise him, should have been dealt with much earlier. Rather than deciding that the Applicant's interpersonal problems were such that warranted losing a staff member who, professionally, was excellent, the Administration should have provided the Applicant with the necessary guidance to overcome this shortfall of his.

The applicant further submits that:

> The rationale put forward by [the Interim Executive Director] for the removal of the applicant from his job is suspect from both a substantive and procedural perspective. Substantively, the applicant has demonstrated his good relations with clients and performance assessments of his immediate supervisor that lack any justification for his removal. Procedurally, the use of private, undisclosed criticism violates due process.

76. The Administrative Tribunal has warned against the use of informal comments made against staff members as follows:

> It should be self-evident that the making of any informal comments without the Applicant having the opportunity to rebut those comments is a flagrant contradiction of transparency of the Staff Rules and cannot be tolerated. (Judgment No. 1209, *El-Ansary* (2005))

Applicant was not given full and fair consideration for posts to which he applied

77. With regard to posts for which he applied, the applicant was entitled to full and fair consideration based on the published rules for selection and the respondent has not met this burden, including excluding the applicant from shortlists for posts in Latin America and other procurement posts which were advertised externally, despite the availability of the applicant. The selection process was unfair, including arbitrary short-listing and thresholds being applied, evaluation based on a single interview and the ASB reviewing only the final outcome rather than the entire process.

Applicant was systematically removed from decision-making boards and panels

78. The applicant was systematically removed from any decision-making or oversight function within UNOPS, including unfair removal of the applicant from the PRAC (procurement review and contracts committee) after he noted some "irregularities" in a presentation made by the Interim LAC Regional Manager.

Lack of career development

79. There were only limited opportunities for career development during his entire service under the administration of the current ED.

80. The respondent has failed to give credible reasons for why the applicant's apparently successful career "stagnated" upon relocation to Copenhagen.

Failure to place applicant during restructuring process

81. Having narrowed his career options to the limited area of work as a Business Process Specialist, the applicant had to compete for a job for which he was seen as unsuited, first by a "botched attempt" to evaluate him against his two similarly placed colleagues (the job matching exercise) and then by making him compete along with external candidates (the job fair). Rather than assign the three incumbents to the three vacancies that were available, the recruitment was opened up to external candidates. The job fair was marred by a number of procedural irregularities including the use of arbitrary thresholds to eliminate candidates initially found qualified. At the end of the job fair process, in spite of having a vacant post to accommodate him, the applicant was served with a notice of termination. One post was offered to an external candidate who had to be recruited at a lower level because he did not meet the requirements of the vacancy announcement. He rejected the offer.

Applicant unfairly excluded from staff rotation process

82. No explanation has been proffered for the exclusion of the applicant from the staff rotation exercise, which would have been another opportunity to "avoid termination".

Institutional prejudice and abuse of authority

83. The instant case is one of institutional prejudice, rather than administrative error or ineptitude:

> There is an essential difference between administrative error or ineptitude and institutional prejudice, although the results may appear similar. The difference is when one is set up to fail in a process that is predetermined, and when simple solutions could avoid the resulting adverse consequences but are not utilized.

The outcome of the job matching exercise was predetermined and the applicant was the only staff member adversely affected.

84. Repeated failure to follow established procedures and rules designed to safeguard the rights of staff are an abuse of authority, see UN Administrative Tribunal Judgment No. 1134, *Gomes* (2003) which provides:

> … because of such procedural irregularities, the Applicant is not required to provide any evidence of prejudice to make his case, and the Tribunal must impute prejudice where otherwise it would find none.

Retaliation as a pattern

85. Retaliation is often demonstrated in a pattern of behaviour rather than a single act, which is particularly true in cases of institutional harassment. The Administrative Tribunal has recognised actions with increasingly prejudicial consequences to career and status may lead to the inevitable result which, if taken more directly, would be clearly labelled as illegal, see Judgment No. 1258 (2005):

> There are situations where each act complained of, when viewed in isolation, is one that the Administration was entitled to take. There are, however, situations where the cumulative result of several such actions taken by the Administration could lead to a conclusion that, the "whole picture", rather than the isolated acts, indicates the contended abuse.

In Judgment No. 1052, *Bonder* (2002), the Administrative Tribunal judged the non-renewal of contract of a staff member illegal due to the egregious pattern of irregularities that preceded the outcome, discerning an overall picture of discriminatory and bad-faith treatment.

Compensation warranted for harm done to the applicant

86. As a result of the respondent's actions, the applicant was forced to leave UNOPS "under a cloud of doubt, suspicion and unfair defamation, which has caused severe emotional distress, needless dislocation and uncertainty and which has affected his professional reputation". Compensation is justified when the respondent's actions have resulted in deep humiliation, distress and financial and career uncertainty as in UN Administrative Tribunal Judgment No. 812, *Everett* (1997) and the Administrative Tribunal has awarded maximum damages where, for example, the respondent "failed to observe proper procedures and, in so doing, denied the Appellant due process" and for "distressing and unwarranted treatment at the hands of the Organization" (Judgment No. 807, *Lehmann* (1996)).

87. In conclusion, the applicant submits, *inter alia*:

> Loss of a job as a result of a retaliatory motive harms the entire organization not just the victim since it has a chilling effect on others who might be potential whistleblowers. The circumstances surrounding the treatment of the applicant's career and contractual status reflect not only an injustice but also a pattern of institutional failure. It is incumbent on the Respondent to ensure that, in the absence of its own adequate protections against acts of retaliation, UNOPS conform itself to the Organization's best practices and at a minimum ensure that other staff are not treated in a similar unfair manner.

88. On the matter of compensation, the applicant submits:

> As a matter of principle, the applicant deems he is entitled to reinstatement for wrongful termination of his appointment as a precedent for similar cases. The applicant requests that the decision not to renew his appointment be rescinded and that in lieu of reinstatement, the Tribunal order the payment of equivalent

> compensation. In addition, he requests appropriate and exceptional compensation in the amount that reflects the irreparable damage caused to his career and professional reputation and for the professional dislocation he has suffered and the abridgement of his rights by the respondent, as well as legal costs in the amount of $20,000.

Respondent's submissions

Timing of key decisions renders them non-retaliatory

89. The timing of particular events relative to the dates the decision-makers knew about the applicant's reporting of alleged wrongdoing make it impossible to conclude that they were influenced by the applicant's reporting of the alleged wrongdoing. Specifically, the Interim ED recalled:

> 20. I would like to make clear that when I made the decision to reassign the Argentina portfolio, I did not know that the Applicant had made allegations of corruption in Argentina.
>
> 21. I cannot remember for sure the exact time I learned about the allegations of corruption. The earliest date that I can now remember thinking about the alleged corruption is the time when [the Interim Ethics Officer's] report was released. Even though I was earlier interviewed by [the Interim Ethics Officer] (as may be seen from her report), I would like to stress that [the Interim Ethics Officer] never actually told me that it was related to an allegation of corruption on the part of [the Project Management Specialist] … It was not until the interview had gone for a while that I realized that she was actually discussing a complaint that the Applicant had made about me. However, [the Interim Ethics Officer] did not mention that the Applicant had alleged corruption on the part of [the Project Management Specialist], let alone that I was alleged to have "retaliated" against the Applicant because of these corruption allegations against [the Project Management Specialist]. In other words, I realized over the course of the interview that the Applicant had accused me of doing something, but I was never informed what the supposed reason was.

90. The applicant has not provided evidence that the Interim ED knew of the reporting of the alleged wrongdoing prior to 15 May 2006. The Regional Director informed the Deputy ED, not the Interim ED.

91. The inference should be drawn from the documentary evidence that the Interim Ethics Officer did not take any further action or inform anyone further.

92. Emails sent or received prior to ST/SGB/2005/21 on *Protection from retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations* coming into force on 1 January 2006 cannot be used to support a claim or retaliation.

93. The removal of the Regional Director by the Interim ED cannot be retaliatory as the decision was taken prior to the applicant reporting the alleged wrongdoing to anyone (except the Regional Director).

No adverse effect on career of applicant or others involved in reporting

94. There was no retaliation by the ED against the applicant as the latter was assigned an asset management project of critical importance after it was known that the applicant had reported alleged misconduct and the OIOS report had been issued. This also shows that the reporting of the alleged misconduct did not have a negative impact on the applicant's career.

95. The positive career developments and/or the personal opinion of the persons who made accusations against the Project Management Specialist show that there was no retaliation for reporting the alleged wrongdoing. One of these staff members left because of what he saw as a pay issue, rather than retaliation:

> Let me tell you that my contract will come to an end … They will create a competition for all posts (their intentions is to lower the monies they pay). Naturally, I will not participate, otherwise it would be tantamount to going along with the manipulation …

Both of the other staff members remain employees of UNOPS, and the former Regional Director has recently been issued a permanent contract. In his testimony, the former Regional Director said that he did not believe the Interim ED had led to the decision for him to be removed from the post of Regional Director of UNOPS LAC or that the ED had ever made a decision that negatively affected his career.

Ordinary professional relationships existed between the ED, Interim ED and the Project Management Specialist

96. The Interim ED and the ED had ordinary professional relationships with the Project Management Specialist rather than protectionist ones. According to the Regional Director's statement: "I don't think they were more than colleagues, but I cannot be sure". The Interim ED said this in his statement and that he had not known the Project Management Specialist for long enough to keep in touch "let alone 'retaliate' against the Applicant for making corruption allegation…" The email of 6 December 2005 from the Project Management Specialist to an acquaintance supports that he and the Interim ED did not know each other.

97. The relationship between the Interim LAC Regional Manager and the Project Management Specialist was also an ordinary professional relationship and the issue of him allegedly falsifying the latter's attendance records is not relevant for the present purposes, and if it were, the issue is now time-barred.

98. The most likely explanation for the change in the Deputy ED's decision with regard to whether to renew the contract of the Project Management Specialist was her realisation that the claims of the applicant were unsubstantiated rather than any pressure from the Interim ED.

99. The ED had an ordinary professional relationship with both the Project Management Specialist and the Interim ED. It was not unusual that the three of them were together at the signing of the host country agreement. The Interim ED, in his own testimony, stated that he never sought to influence the ED about the applicant's

contracts. The Interim ED being kept on as a part-time consultant after the ED joined was due to his vast experience and knowledge.

The assessment of the applicant as "not a team player"

100. The ED testified that the Interim ED had informed him that the applicant was not a team player in the ordinary course of the handover. The ED, in his testimony of 10 March 2010, also stated that he had told the applicant he would focus on the applicant's future performance, not the past. The ED made observations about how the applicant had isolated himself in meeting by sitting separately. The ED disputes that he ever told the applicant that he had acted against the best interests of the Organization by reporting the alleged wrongdoing.

101. "Not a team player" was used to describe the applicant "due solely to the Applicant's difficult relationships with his colleagues and not to his alleging wrongdoing on the part of others" and due to him isolating himself from others. The Director of OEC&HR described how the applicant had frequent disagreements with his colleagues, e.g. refusing to work in a team on one occasion, refusing to work with one of the most senior members of OEC and urging the Director of OEC&HR to take action against staff for work with the applicant considered to be of poor quality. The applicant's relationship with one OEC colleague was so difficult that she asked the Director of OEC&HR to be allowed to change workstations so that that she would not be near the applicant.

102. The applicant's performance evaluation for 2007 indicated under "Teamwork" next to the competency/behavioural indicator of "works collaboratively with colleagues to achieve organizational goals" as "needs development" and two indicators under "communication" were also indicated "needs development". His supervisor also noted that the applicants "difficulties in integrating the team limited team members and the organization to benefit from his knowledge". In the Director of OEC&HR's testimony of 27 April 2010, she stated that the person who was

eventually selected for the Team Leader post asked that the applicant not report to her so the Director of OEC&HR decided that the applicant should report directly to her.

103. There were some complaints about the applicant of a general nature, as referred to in the Regional Director's statement:

> b. To your knowledge did any of our substantive clients complain about [the applicant or the applicant's] services? Were there any other complaints of which you were aware and was [the applicant] informed?
>
> Answer: The only client who was complaining about [the applicant's] personality not about [the applicant's] performance was UNDP.
>
> h. Were you aware of any clients expressing a desire to change the manager of the Argentina Portfolio?
>
> Answer: None other than UNDP Argentina

104. The applicant had a difficult relationship with UNDP Argentina dating back to 2003, and while the reasons are contested, the applicant acknowledged that at some point it desired to remove the applicant from his position:

> In August 2003, [name] joined UNOPS as the new [ED]. One of the first activities in his new position involved a meeting with all the Resident representative, who coincidentally were meeting in New York…In that meeting [name], Argentina's UNDP Resident Representative appeared to have demanded and appeared to have obtained from the [former UNOPS ED] and "agreement to remove me from my job in exchange for new business and goodwill from the CO [country office]".

The decision to remove the Argentina portfolio from the applicant

105. On the decision to remove the Argentina portfolio from the applicant, the Interim ED described the context and reasoning as follows:

> d. On my trip from Chile to assume my duties as UNOPS ED a.i., I made a stopover in Argentina to meet with the then UNDP Resident Representative/UN Resident Coordinator ([name]) in order to explore the possibilities of UNOPS and UNDP working together, so UNOPS from then on could start servicing projects within its mandate. The reaction of [the UNDP Resident Representative/UN resident

Coordinator] was very negative: he stated that it was impossible to work with UNOPS because it did not honour its commitments. He explained that, in the past UNDP Argentina had had serious problems with the Applicant to the point that [the UNDP Resident Representative/UN resident Coordinator's] predecessor, [name], had complained to the then ED of UNOPS ([name]), and UNDP went as far as asking for the replacement of the Applicant as the UNOPS official working on the Argentina portfolio. [The then UNDP Resident Representative/UN Resident Coordinator] informed me that [the then ED] had actually agreed to the request. However, UNDP learned that, notwithstanding this agreement, the Applicant had continued going to Argentina. According to [then UNDP Resident Representative/UN Resident Coordinator], UNDP insisted again on the need to have the Applicant replaced, and again UNOPS agreed to do it. But, once again, nothing happened. I attach herewith as Annex R-GF-4 communications between UNOPS and UNDP about the foregoing. I requested UNDP Argentina for copies of these documents after UNOPS contacted me about this case. (I should note that while I was copied on some of these communications … I did not pay much attention to these communications prior to my discussion with [the then UNDP Resident Representative/UN Resident Coordinator].)

e. In addition to the opinion of [the then UNDP Resident Representative/UN Resident Coordinator], I saw at the local UNOPS office documentation that raised serious doubts about the professionalism of the Applicant. In particular, I saw e-mails from the Applicant to [the Project Management Specialist] written in a way that raised doubts about the mental balance a supervisor should have. I have seen many angry communications during my many years working in the UN, but these managed to still surprise me. I did not at that time think of asking for copies…

…

f. … a lot was at stake in UNOPS' success, or lack of it, in Argentina. It was too risky to keep a person that, for a long period of time, had been seriously criticized to the point that the UNOPS ED ([name]) had agreed to replace him. For the long-term benefit of UNOPS, the UNOPS Argentina portfolio had to be reassigned. I believe that the events in the four years since has proven me right: UNOPS' Middle East operations developed serious difficulties, as I anticipated, while its Latin America & Caribbean region, with proper management of relations with UNDP and other major entities in the LAC region, has grown to the point that it provides a large share of UNOPS's income today.

106. When asked if the likely reason for the applicant's removal from the UNOPS Argentina portfolio was UNDP Argentina, the Regional Director said "I believe so" and in his testimony to the Tribunal he suggested that UNDP Argentina actually "threatened" to stop cooperating with UNOPS because UNDP had strong objections to the applicant.

107. The decision to remove the Argentina portfolio from the applicant was made "for business reasons", not as a retaliatory act. Contemporaneous emails of the time show that the applicant was aware of the reason for the decision, although he claims he was never told the reason. This could not be confirmed by the Deputy ED despite attempts on the part of the respondent as she has since retired and contact numbers did not work.

Position in Uruguay

108. The Regional Director's proposal regarding the relocation of the applicant to Uruguay required the agreement of UNDP country offices, as noted by the Regional Director in his handover note: "This would need to be negotiated with UNDP Argentina". The country offices objected strongly.

The offer of the post in Lima

109. While limited to six months, the offer of the post in Lima was offered concurrently to eighteen-month appointment in UNOPS, Copenhagen.

The relocation agreement

110. Twenty-four notice to make the decision whether to take up the job offer in Copenhagen was not the first deadline that had been given to the applicant. On 24 March 2006, he had been informed that he would need to take the decision by 31 March. The applicant was not given a sudden deadline, but was given the extended deadline of 6 April 2006 after a long series of discussions between the applicant and

the Deputy ED over some two weeks. This was noted in the Interim ED's witness statement:

> 6. I would first like to stress that this letter dated 6 April 2006 was not suddenly sent to the Applicant. Instead, this letter was sent to the Applicant only after a long series of discussions between the (then) UNOPS Deputy ED ([name], who retired later in 2006) and the Applicant. Indeed, [the Deputy Executive Director] had a much more active role in the discussions with the Applicant than I did. I mention this because I was surprised that [the Deputy Executive Director] was not the subject of the same accusations since even though I made the final decisions, she was very much involved in the reassignment of the Argentina portfolio and also to have the Applicant relocate to Copenhagen.
>
> 7. I cannot remember now the exact date when [the Deputy Executive Director] started discussions with the Applicant, but I do remember the discussions lasted some time, probably at least two weeks …
>
> …
>
> 9. I also attach, as Annex R-GF-3, a series of e-mails between [the Deputy Executive Director] and me starting from 29 March 2006. I would ask the Tribunal to note that in this e-series of e-mail, in particular in my e-mail dated 31 March 2006 to [the Deputy Executive Director], I state "[the Applicant] should give us an indication of what he really prefers. Based on that information we will make him an offer." I think it is clear from this e-mail that I never had any intention to negatively influence the Applicant's career.

111. The letter of 6 April 2006 was only sent when the applicant "refused to make any decision, notwithstanding [the Deputy ED's] efforts, and instead kept delaying. It was only after this refusal and repeated delay that I sent him the letter dated 6 April 2006 to the Applicant offering him the Copenhagen post. I did not think it was unreasonable to require him to give an answer by the next day, because he had had more than a week to think about the Copenhagen post", as per the Interim ED's statement. Moreover, other staff were required to make the same decision and some even chose separation.

Transfer of the applicant to Copenhagen lawful under staff regulation 1.2(c)

112. The transfer of the applicant to Copenhagen was lawful under staff regulation 1.2(c) which provides:

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities of offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

The warning of disciplinary action was appropriate given the applicant's delays in handing over his portfolio. The Interim ED's desire to improve relationship between UNOPS and UNDP Argentina cannot be considered to be an extraneous factor in making this decision and he was acting within the authority conferred by staff regulation 1.2(c).

113. In Judgment No. 1408, *Cherian* (2008), the Administrative Tribunal stated:

> This was rather a case of transfer of a staff member (from the post of Supervisor to Assistant Supervisor, with salary and grade protection) as part of the reorganization of the Department. Staff regulation 1.2(c) provides that "[s]taff member are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations". The case law of the Tribunal has emphasized that the Secretary-General "generally enjoys broad discretion in making decisions of this kind. Only where the Respondent's discretion is tainted by extraneous facts, such as prejudice, arbitrariness improper motive, discrimination, for example, is such discretion subject to limitation." (Judgement No. 1163, *Seaforth* (2003).) Accordingly, the Tribunal is satisfied that the Respondent has the discretionary authority to take the impugned decision.

The respondent points out that as was the case in *Cherian*, the instant case did not involve any loss of grade to the applicant.

114. That the Interim Deputy ED met and consulted with the applicant about the reassignment is "fatal" to the applicant's contention that the decision was unfair or

unlawful. Specifically, in UNAT Judgment No. 518, *Brewster* (1991) there is a discussion as to what would constituted the "consultation" required in which it is said

> There is, so far as the Tribunal is aware, no definition in the Staff Regulations or Rules, or in the Tribunal's jurisprudence, of the concept of consultation, but on an ordinary construction, it would appear that the essential element is that he each part to the consultation must have the opportunity to make the other party aware of its views, so that they can be taken into account in good faith … This construction does not meant that the views of either party must necessary prevail or that one side or the other must change its position ...

115. The present case can be distinguished from the *Aertgeerts* case relied upon the applicant as the decision under appeal in that case was a decision not to renew the applicant's contract. In the instant case it was a decision to transfer the applicant to another position without any loss in level.

116. *El-Ansary*, as relied upon by the applicant, was not a case regarding the Executive head's authority pursuant to staff regulation 1.2(c) to reassign staff.

117. With respect to *Banerjee*, the respondent notes that the ED had witnesses to the applicant's conduct, while the decision-maker in *Banerjee* had not.

Disclosure that the matter was being investigated made in good faith

118. In June 2006, when the Interim LAC Regional Manager disclosed that the Ethics Office was investigating the matter, he was acting in good faith as this was done in a staff meeting, "not surreptitiously" and he did not disclose the nature of the questions being asked, therefore his disclosures were of a limited nature.

119. On the Interim Ethics Officer's report, it is correct and consistent with the Regional Director's testimony.

120. With regard to the submission that the applicant was told by the Ethics Office that the matter was closed and there was no appeal the respondent notes that the relevant documents show that the Interim Ethics Officer was *functus officio*, not that

there was no appeal and that the Interim Ethics Office specifically noted that although she was not forwarding the case to OIOS, the applicant had the opportunity to submit it to them directly or to request review of the decision under the staff rules.

OIOS involvement in reviewing issues viewed positively

121. The ED took steps to encourage staff to report wrongdoing, even prior to his awareness of OIOS investigation of the matter. He has himself invited OIOS to investigate matters:

> The first thing I would like to point out is that on 6 November 2006 I sent an all staff message titled "Protection Mechanisms for UNOPS and its Staff". This communication, which is attached, and which was followed by other similar messages, encouraged staff to report any suspicion of wrong-doing and offered protection. It is noteworthy that this message was sent before I was informed on 14 November 2006 about an OIOS investigation of UNOPS' work in Argentina. Furthermore, I do not view OIOS involvement in any issue as negative. I have myself invited OIOS to review UNOPS issues. One example is the review of certain UNOPS operations in Afghanistan which subsequently hit the headlines. As OIOS review is not a negative thing, and I have encouraged staff to report what the see or suspect, I do not get upset when they do.

On whether the applicant had a procurement role in Copenhagen

122. With regard to the assertion that he had no post upon arriving in Copenhagen, the applicant himself noted that he "was initially assigned to what at the time was known as the Division for Procurement Services". While the applicant did not initially have a job description, UNOPS was in a state of disarray and job descriptions were either lacking or hopelessly outdated, as per the ED's testimony. The Interim ED in his witness statement said that he

> had just assumed that the new UNOPS headquarters in Copenhagen would be made up of the different units that, prior to the move, existed elsewhere. In other words, we assumed we were just physically relocating organizational units and their international staff. I mention this because I want to make clear that I really did expect the Applicant

> to work as a procurement officer in the UNOPS Division for Procurement Services once he relocated …

123. Although the applicant claims he was not assigned procurement responsibilities, the organization chart of September 2006 notes him as a Procurement Track Analyst in the IBS Team. In his oral testimony, the ED explained that the IBS unit was a top priority with regard to change management and the applicant was responsible for the procurement track of this change management team which was not below the applicant's competence. The applicant's performance appraisal of 2007 specifically mentions that he was to "provide business & procurement consulting" so he did have some procurement work. Likewise, in the same appraisal, the applicant states he "carried out a comprehensive review of UNOPS handbook in order to identify those gaps not covered by the introduction of either the Procurement Manual or the Standard Operating Procedures …". The applicant also worked on recruitment for the e-roster and e-recruitment project for consultants. The Chair of the Headquarters Contracts and Property Committee (HQCPC), in her testimony of 10 December 2009, stated that UNOPS treated its consultant recruitments as procurement actions.

124. The lack of job descriptions applied to others in the IBS unit, as supported by the testimony of the Director of OEC&HR. She also stated that in her professional opinion there were two factors which contributed to his career difficulties: difficulty getting along with his colleagues and not enjoying his job.

125. An L-4 procurement position did exist within the Division for Procurement Services when the applicant arrived in Copenhagen, "procurement consulting" was noted in his performance evaluation for 2007 and the organizational chart of 2006 had him referred to as a "Procurement Track Analyst". The respondent notes that "the responsibility for the formulation of the reorganization of [the UN organization] falls within the Administration's exclusive domain", UNAT Judgment No 1254 (2005).

The applicant's exclusion from decision-making panels and committees

126. The applicant was not singled out in his exclusion from the HQCPC, PRAC's successor: the HQCPC Chairperson and PRAC alternate chairperson gave a statement which included three other staff members who were former PRAC members who were not appointed to the HQCPC. Similarly, for the APB, the evidence shows that the applicant was only excluded on that one day rather than as a rule because they had been frantically looking for someone to form a quorum and there is no evidence to suggest anything further.

127. With regard to the Interim LAC Regional Manager proposing administering more ANSES consultants, there should be no adverse inference drawn from him considering the project as the allegations with regard to the applicant were never proved.

128. There was no restriction put on the applicant by the Deputy ED with regard to participation in the mission to China, although the Deputy ED did not like the way it had been arranged. Any decisions regarding the release of the applicant were reasonable and based on availability.

The restructuring light

129. On the issue of whether the applicant was told that he would not be matched, the Director of OEC&HR denies saying this:

> I categorically state that I never told the Applicant that he would not be "matched" during the position matching exercise. The only reason that I can imagine for the Applicant making such a shocking claim is that he is referring to his misinterpretations of my attempts to help him move away from the "business process specialist" filed that he was obviously did not like, i.e. (my suggestion that he speak to [a UNDP colleague] about possible opportunities at UNDP procurement and (ii) my asking him whether he would be happier if he were to leave with an "agreed separation package".

She describes the many actions she took as a human resources professional and concerned colleague to assist him.

130. The applicant was neither singled out, nor highlighted as the only outstanding case, as verified by email from the Deputy ED shortly after the process: "We also never said that [the applicant] was the 'outstanding case'. The situation we have is that we have three individuals ([the applicant] is one of them) against two posts. Therefore, it's 'reduction in force' and all three will have to apply". This is supported by the Director of OEC&HR's statement, in which she states that she did not recall telling the panel that he was the only staff member that was not going to be matched but that she did make an initial error in one aspect of the position matching exercise, namely, the two other staff members were matched to posts but not the applicant and they were not meant to do this if there were more incumbents than posts. This mistake was pointed out to her by her direct supervisor and the panel was reconvened to correct the error. She also notes that some mistakes at that time are likely to have been due that she had been unwell.

131. The applicant was not singled out in his treatment. Others in similar positions were treated in the same way, for example, other UNOPS staff members who were assigned to the new Organizational Effectiveness Centre (OEC). In her testimony of 10 December 2009, one such colleague confirmed that prior to the restructuring she had worked at the Division for Procurement Services and then she had to take on a new role as Team Lead, Policy and Quality Assurance. In her statement, she stated as follows:

> 5. I was one of the staff members who was negatively affected by the Respondent's 2007 "restructuring light" process.
>
> 6. In particular, my pre-"restructuring light" post was abolished, and I was not "matched", even though the simpler and more logical thing to do was to just transfer me to another part of UNOPS to do another procurement job, without any change in my grade.
>
> 7. In addition despite all my years of good service with the Respondent, the Respondent refused to treat me as an internal candidate for the new post that I applied for (Team Leader, Global

> Procurement Support Unit). Instead, I was treated as an external applicant. This was despite the fact that I had had a major role in the development of the Respondent's Procurement Manual (under the supervision of the chief of the Respondent's Division of Procurement Services (DPS)), and was, up to the time of "restructuring light", the "Team Leader, Policy & Quality Assurance (PQA)" of the Respondent's "Organizational Effectiveness Centre" at the same level of the post I applied to.
>
> 8. I believe that the planning for the "restructuring light" process was insufficient. I also believe that the time-table that the Respondent's HR staff set for the "restructuring light" process was overly ambitious and it was confusing due to the "restructuring light" and the merger with IAPSO taking place at the same time. This resulted, in my view, in unnecessary anxiety and confusion among staff. Some of us who were affected were so anxious that we had a meeting with a Staff Council representative ([name]).
>
> 9. I was worried about being left without a job through no fault of my own and I therefore began to apply for jobs elsewhere.
>
> 10. However, at no time did I see anything that suggested that the "restructuring light" process was "targeted" at me or anybody else as individuals. Many errors were made, but I do not think they were made with bad intentions.

132. The restructuring light (or job matching) process was in line with the staff regulations and rules, as provided by the Position Matching Guidelines:

> It is important to distinguish "position matching" from "job matching", where, in the latter, displaced individuals would be matched to vacant position. In "position matching" individuals are not considered – only the positions are compared. The UN Staff Regulations and Rules are clear; a staff member is displaced from his/her position when a) the post is abolished, and this includes when the job description changes materially, such that it can be considered as if new; or b) when the job is part of a reduction in force.

133. The Director of OEC&HR and the panel *did* consider internal candidates prior to considering external candidates as per her oral testimony and supported by the witness statement of the Portfolio Manager/Staff Council Representative:

> … I believe that a long-serving internal candidate who scores near the top should be hired if the top-scoring candidate is an external candidate. This was why I pushed for [another candidate] to be

> appointed to the Team Leader position, even though she was the second-highest scoring candidate, and was able to convince the other panel members … In the Applicant's case, his scores were just too low.

Failure to secure one of the three positions following the restructuring (Business Process Specialists (P-4 and L-4) (posts #7 and #9) or Team leader (P-4) (post #8)

134. With regard to the position of P-4 Business Process Specialist, the testimony of the Director of OEC&HR and the Portfolio Manager/Staff Council Representative and the interview panel minutes, are conclusive that the outcome of the panel was due solely to the applicant's poor performance at interview. Specifically, the panel minutes state:

> Overall, the panel was disappointed with his performance during the entire interview. It was evidenced that he lacked technical skills for the post. In the core values and competencies his performance was below average. The candidate could not support his answers with concrete examples.
>
> In technical part of the interview, it was evident that he did not have the understanding of what the job entails and his answers were just average. He failed to exhibit good level of experience and understanding. It was unanimously agreed that [the applicant] would not be a right match for the post.

In her witness statement, the Director of OEC&HR said:

> By that time, I had sat on enough UNOPS interview panels that I could myself give a good answer to many of the questions that we asked. However, to my surprise, the Applicant's answers fell noticeably short of the type of answers that I had come to expect, notwithstanding his years in UNOPS. On the other hand, some of the other candidates did give the type of answers I had expected.
>
> …
>
> 44. I had expected the Applicant to be among the high-scorers at the end of the interview. Up until the interviews, I was thinking that the Applicant, [and two other staff members] would have the strongest chances of being selected because they knew more about how things had been done at OEC compared with other candidates. So when I heard some of the Applicant's answers, I was surprised. I was shocked when I realized that the Applicant's total score had not even

> met the threshold we had set (this is UNOPS's usual procedure). I remember thinking that maybe the Applicant did not take the interview seriously enough to prepare as much as the other did, or experience a "mental block" or "mental freeze" during the interview, or both.
>
> I would like to also state that I found that the other interview panel member conducted themselves professionally. I believe that I also acted professionally. We were all only trying to identify the best candidates for the vacancies. The points given for each candidate were, in my view, a fair reflection of each candidate's answers.

Likewise, the Portfolio Manager/Staff Council Representative stated:

> 6. I have re-read the minutes of those interviews, and believe that the minutes are a fair and accurate reflection of what occurred during the interviews. The scores given to each candidate were fair …
>
> …
>
> 7. I stated that the other members of the interview panels conducted themselves properly throughout the interviews and deliberations. I believe that they, like me, were at all times only trying to identify the most qualified candidates for the posts.

135. As regards the concern the applicant has raised that it was not disclosed that he was the incumbent of the post, the respondent submits that this would have been clear from the papers (and the *curriculum vitae*) before the panel.

136. The selected candidate for the Business Process Specialist (P-4) *did* possess the minimum requirements and even if he had been considered ineligible, the post would have been offered to the next ranked candidate who was not the applicant. Moreover, the Director of OEC&HR explained that this candidate had educational certificates which were equivalent to a masters' and that he should be appointed at the P-3 level.

137. It has since been confirmed by the Human Resources Specialist responsible for UNOPS Copenhagen that following the rejection of the post by the selected candidate, no one was appointed.

138. For the Business Process Specialist Process (L-4) position (post #9), neither the applicant nor the other candidate previously interviewed for the P-4 position were short-listed which shows that the applicant was treated in the same manner as another staff member in a similar situation. A contemporaneous email from the Director of OEC&HR states that she would not interview either as they had already been interviewed. The selection of the successful candidate was consistent with the regulations, rules and policies. He was not an external candidate at the time.

139. An examination of the scoring grid and the interview report for the P-4 and L-4 Business Process Specialist posts shows that each candidate was only interviewed once for both posts. The applicant *was* considered for both posts, as confirmed by the statement of the Director of OEC&HR and the Staff Council Representative on the panel. Even if the Tribunal concludes that the applicant was not interviewed for the L-4 post, no adverse inference should be drawn because the applicant was treated the same way as another candidate who was also only interviewed once.

140. The selection for the Teamleader, Business Process Improvement (P-4) (post #8) position was consistent with the applicable regulations rules and policies. There was no apparent manipulation of the scores that single out the applicant, as can be seen by the way in which other candidates were treated. The applicant was ranked fourth out of five candidates. The addendum to the interview panel report explains the application of the rule that internal candidates would be considered prior to the consideration of any external candidates:

> The Selection Panel reconvened to reconsider its recommendation of a second round of interviews of the two top scoring candidates. It concluded that a second round of interviews for the candidates who are both existing internal UNOPS staff would not add value to the process. It further concluded that in accordance with staff rule 109.1(c)(i) and gender balance that [candidate A] is offered the position. Should [candidate A] not take up the offer then the position should be offered to [candidate B]. In case [candidate B] also does not take up the position when offered it will be readvertised.

The selection of the candidate A demonstrates that, in fact, UNOPS gave priority to the "incumbents" of the abolished posts as she was a close second to the top-scoring candidate.

Other selection processes under scrutiny

141. The ED testified to taking a conservative approach to appointments and relying almost exclusively on interview panel members and the ASB members when deciding on staff appointments, with a few exceptions for the posts for people who would be reporting directly to the Executive Office.

Applicant did not apply for any portfolio manager positions

142. The applicant never applied for any portfolio manager positions during the relevant period.

Regional Director, LAC (D-1) (post #1)

143. With regard to the applicant's application for the post of Regional Director, LAC (D-1), the Regional Director said in his witness statement that the applicant "needed some more time before he was ready to be a Regional Director" and in the ED's oral testimony he noted that it would be unusual to jump from the L-4 level to D-1 level. The respondent notes that this selection process took place before the OIOS report of 2 April 2007 was released and therefore it could not have been retaliatory. Respondent states that the *curriculum vitae* of the successful candidate had more than twelve years of experience and that the eight years reflected eight years of UNDP experience and that she was already a P-5 level staff member. The applicant's stint as Officer-in-Charge did not necessarily mean that he was qualified for position of Regional Director.

Manager, Argentina Operations Centre L-5 (post #4)

144. With regard to this post and the applicant's questioning of why he was not short-listed, the respondent submits that this post was L-5 which was at a higher level than the applicant and that the reason for him not being short-listed, as explained by the Regional Director of LAC was "I don't consider he has the profile I am servicing for the consolidation of office in Argentina. He has valuable experience but right now I need other type of experience which I do finding the short-listed candidates…". In addition, the applicant was up against candidates of a very high standard, with the selected candidate having had a vast experience in the Latin American region and was a former Vice-Minister of Economy for the Government of Paraguay. The applicant has ignored that the ASB revised its initial recommendation after receiving some information from human resources which the then Chair of the ASB indicated would be sufficient evidence to support the appointment. With regard to the argument of the applicant that the person appointed was not fluent in English, it is not uncommon for UNOPS not to insist on this.

145. It was "not objectionable" to include the former Interim ED in an interview panel for a Latin America and Caribbean post.

Deputy Regional Director, Latin America (L-5) (post #5)

146. The ASB revised its recommendations on 9 April 2008 in light of addition information provided by UNOPS management and the selection was in line with all relevant staff regulations, rules and policies and the selected candidate did hold a masters' degree and have the required years of experience. He also had recent and extensive experience working in the Latin American region in contrast to the applicant who has been based outside of Latin America since 1985. As regards the acknowledgement of the Interim ED that he knew the selected candidate, the respondent notes that in *Sprauten* UNDT/2010/087:

> 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.

Procurement Specialist, TCPU (P-4) (post #6)

147. The applicant states it was unfair that he was not considered eligible for this position. However, the Officer-in-Charge, Procurement Support Office, UNDP in a contemporaneous email to the Deputy ED, gave a reasonable explanation for this: "I cannot support a displaced person being in job fair round 1, if that person was not initially affected by the merger and now has no post to throw in. Throwing in a post was a key condition to participating as voluntarily affected". The applicant does not provide any proof that his post was initially affected by the UNOPS-IAPSO partial merger or that he had "thrown in" his post i.e. a person not initially affected but "throws in" their own post so that there is an enlarged pool of applicants. The applicant was ineligible. The respondent further emphasises that the applicant was part of the restructuring light exercise, not the partial merger.

Senior Procurement Officer (post #2)

148. The fact that the applicant was not short-listed was not evidence of retaliation. Another internal staff member who was also a former Portfolio Manager with experience was also not short-listed and the successful candidate and the alternate candidate were of extremely high quality.

Senior Partnership Manager (post #3)

149. In response to the fact that his candidacy was not acknowledged, the respondent notes that this post was never presented to the ASB or filled.

Procurement Specialist (post #10)

150. There were three other candidates who scored higher than the applicant and the applicant does not dispute that he did not perform nearly as well as the two

candidates who were invited for the second interview (the scores were 94, 92, 71 and the applicant received a score of 68). In particular, the respondent notes that the applicant does not dispute that the portion of the minutes describing his interview were fair. The applicant has sought to rely on the subsequent debate as to which of the two higher-scoring candidates should have been selected (in particular, whether a second interview was necessary), but the essential issue is that there is nothing to indicate that the applicant was not treated fairly.

151. The most relevant portion of the ASB's minutes is "the first interview had a clear outcome with a female candidate emerging with the top score of 94 compared to the proposed candidate's 92" and that even if an apparent conflict of interest existed with all but one of the panel members being supervised by the chair, there was no basis under para 11.5 of the Recruitment Policy to ask for a second round of interviews:

> 11.5 In situations where the interview panel agrees that they have insufficient information to be able to make a recommendation, they may choose to recommend that a second round of interviews be conducted, either with all candidates or only with the highest scoring candidates. The Chair may decide that the second round of interviews should be conducted by a new panel, in which case no member from the first panel, other than the Chair, may sit on the new panel.

It is clear that the interview panel and the ASB never believed the applicant was treated unfairly. The decision of the ED to endorse the appointment was done following discussion with the Human Resources representative and Global Service Centre Director.

Procurement Specialist (L-4) (post #11)

152. His non-appointment to this post is not attributable to retaliation but rather, as the applicant has stated himself, it was mainly due to him not speaking French: "Since most questions were in French, I did not stand a chance".

153. Two separate selection process were attempted before resorting to transferring a staff from an office that was closing down.

The applicant's eligibility for rotation

154. With regard to the applicant's contention that he was excluded from participating in the staff rotation exercise, in spite of his apparent qualification under the policy and his imminent termination, the respondent submits that the applicant was not eligible because he did not have a post as required by UNOPS Administrative Instruction on Rotation which provides:

> 2.2.2 A staff member serving with UNOPS is subject to rotation if:
>
> …
>
> (c) the post he/she encumbers is included in the Executive Board approved staffing table;

This is a basic element of a rotation policy: the number of available posts must at least be the same as the number of staff members, otherwise an individual against a post would find himself without a post because of the policy. An exception was appropriately made for another staff member by the ED due to the serious health problems of the individual involved.

The decision of the respondent not to agree to the loan of the applicant

155. On the decision of the respondent not to agree to the loan of the applicant, the applicant was treated in exactly the same way as another staff member. Due to UNOPS difficult financial situation at the time, it had decided to avoid secondments and loans and opt for transfers instead.

156. On the decision to separate the staff member, the respondent notes that the applicant's contract had already been extended for more than a year after his post had been abolished in the restructuring process of 2007, and UNOPS' self-financing structure meant that this could not continue indefinitely. The respondent also notes

that the applicant remained in the UN system without any break in service, and started with the UN Secretariat as of 1 December 2008.

Receivability

157. The respondent maintains its position that the only decision which is receivable is the non-renewal of the applicant's appointment, as all the other decisions are time-barred pursuant to staff rule 111.2.

158. The pre-31 July 2008 events are only relevant insofar as they may show the Interim ED improperly influenced the ED not to renew the applicant's contract.

159. Assuming that the Tribunal concludes that the Interim ED made the wrong decision in 2006 to allow the applicant to be reassigned away from the Argentina portfolio and/or be transferred to Copenhagen, but it is not shown that Interim ED influenced the ED not to renew the applicant's contract in 2008, then the actions of the Interim ED are irrelevant for the purpose of this case.

160. All decision prior to that of 31 July 2008 are also time-barred, and are only relevant to the issue of whether the ED had an improper motive that continued until 31 July 2008. If no such motive exists, then the decisions are irrelevant.

161. Paragraph 2.2 of ST/SGB/2005/21 on protection against retaliation for reporting misconduct and for cooperating with duly authorised audits or investigations provides:

> The present bulletin is without prejudice to the legitimate application of regulations, rules and administrative procedures, including those governing evaluation of performance non-extension of termination of appointment. However, the burden of proof shall rest with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity referred to in section 2.2 above.

Paragraph 2.2 does not alter the time bar provisions of the then staff rule 111.2. In other words, an appeal must still be receivable before the Administration is required

to prove that it would have taken the same action absent the protected activity. If the appeal is not receivable, and the time-barred decision is only relevant because it may show whether or not an improper motive existed (and possibly continues), then paragraph 2.2 does not apply. In such a situation, only the usual rule applies: the applicant has the burden of proving improper motive.

162. With regard to the only decision that is not time-barred, i.e. that of the ED of 31 July 2008, the evidence meets that standard set out in para 2.2 of ST/SGB/2005/21, i.e.:

> 6. It was however my decision not to further renew the Applicant's contract after 30 November 2008. This type of decision is never easy to make, but I decided that it was in the best interests of UNOPS. The Applicant's contract had already been extended for more than a year after his post had been abolished I the restructuring process of 2007, and UNOPS' self-financing structure meant that this could not continue indefinitely.

Further, or in the alternative, the respondent submits that ST/SGB/2005/21 is not applicable to this case, and its said para 2.2 does not apply, because the applicant was not undertaking a "protected activity" as defined in ST/SGB/2005/21:

> 2.1 Protection against retaliation applies to any staff member (regardless of the type of appointment or its duration), intern or United Nations volunteer who:
>
> a) Reports the failure of one or more staff members to comply with his or her obligations under the Chart or the United Nations, the Staff Regulations and Starr Rules of other relevant administrative issuances, the Financial Regulations and Rules, or the Standards of Conduct of the International Civil Service, including any request or instruction from any staff member to violate the above-mentioned regulations, rules or standards. In order to receive protection, the report should be made as soon as possible and not later than six years after the individual becomes aware of the misconduct. The individual must make the report in good faith and must submit information or evidence to support a reasonable belief that misconduct has occurred …

The applicant's reporting of alleged wrongdoing has to be about the Project Management Specialist's failure to comply with his or her obligations under the UN

Charter, regulations or rules and the respondent submits that the Project Management Specialist was only carrying out activities pursuant to an agreement that the UN had entered into with a government.

163. In the alternative, the respondent submits that ST/SGB/2005/21 does not apply to the arguments regarding the Interim ED's action because they took place before ST/SGB/2005/21 became applicable to UNOPS. (The respondent notes that at that time SGBs did not automatically apply to UNOPS as per ST/SGB/1997/1, which provides that "Secretary-General's bulletins shall not, unless otherwise stated therein, be applicable to separately administered organs and programmes of the United Nations".)

164. In response to the argument that the respondent should have found him a suitable placement given he had been a successful portfolio manager for ten years, the applicant was not treated differently from any other staff member in the same position and did not get a position in the restructuring light due to his poor performance in the interviews.

165. The portfolio was removed because of the applicant's well-documented poor relationship with UNDP Argentina. The applicant was aware of this poor relationship. The Interim ED was not aware of the applicant's reporting of alleged wrongdoing until May 2006, and therefore this was not a retaliatory act. No special relationship existed between the Project Management Specialist and the Interim ED.

Compensation

166. With regard to the applicant's reference to the *Everett* case, the respondent notes that the staff member in that case received USD3,000 for "the humiliation, stress and uncertainty she endured throughout the three-year period during which she was placed on SLWFP [Special Leave With Full Pay]". The circumstances in *Everett* included the Organization rejecting unanimous JAB recommendation to suspend said SLWFP and the lack of efforts made earlier to find the applicant a suitable post. The

staff member in that case had a 100 series (permanent) employment, and thus the Organization was under an obligation to do so; in the present case, the applicant did not have a 100 series permanent appointment and thus the respondent is under no such obligation.

167. With regard to the applicant's reference to the *Lehmann* case, the respondent notes that *Lehmann* involved a decision to terminate the staff member's appointment under extraordinary circumstances: the Organization had decided not to forward the applicant's case to the prescribed committee because it thought the UN Medical Director's opinion made it difficult to conclude that the applicant was in fact incapacitated. In the applicant's case, the decisions were made upon the recommendations of the relevant committees. The applicant's case is "nothing like" *Lehmann* where three years' net base pay was to be paid only if the Organization declined to reinstate the applicant's permanent appointment. In other words, the staff member in *Lehmann* had a legal right to be employed until retirement, in contrast to the applicant who has never had a permanent appointment and whose appointment may be allowed to expire and does not carry any expectancy of renewal.

Issues

168. The issues can be summarised as follows:

a. whether the decisions raised by the applicant are receivable;

b. whether the decisions or acts raised by the applicant are sufficient evidence, either cumulatively or severally, to support his claim of retaliation, harassment and abuse of authority;

c. whether a link can be established between the protected activity and the ensuing treatment of the applicant;

d. whether the respondent was in breach of its contractual obligations under the relocation agreement;

e. whether the selection processes under scrutiny were lawful and afforded the applicant full and fair consideration for appointment; and

f. whether the non-renewal of the applicant's contract was affected by retaliation.

Discussion

Scope and receivability

169. The applicant has submitted that the scope of this case included the alleged failure of the respondent either through the Interim Ethics Office or OAPR to conduct a thorough investigation into the applicant's allegations of financial impropriety and retaliation. I directed early in the case management process that the truth of the applicant's allegations was not a relevant issue in this case. Nor, for equally obvious reasons, is the adequacy of the investigation into his claims. It follows, amongst other things, that whether there were widespread fraudulent practices involving the Project Management Specialist or not has not been examined by the Tribunal. No submission that depends on the truth of the allegations or the extent of any so-called frauds can therefore be accepted.

170. The applicant also submitted that the respondent failed to consider his allegations of retaliation. Even if this were so, and I do not accept that it was, this seems to me to a peripheral issue, since there is no asserted connection between this and any adverse decision about which the applicant complains.

171. The applicant questions a large number of decisions in order to prove his claim of retaliation and abuse of authority. The respondent submits that these decisions cannot be examined as the time for appealing them has long since expired. However, the receivability or otherwise of these decisions has nothing to do with their relevance. There is no presumption of any kind that, since they were not the subject of litigation, they were correct or that the staff member is unable to establish that they were improper if it is relevant to do so in connection with a case which is

receivable. Here, the issue is whether the particular decision actually being litigated breached his contract of employment as not having been made properly but, rather, as part of a pattern of retaliation and thus the evidence of the circumstances of prior decisions is plainly relevant. The demonstration of the distinction between receivability and relevance is obvious when it is realised that, even if the Tribunal were to determine, for the purposes of this case, that an earlier decision was retaliatory, it would not affect its legal status and no order could be made in respect of it.

172. As regards the respondent's submissions that certain decisions are not receivable because the bulletin on retaliation had not yet come into force at the time of said decisions, this is a *non sequitur*. First, as stated above, the question is not receivability but relevance. Secondly, a decision that was influenced by an intention to retaliate against a staff member would undoubtedly have been a breach of the obligation of the Organization towards the staff member that decisions must be made with regard only to relevant matters and without being influenced by extraneous considerations. Indeed, any acts of retaliation against a staff member for fulfilling his or her responsibility to report misconduct would, of themselves, constitute serious misconduct. The non-existence of the bulletin on retaliation could not affect these principles.

173. The respondent submits that para 2.2 of ST/SGB/2005/21 on protection against retaliation for reporting misconduct and for cooperating with duly authorised audits or investigations does not apply to impose on the Administration the burden of proving "by clear and convincing evidence" in respect of decisions made before that provision came into effect that "it would have taken the same action absent the protected activity". It is somewhat uncertain whether this provision concerns all questions about the administrative decisions specified, arising in any context, including proceedings in the Tribunal, or only decisions made by the Ethics Office in relation to complaints of retaliation. Having regard to the generality of the language, I consider that it applies to decisions that are the subject of applications in the

Tribunal. But it does not relate to finding facts as such but rather a determination whether a particular decision is illegal for retaliation. Thus, it would apply in the present case to the decision not to renew the applicant's contract but it does not apply to impose an evidentiary presumption that the other decisions being considered for the purposes of the case were affected by retaliation unless the respondent proves otherwise by "clear and convincing evidence". Such evidentiary questions are to be considered in the ordinary way, unaffected by any presumption or special test.

Retaliation

174. In opening the case for the applicant, counsel on his behalf at the outset said that he relied on what he described as "institutional prejudice", not on the prejudice of any individual, to prove his case. He submitted that the pattern of adverse conduct, ending in what he described as constructive dismissal, establishes the applicant's case. Part of the difficulty with the word "prejudice" is that it can have at least two meanings or, perhaps more precisely, two applications. The first is the sense of personal judgment or attitude, a prejudice about someone; the second is in the sense of an adverse situation or even decision, where the individual is prejudiced or harmed by what has occurred. The two applications are very different. In the sense that the applicant suffered a series of adverse decisions, there can be no doubt that he was prejudiced. However, whether those decisions came about because of prejudiced views about him is quite another question. Here, if the ultimate decision not to renew his contract was affected in any substantial way by prejudice against him – as it is alleged, by his having been a whistle-blower – then it is clear that the decision was improper and a breach of his contract. However, that is not the case made against the respondent. On the basis of the opening, the applicant's case is that, because the decision was adverse to the applicant and he was prejudiced thereby, the fact that it flowed from a series of other decisions that were adverse – i.e., prejudiced him – demonstrates that he was the victim of institutional prejudice on the part of the respondent which has thus breached its contractual obligations towards him. In my view, this argument is untenable. Rather than dealing with it in terms of prejudice, I

prefer to analyse it in terms of the actual case sought to be made, namely one of retaliation, of which the decision under consideration is said to be the ultimate result. Accordingly, I have used the term "institutional retaliation". One of the immediate results of this focus is the observation that "retaliation" is not quite so ambiguous a notion as "prejudice". It necessarily involves the notion of motive or reason for an action. Actions cannot be retaliatory objectively – they can only be so described if they occur for a particular reason. The attempt to ascribe retaliation to an institution is therefore bound to be problematical. The reference, in my view, by the applicant's counsel to the notion of institutional prejudice is therefore not helpful – not so much because the term is at all events ambiguous but, more importantly, because it obscures the real issue in this case.

175. If the concept of institutional retaliation means that it is unnecessary to consider whether a particular adverse decision claimed to exemplify such retaliation is in fact retaliatory and sufficient simply to point to a collection of such decisions, I consider that it must be wrong both in principle and logic. This is especially so when the decision-makers involved (and those constituting panels of committees making recommendations to them) are numerous and removed from the allegation that has, it is alleged, motivated the retaliation. In principle it is wrong because it implicitly or explicitly impugns the reputation of the individuals involved upon the basis that their recommendations or decisions are improper simply because they are adverse to the complainant and other decisions made by others, in which they were not involved, are also adverse. It is logically fallacious because it only operates where an examination of the particular decision shows a proper basis for it: if the examination showed that it was inadequately grounded, then it is improper for that reason and there is no need to resort to any notion of institutional retaliation to characterise it; if, on the other hand, the decision can be shown to be justified, it cannot rationally be characterised as retaliatory. And a mere accumulation of adverse decisions does not change this logic. Of course, decisions may be wrong for any number of different reasons. In cases of discrimination or retaliation, it may be very difficult to prove the motive for the impropriety. However, where there is a significant number of decisions that are

improper for reasons other than retaliation, it is then legitimate (there being conduct that might rationally be regarded as likely to instigate retaliation) to infer that the collection of wrong decisions betrays the likelihood of a common factor, namely retaliation, leaving out of account, of course, those cases where the decision is wrong but retaliation can be positively excluded. This is because it is reasonable to ask for an explanation of the number of wrong decisions adversely affecting a particular staff member who, as it happened, had made a complaint which might well have led to a desire in the targets of the complaint to retaliate. It is also necessary to recognise that the target might well have friends or colleagues who resent the allegations or, indeed, think that they are entirely unjustified and, perhaps, themselves are wrongly motivated. But a decision must still be regarded as retaliatory if it is affected by disapproval of the actions of the staff member involved in making the complaint. This is because that disapproval is an extraneous matter that, therefore, is irrelevant. This is not, of course, to say that in every case the fact that a staff member (who, for example, is a candidate for promotion) made an irresponsible allegation against a colleague is entitled to have that fact ignored: character, integrity, judgment are all relevant considerations for promotion and such an allegation might well reflect on suitability for appointment. However, this is more hypothetical than real, since it would be necessary to have good evidence that the allegation was correctly so characterised and the staff member being given an opportunity to explain before acting on it, a most unlikely scenario.

176. There are many decisions, however, which are not inevitable and which could as reasonably have been made otherwise and, if made in that way, would not have been adverse or so significantly adverse to the staff member. Where there are a significant number of decisions of this kind but the adverse or more seriously adverse outcome is consistently selected, although the decision-maker is entitled so to do, then this could well be cogent evidence of the operation of a latent extraneous factor that is affecting the decision. In such a case the number of instances may well prove more than each individual instance. And, where there has been a complaint capable of giving rise to criticism (even unjustified) or the desire to retaliate, this might be

enough to justify a conclusion – at least on the balance of probabilities – that the adverse decision in question was improper. It seems to me that the passage from Judgment No. 1258 (2005) cited by the applicant goes or should be taken to go no further than this. At the same time I wish to emphasise that, if the evidence of the circumstances in which the impugned decision came to be made positively establishes that it was not affected by some extraneous matter, then the existence, or even probable existence, of a pattern of retaliation will have no operation since, in that event, it will have been proved to be irrelevant.

177. Accordingly, in my view, the notion of institutional retaliation can only be applied, if at all, where there is a significant number of wrong decisions adversely affecting the staff member or a significant number of adverse decisions which are not wrongful as such but could reasonably have been made in a way that was not adverse or so seriously adverse to the staff member and there is no sound reason why the latter course was not taken; and it cannot rationally have any role to play where all that is established is a number of adverse decisions which, on examination, are justifiable (as distinct from only lawful) in themselves.

178. The preponderance of evidence in this case does not establish that the impugned decisions were, or any one decision was, affected by any intention to retaliate against the applicant, either wholly or partly, for his reporting of what he believed to be misconduct. The crucial factors leading to this conclusion to my mind are the lack of any evidence of a significant connection between the Project Management Specialist and any relevant decision-maker such as might suggest a motive for retaliation, the fact that the crucial decision to remove the applicant's portfolio not only was justifiable for identified reasons but was made by the Interim ED in ignorance of the complaint of the applicant, the ED, who was appointed after the complaint had been made, had no significant connection with any of the protagonists, no interest in the particular events and no discernible motive for acting adversely to the applicant and, as will be seen, the decisions of which the applicant

complains were not either improper or susceptible of an alternative outcome. I will deal with each issue that the applicant has raised.

On the decision to remove the applicant's portfolio and duties

179. The Interim ED gave testimony before the Tribunal of the reasons he gave to the Interim Ethics Officer as to why the applicant was removed from his portfolio. These included the applicant's copying of an internal communication to a government official regarding the procurement of computers and that this seemed to be a personal revenge against the Project Management Specialist which could have caused serious loss to UNOPS. The Interim ED further confirmed that he had a number of issues regarding the applicant which he considered to be, together or separately, enough to want to separate him, though he did not discuss these issues with him, but with other managers. The Deputy ED reported back that she had discussed options for his removal with the applicant and that he had accepted to explore other options. The Interim ED made the decision to remove the applicant's portfolio but, at the hearing, could not recall making a written account of his reasons for doing so. He also made the point, for reasons he outlined, that the actual significance for UNOPS of the applicant's portfolio at the relevant time was less than the bare numbers indicated. Since he was not cross-examined to suggest this analysis was wrong, I do not set out the figures and policy considerations that he mentioned. Nor do I take this material as establishing more than that the productivity of the applicant was not such as would have prevented a reasonable manager from moving him to Copenhagen or removing him from management of his portfolio. This is not to suggest that I accept that the applicant had not competently managed his portfolio.

180. While one would expect such a significant decision to be better documented, there is substantial evidence of long-standing difficulties in the relationship between the applicant and some UNDP country offices, which the applicant references in his original Statement of Appeal, which would warrant the decision to remove his portfolio.

181. Taking the evidence as a whole – particularly the lack of any significant relationship being established between the Project Management Specialist and the Interim ED – I am satisfied that the complaint of the applicant about the activities of the former played no part in the decisions as to the applicant's portfolio management or deployment. There were real issues between UNDP and UNOPS concerning the applicant's management of his portfolio and his relations with persons within the host Government Department which could reasonably have justified the decision of the Interim ED and, I am persuaded, were in fact the instigating considerations.

182. Even if the decision to remove the applicant's portfolio from his management were wrongful as based upon mistaken facts or insufficiently based upon properly understood facts or motivated by some personal feelings of ill-will for the applicant, if it were not retaliatory, then it is not relevant to the disposition of the present case. On a consideration of the evidence as a whole concerning this event, I have come to the firm view that it provides nowhere near a sufficient basis for inferring that there was a link between the applicant's reporting of the alleged wrongdoing and the decision.

The offer of the assignment in Peru

183. The offer of the six-month assignment in Peru, while unsatisfactory to the applicant, was not, in my view, intended to be prejudicial to the applicant or to ensure his separation. Such an argument is not credible. The applicant argues that the six-month term meant that he was not treated equally to other staff members in the same position. While it is true that there was a six-month restriction on the Peruvian post, the application was under no obligation to accept this offer and he was concurrently offered the same contract-end date as other staff with regards to the other offer of relocation to Copenhagen. It appears clear that the Peruvian assignment was simply another offer for the applicant to consider and decide whether he wished to accept or decline.

The relocation agreement

184. While there is not an adequate evidentiary basis to suggest retaliation played any role at all in the requirement of relocation, I have two concerns with regard to the relocation agreement: first, whether the applicant, having been given less that twenty-four hours to make his decision, was subjected to unfair contractual terms; and, secondly, whether the respondent breached the terms of the contract as there was no specific position for the applicant when he arrived there. On the first issue, I am satisfied that the applicant was aware that the offer was impending given his discussions of the Peruvian option and that he was not blind-sided by the offer. In fact, it appears that his managers had discussed the matter with him and while it is clear that he did not find the offer satisfactory and was not happy with the change, he was informed of the offer well prior to the twenty-four hour notice being given to him. Other staff members were also adversely affected as a result of the relocation period and also had to make difficult choices. I do not find that the terms of the offer were unlawful given the context under which UNOPS was operating and given the evidence of prior discussions regarding the impending changes. Moreover, the applicant was at liberty to express his concerns with regard to the agreement and did so.

185. Turning to whether the respondent breached the terms of the agreement in not providing the Procurement Officer post to which the applicant agreed, this issue is more troubling. The Business Process Specialist position was not the position to which the applicant had agreed and while it had some procurement functions, it was a substantially different job, as evidenced, *inter alia*, by the Organization's subsequent decision to advertise it externally. A review of the role on the documents provided indicates that the procurement functions, as the name would suggest, were significantly reduced. Nevertheless the role was within a procurement department and other staff members had to deal with the same issue upon arrival in Copenhagen. I am satisfied that this shows the applicant was not singled out in this regard and that the act was not, of itself, retaliatory. However, the argument that others were in the

same position does not sufficiently fulfil the respondent's contractual obligations. The applicant did not suffer any financial hardship in that he was employed at the same level, albeit in a different role from that to which he had agreed. Notwithstanding the Organization's discretion to change the organizational structure and to reassign staff, the respondent did not meet its contractual obligation with regard to the relocation agreement. As the evidence discussed above shows, however, the failure to fulfil its undertaking to give him a procurement post in Copenhagen was not influenced by his having made complaints about misconduct and the mere fact that, as it happened, this failure was a contractual breach is not material to the issues in the case. At the same time it is worth noting that the decision had no financial implications with regard to salary and benefits during the contracting period and the evidence strongly indicates that there was no likely adverse effect on the applicant's career. Since, however, this decision is not before the Tribunal for determination under art 2 of the Statute, but only as evidence relied on by the applicant as part of proof of retaliation, no compensation or other relief can be ordered.

Was the applicant given full and fair consideration in all selection processes?

186. There is no right to appointment. On my assessment of the evidence for the posts which have been put before the Tribunal, the applicant was given full and fair consideration in all selection processes reviewed. In sum, the applicant was not successful either because he performed badly at interview or the other candidates performed significantly better or he was not short-listed. Where the applicant had concerns about lesser-qualified candidates being employed over him or that he was not prioritised over external candidates, I believe that the extensive documentation as provided by the respondent shows that in each and every case, even where an ASB decision was reversed or changed, the applicant was afforded full and fair consideration. More particularly, unless the material contained substantial fabrications, for which there is not the slightest evidence and every reason to conclude otherwise, the recommendations and decisions were entirely justified. The

suggestion that they were influenced by the applicant's complaints about the Project Management Specialist is, to my mind, decisively refuted. The Portfolio Manager/Staff Council Representative gave evidence in connection with the recommendations for the P-4 and L-4 posts, for which the applicant had applied. She was a staff representative on the interview panels which considered the applicant's candidacy. She said that the interview was conducted in the conventional fashion, the questions were essentially the same for each candidate, there was no mention at any time of the applicant's having made a complaint and the panel was unanimous in its evaluation of the applicant. I consider that this witness was telling the truth, which was also consonant with the logic of events. It would be quite wrong to conclude that the applicant was not recommended because of his whistle-blowing. I note also that the applicant did not apply for any portfolio manager positions during this period.

187. I have reviewed the evidence with regard to four other issues which the applicant has raised as unfair and not in keeping with the obligations of the respondent to the applicant, namely the respondent declining to loan the applicant, the applicant's exclusion from the staff rotation process, the decision not to reassign the applicant to Uruguay and the decisions regarding whether or not he could go on mission to China. The evidence does not support that any rights were violated by the respondent with regard to these issues, nor that decisions were made which were not reasonable at the time. In fact, the evidence surrounding these decisions as presented by the respondent shows that these decisions were reasonable, given the circumstances.

Did the respondent meet its obligations with regard to the restructuring light exercise?

188. As regards the three specific posts which resulted from the restructuring process, there is an abundance of evidence that the applicant did poorly at interview and no indication that the panel was prejudiced against him. Others were only interviewed once for the two positions and therefore the applicant's concern in this regard seems misplaced. While there is a commonsense argument for having given

the applicant the job he was encumbering, i.e. the Business Process Specialist position, he performed significantly worse at interview than his fellow candidates, and therefore no reasonable panel could have justified his selection. While there was an initial mistake made by the Director of OEC&HR in the job matching process, it was immediately rectified and thus inconsequential. It was made as a result of ordinary human failing to which we are all subject and had no relevant negative effect on the applicant.

The non-renewal of the applicant's contract

189. I have discussed above the circumstances in which the decision not to renew the applicant's contract was made by the ED. As I said, I considered that he was frank and truthful about the matter. This evidence, once accepted, undoubtedly amounts to clear and convincing proof that retaliation played no part in the decision. I note also that counsel for the applicant did not submit that the ED was in fact motivated by any notion of retaliating against the applicant for having made his complaints to the Ethics Office or OIOS but relied only what he termed "institutional prejudice". I do not accept that there is any evidence of such an institutional approach at all events. It follows that the non-renewal of the applicant's appointment was not a breach of the contractual obligations of the applicant.

Additional matter

190. The applicant and, to some extent, the respondent have sought, well after the evidence was closed, to tender new material. I refuse these applications. It is simply unfair both to the parties and the Tribunal to seek to reopen litigation when the task of preparing for judgment is underway. The new material was not uncontroversial and would have necessitated further submissions and, perhaps, another hearing. In a case where there has been extensive case management and several days of hearing with substantial gaps in between, the approach that the door is open right up to judgment is simply intolerable. If I were satisfied that a fundamental injustice might result from

refusing to consider the further evidence, it may be that I would have permitted it. But I am far from thinking this is so.

Conclusion

191. The application is dismissed.

192. In view of the circumstances of the case, I have agreed that the name of the applicant be omitted from the judgment.

(*Signed*)

Judge Michael Adams

Dated this 25th day of June 2010

Entered in the Register on this {25th day of June 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York