UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/021/ JAB/2008/035 UNDT/NY/2009/121
Judgment No.:	UNDT/2010/116
Date:	25 June 2010
Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

MESSINGER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
George Irving

Counsel for respondent:
Jorge Ballestero, UNICEF

Introduction

1. The applicant has filed two separate applications, which relate to three contested decisions. Two of these decisions were the subject of proceedings formerly before the Joint Appeals Board (JAB) which are now before the Tribunal as a consolidated appeal (UNDT/NY/2009/021/JAB/2008/035, the "first case") and the other is an application newly filed with the Tribunal (UNDT/NY/2009/121, the "second case"). The applicant alleges that all of the contested decisions are interrelated, have material facts in common and are based on a continuing pattern of harassment and mistreatment. Accordingly, I ordered that the cases be heard together after considering the parties' consent to this course of action.

2. The first decision relates to the abolition of the applicant's post, which he says was motivated by ill-will, hence an irrelevant or extraneous factor, and could have resulted in his separation. The second decision relates to what the applicant says is a mishandling of his harassment complaint against his supervisors. The third decision concerns his non-selection for the post of Chief, Organizational Learning and Development Section (OLDS), UNICEF.

Facts

Allegations of harassment

3. In September 2001 the applicant was appointed Chief, Recruitment and Career Development Section, P-5, in UNICEF's Division of Human Resources, New York (DHR). Since this time, his record of performance is noted to have been consistently very good. It is clear that amongst a significant number of senior officials in UNICEF both current and past, he is held in the greatest esteem, both for his personal qualities and the very substantial, in some ways unique, contribution he has made over the years to that major UN agency. The applicant perceived, however, that following the appointment of a new Director of the Division (the Director), his contribution to the

agency was less valued and, eventually came to believe that a calculated scheme was underway to remove him. The following account deals with specific events that he points to as evidence of this scheme and upon which he relies to establish that the particular decisions in issue were improperly made.

4. By email dated 4 May 2005, the Director approved a change in the reporting line of one of the applicant's supervisees which took him out of the direct supervision of the applicant. The supervisee had made a formal request on the previous day on the ground that the change would better reflect the supervisee's actual work structure. Both communications were copied at the same time to the applicant, who testified that he would have objected had he been consulted beforehand but felt he could not do so after the decision was made. He felt that the change of reporting line without consultation was done to undermine his position. The Director, for his part, denied any ulterior motive and said that he had merely agreed to the proposal put to him by his deputies, not knowing until afterwards that the applicant had not been consulted. The supervisee's evidence was that the applicant was at least aware that the situation was seen as a problem and had participated in discussions about it. It seems to me that simplifying the reporting lines of the supervisee was a proper basis for the change and the overwhelming bulk of his work did not involve the applicant. It may be that the applicant was not sent a copy of the formal request until after the fact and this was unfortunate but I would not draw any sinister implication from this fact. Nor does the rarity of such a change in the middle of a reporting period seem to me to be significant. We are not dealing with the laws of the Medes and the Persians.

5. In 2005, a restructuring of DHR was arranged for the 2006–07 budget biennium, part of which involved the division of the Recruitment and Career Development Section (then headed by the applicant) into two new Sections: the Recruitment & Staffing Section (RSS) and the Talent Management Section (TMS). This was documented in an Office Management Plan. As part of this process, a Vacancy Bulletin for Chief/RSS was issued in October 2005, with a closing date of 19 October 2005. On 28 October, the Selection Advisory Panel (SAP) met and

conducted a desk review. According to the Human Resources (HR) Manual, an appointment of this kind required the SAP to include two Global Appointment and Promotion Committee (APC) members but, as it happened, it contained only one such member. This member expressed concern that interviews had not been held but the DHR representative explained, according to the SAP minutes, that there was only one internal candidate who was at that time in an abolished post and, hence, was appropriately appointed. The evidence does not permit me to conclude, one way or another, whether this process was proper but, either way, it is difficult to see how it adversely affected the applicant.

6. The Recruitment and Career Development Section was divided into RSS and TMS on 1 January 2006 and the applicant became head of TMS on 1 February 2006. The job description used for this position was the same as had been used for a Chief position in 1997. A new job description was created for the position of head of RSS. It was the applicant's case that the jobs were essentially duplicated (in a set-up for the abolition of his post), but the job descriptions carry quite different wording, despite structural similarities in the documents. For example, the supervisees, the purposes of each post and the duties and responsibilities, in addition to being worded in a very different manner, also appear to outline different substantive functions. It is evident also that the functions of the two posts actually differed substantially in terms of their actual operation.

7. The applicant alleged that the Director, together with the then Deputy Director/DHR (Deputy Director), created a hostile working environment for him during the 2005–07 period by making demeaning comments about him. It is the applicant's position that other staff members in the department were aware of this, and he provided their statements attesting to this during the proceedings. (I discuss the weight to be given to these statements later in this judgment.) One such occasion was a comment made by the Director about the state of the applicant's working space, in the context of a colleague potentially being required to share that space. The applicant testified that the Director said that garbage trucks would need to be sent to sanitise his

office. In his testimony, the Director said that he did not recall this until reading the applicant's statements in this proceeding, but that he did not use the word "sanitise". He said that his comment was that he would have to call in the garbage truck from the sanitation department to remove the old material from the office. However this may be, it was an ill-judged remark that, literally understood, was offensive and would have been better not made even if, as he claimed (and I am inclined to accept), he had not intended it offensively but humorously. It was said by the applicant that comments were also made about his clothing, though this evidence is rather lacking in detail and, accordingly, not only difficult for the Director to deal with but for me to evaluate. The Director said he could not recall having made comments about the applicant's appearance, other than to compliment him on his boots on one occasion. In fact he thought that the applicant's clothing was appropriate. He said that he was never made aware prior to the present proceedings, nor was he aware that any other staff thought that the applicant felt harassed by him and other supervisors. It was also not disputed that the Director had on one occasion likened the applicant to "Gandalf", (a wizard character in the *Lord of the Rings* books and films). The applicant viewed this as demeaning but the Director says it was, if anything, a statement of respect. Since the character is one of heroic wisdom and virtue, it is difficult for me to see how the applicant could think it demeaning even if it were intended ironically, which is how the applicant took it. The Deputy Director is also alleged to have introduced him as "Santa Claus" at a Christmas staff party to humiliate him, although she testified that she did not recall this. Again, context is everything, but I cannot see why in the applicant's case this was a demeaning comment.

8. A retired DHR staff member who had been a colleague of the applicant and who had worked with the DHR management (ex staff member) testified that, at a meeting in 2006 for the purpose of discussing the applicant's recommendation for a post, the Deputy Director commented that the applicant should no longer be allowed to represent UNICEF, which provoked a laugh and affirmative body language from the Director and the other Deputy Director. The Director testified that he was not at

such a meeting and, furthermore, did not have such a view and would not have agreed with it. The Deputy Director testified that she recalled the meeting, did not recall making any such statement and does not believe that she made it. She stated that she had no opinion one way or the other whether the applicant should represent UNICEF and that, as the applicant was involved in many activities outside UNICEF, it would have been a surprising thing to say. It is always difficult to decide a conflict of evidence of this kind. I thought that the witnesses were sincere and honest, though obviously disagreeing. Certainty is not possible but I am minded to think that the probability is that some remark or other was made about the applicant's representing UNICEF but that the ex staff member misinterpreted it as being genuinely critical of the applicant. It is clear that she had gained the very strong impression that the applicant was not liked or, perhaps, not taken sufficiently seriously – indeed, she said that she told him of her opinion that the Director and Deputy Director did not like him or want him in DHR – and would have been ready (though, I am sure, not deliberately) to misconstrue a light-hearted, if perhaps barbed, remark.

9. It is important in this context to appreciate that people are entitled to their opinions, even unflattering or wrong-headed opinions, about colleagues. It is only when those opinions are conveyed in ways that constitute harassment or abuse that they become problematical in a legal sense. Of course, where adverse decisions are made, the fact that those opinions are held by the decision-maker may lead to the conclusion that the decision was made for reasons of personal dislike and, in that sense, otherwise non-problematical opinions are significant. Indeed, this is the case that the applicant makes here. But a genuine opinion about a colleague's competence that happens to be adverse is not susceptible of criticism. Judgments about competence, either adverse or favourable, are necessarily (and rightly) made by superiors about subordinates and vice versa and, where decisions need to be made that involve such judgments, it is quite reasonable to take them into account, subject always to the necessity of fairness where that person's situation may be affected. Such opinions – as well as flattering ones – are the inevitable consequence of working

with others. Nor is unwavering politeness, though no doubt ideal, essential for efficiency or effectiveness.

10. An example of this kind of judgment is the critical view evidently formed by the Director and the Deputy Director about one of the applicant's major achievements, the P2D Program, not so much of its content as its administration, which they thought was lax. This programme, I think it was accepted by the respondent, was very effective and widely acclaimed. The applicant was rightly proud of it. However, the views of the Director and Deputy Director about its shortcomings from a managerial point of view – whether right or wrong – constituted, I am satisfied from their evidence, of their conscientious judgment about problems they perceived in its administration, a conclusion strengthened by the lack of any cross-examination suggesting that they were mistaken or (more importantly) that it was motivated by ill-will. I would accept that it is very likely that these perceptions influenced their opinions about the applicant's administrative skills, probably adversely, but this would simply have followed as a matter of course and, in my view, not unreasonably. The criticisms referred to did not strike me as inherently arbitrary or excessive, let alone malicious although this evidence was given in a broad brush way. I do not doubt that the applicant felt keenly the lack of unqualified support – which also was reflected in lack of funding – and it is not surprising that he added it to the other slights to which he felt he had been subjected. But this is no real evidence of ill-will, let alone impropriety.

11. In an email of 2 February 2006 to various management-level parties in DHR, the Director criticised a draft "Recruitment Strategy for UNICEF International Professional Staff" which the applicant had prepared, stating it was "not well formulated both in style and content … a rather verbose and rambling document … even with a very gifted editor, I do not think we can usefully make a finished product of the draft", but that it could "remain an internal DHR working document and a source of some useful ideas". It gave specific examples of areas of criticism and concluded that there were "a lot of useful ideas in the document". The Director

testified that he had several times brought the applicant's attention to the problems that he saw with the draft but the applicant declined to make any changes. In the end, the applicant insisted that his draft should go to the Executive Director and indeed it did, but the Director thought – in my view justifiably – that, in effect, it should go forward together with his judgment of it. The applicant says the email of 2 February 2006 is evidence of the harassment he suffered. I have read the draft prepared by the applicant though not, of course, with the educated eye of an HR professional. It seems to me that, without joining in the criticisms of the Director, they are not so unreasonable as to suggest ill-will or a desire to hurt or demean. It seems to me that they were quite capable of being genuinely held and, if so held, he was perfectly entitled to express them and to do so in clear terms. His language was pointed, perhaps even brutal, but not untoward. The draft showed a great deal of effort and genuine skill (if I may say so without being patronising) but, considered objectively, it was fairly susceptible to the criticisms made by the Director. As someone who has to write for a living, I entirely sympathise with the applicant's feelings about his work being so treated, but I do not think that it is reasonable for him to feel that he was being demeaned. Contrary to the applicant's submission, this was not an "open email[s] to many staff". It was addressed to those who were dealing with the substantive matter and it was done in preparation to a retreat that was to be had shortly.

12. The applicant's other evidence of ill-will, being largely general and unparticularised, is difficult to evaluate. He has relied on a number of statements made by colleagues to the investigators of his harassment complaint. However, not a great deal of weight can be accorded to those made by persons who did not give evidence before me, although I have admitted them into evidence, since the respondent has not had the opportunity to test their evidence and I have not been able to assess their credibility in person. Whilst accepting the genuineness of the applicant's embarrassment following the statements of the Director and Deputy Director to which I have referred and the difficulty after the fact of appreciating the

actual chemistry of the situation as it were, I am unpersuaded that a reasonable person would regard them as more than somewhat tactless at most. More to the point, I do not think that, realistically, they can be regarded as indicators of ill-will let alone evidencing a motivation that would go to the extreme of trying to destroy the applicant's career in UNICEF after so many years of faithful and outstanding service.

Abolition of post

13. I now move to the abolition of the applicant's post and his candidacy for the post of Chief/OLDS.

14. Despite the fact that the Deputy Executive Director of UNICEF had signed off on a summary of proposals in September 2005, noting that stability was recommended for a number of years after the 2006–07 DHR restructuring, a year later, in 2007, a second restructuring in DHR was initiated which resulted in TMS being abolished and the applicant's post along with it. His functions were redistributed to the Chief of RSS and the Chief of the newly created OLDS. I accept the evidence of the Deputy Director and the Chief of RSS that the possibility of a further restructure, involving a merger of DMT and recruitment functions, which implied – though this was not, it seems, expressly discussed – the abolition of the applicant's post, was discussed by members of the Division Management Team, one of whom was the applicant, during the June 2007 budget process. As a part of this process there was a retreat and consultants were hired. The applicant evidently expressed the view that the system was working well and questioned the need for change. Perhaps because he disagreed with the direction of opinion, he did not attend all the working groups dealing with the issues.

15. On 1 May 2007 the OLDS post was advertised at a P-5 level, with a closing date of 22 May 2007. Though the applicant did not apply for the position (perhaps because he simply wished to remain where he was and hoped the situation would not change), his name was added to the list of eligible candidates by DHR after the

closing date. Seven candidates were shortlisted for the post. The SAP for the OLDS post on 17 September 2007 recommended a person other than the applicant for the post, with the applicant and another candidate tied in second position. The candidate recommended by the SAP to the APC was selected. I return to this process in greater detail in due course.

16. By mid-June the Director, knowing not only that one of the two recruitment management posts would be abolished but that it would be the applicant's, mentioned this possibility to him at a meeting of 14 June 2007 in the context of a discussion about the response to the Strategic Review. It appears that the applicant did not respond, at least negatively, to this information. A date for the abolition was mentioned and the applicant, asked about this, suggested an earlier date which certainly does not indicate strong opposition to the proposal. It beggars belief that, if indeed he had not known about this likelihood by this time, he would not have asked more questions about what, on that assumption, must have been a shock.

17. On 19 June 2007, shortly after the decision was actually made, the applicant was definitively informed at a meeting with the Director that his post of Chief/TMS was to be abolished by the end of 2007. The new post (from which recruitment responsibilities had been removed) of Chief/OLDS was discussed, the Director then being aware that the applicant had not been recommended for the appointment. The applicant contends that he should have been offered the post by lateral transfer. The view of the Director was that it was an important post which called for a competitive process to fill to ensure the best available appointment would be made. It seems to me that this approach was entirely reasonable, for all that the applicant was naturally concerned about his situation. The applicant also testified that the Director assured him that the abolition could be delayed until 2009, although this was not admitted by the respondent or the Director. The logic of events strongly suggests that this undertaking was not made, largely because it could not have been honoured. The possibility of the applicant's taking a termination was also discussed but in the

circumstances this was not surprising and I would not infer that this indicates anything sinister.

18. On 28 June 2007 DHR management addressed the Disaster Management Team with the Office Management Plan (OMP) draft document for 2008–09. This document had been sent that morning by the Director, giving staff something less than two hours to provide input and stating that meeting to deal with it would take place only an hour and a half later. The email commenced with the words "[a]s promised, please find attached the draft OMP", suggesting that this was not the first communication on the matter. Indeed, the Chief/RSS testified that it was the outcome of several months of discussions amongst the relevant staff. The timetable smacks of unseemly haste but nothing particularly significant, let alone sinister, seems to depend on this. The OMP referred to "the abolishment of seven (7) posts which could not be redeployed for technical reasons".

19. The applicant submits that this second reorganization was of dubious programmatic value and without input outside DHR management. He points to the fact that, out of the five abolished posts, four were vacant and the fifth post was his, thus no other staff were adversely affected or received a notice of termination as a result. The departure from the recommendation as to the need for stability and what is contended to be the singling out of the applicant indicates, he submits, that the restructuring was aimed at him rather than dealing with genuine managerial concerns.

20. Brief evidence on this point was elicited from the Director. In substance, he testified that the earlier proposals which had involved the reorganization of the applicant's responsibilities had represented a compromise which was criticised by the Strategic Resources Committee. The review was impelled essentially by two factors: the Strategic Review, which was of a far wider scope than the biennium programme which was the context for the earlier changes; and the organizational preferences of the Executive Director. The Director said that a rational division of the work should have led to two, rather than, three Sections and that the post of Chief/TMS was not

justified. Whether this opinion was reasonable or not depends upon an analysis of the detailed workings of DHR in this area. Although the applicant, it may be inferred, had the capacity to provide this material, he did not make such a case, at least at any level of detail capable of refuting the view of the Director, and chose, instead, to rely on the fact (together with the evidence of alleged ill-will) that his was the only encumbered post abolished to prove, or tending to prove, that the proposal was aimed at him rather than genuine organizational requirements. It may be that counsel for the applicant understood (rightly) that it would be a very difficult task to persuade me to conclude that the proposal was not organizationally justified, in the absence of any relevant expertise on my part. Even if I did have doubts about the desirability of the changes, that would not have come near to the line of deciding that they were manifestly unreasonable, which is the destination he needed to reach, almost always a steep upward climb where there is no concrete evidence of impropriety. Nor was the Director cross-examined to suggest that there were decisively good reasons to continue the status quo so far as the applicant's post was concerned. The Deputy Director, who was involved in the process, categorically denied that it was aimed at the applicant.

21. On 28 August 2007 the applicant received a letter from the Director informing him that the post he encumbered would be abolished effective 31 December 2007 and that his separation would be effective 28 February 2008, should his applications for available suitable posts in UNICEF be unsuccessful by that time. Of course, this was simply to inform him officially that which he had already been told.

22. The applicant points to several events occurring in the meantime that he says indicated he was being excluded from the work of the Division. On 11 June 2007 the Director responded to an email of that date from the Director of an IT Division regarding the composition of a senior staff selection panel. The applicant was not suggested for inclusion on the panel by either party, which he says was an arbitrary removal of a function that he had previously held. He was later included in other panels. On 22 and 26 June 2007 the Director sent emails to the applicant's

colleagues, including junior colleagues, which were not copied to the applicant. The applicant alleged that they related to subject matter with which he was involved (the Organigram modifications and draft documents of the Division). The earlier email appeared to be a "reply all" to an email sent by the applicant's junior. A further email of 20 October 2007 from the Deputy Director to various parties also failed to copy the applicant, despite being in relation to new HR initiatives which fell under the applicant's purview. These apparent exclusions were not explained and are suggestive of exclusion but, without further information, it is difficult to draw any firm inference one way or another. The omission of counsel for the applicant to cross-examine about them also makes it unfair to draw any inferences of impropriety. If such is the case being sought to be made it is incumbent on the accusing party to put the accusation to the relevant witness to provide an opportunity for an answer. This is not only a rule of fairness but it identifies the issue to which the evidence is said to go. The other party cannot be expected to anticipate and answer every conceivable case: that is both impractical and wasteful. Litigation should not involve making a general case with a number of potential elements, not all of which are specifically identified, in the hope that the other side might fail to see one and leave it unanswered at the end of the day.

23. On 15 July 2007 the applicant submitted a formal complaint of harassment and abuse of authority against the DHR management. He said that the abolition of his post was the step that at last provoked him into taking action. I accept that this may have been so and reject the submission made on behalf of the respondent that the delay in making a formal complaint indicated that his allegations were untrue. Taking such a step will frequently constitute a point of no return, making it very difficult to continue in a position with colleagues against whom such allegations are made and it is easy to accept that a staff member will hesitate long before crossing this Rubicon, despite the protections in place against retaliation. However, the concomitant problem in delay is that witness' recollections become hazy, confused and inherently unreliable, not to speak of the complainant's memory. This affects both sides of the

case and is thus productive of significant unfairness. This problem has been not insignificant in this case where, as is almost inevitable, in Rudyard Kipling's words, the tale has not lost fat in the telling. This is not because the protagonists are dishonest or unreliable but because of the natural effects of the lapse of time on memory, even where the person involved has been an uninvolved and concentrating witness, which is very rare – mostly, the remark or event occurs momentarily and particular note is not taken at the time, so that when the person is asked to recall it, it has already been significantly distorted by the lapse of time, the attitude of the individual towards the issue, any predilection of favour or otherwise for one side or the other and all the other ordinary, human weaknesses of mind under which we all labour. Often, also, the events are stripped of the contextual details that give useful information about reliability and enable a fair judgment to be made about their true significance. Sometimes contemporaneous documents or the logic of events shed light on the probabilities but sometimes they remain impenetrably ambiguous. Thus, while not placing the delays of the applicant in making complaints about the matters to which he has referred on the scales against him, those delays have made it much more difficult for him to persuade me that they occurred quite as he alleges and, even more, that they were the expressions of ill-will or suggested calculated scheme to remove him from DHR.

24. On 1 August 2007 the Deputy Director signed off on the DHR post budget submission as "Head of Office" of DHR. On the same date the Director approved the DHR post budget submission as "Approving Official for the Executive Director [of UNICEF]". The applicant submits that this was inappropriate since it meant that the submission was approved by only one person. It strikes me that this was unfortunate and, perhaps, contrary to the sense of the rule as to approval of such submissions. But I do not see it as being significant to the issues in this case.

Non-selection for OLDS post

25. I now return to the consideration of the candidates for the OLDS post. On 17 September 2007, the interview panel issued a summary of the interview process and recommendations, which was signed by the Director/DHR on 24 September 2007 by way of an inscription which stated "I endorse the recommendation. Please refer to APC". This document stated that, following the receipt of seventeen applications, the short listing of seven of these, and the interview of six (one candidate withdrew), a female candidate was the leading candidate, and the only one who appeared to meet "the technical, managerial and strategic aspects of the post equally". Two male candidates, one being the applicant, were equally "next" after her, both being considered "suitable for the post, as alternatives". The panel's summary of the applicant's candidacy was as follows –

> [He] has a strong background in HR, from the administration of services, coaching, recruitment, talent management to career development and designing and delivering learning and development programmes. He developed the P2D initiative which has been very successful and spearheaded competency based learning. During the interview he conveyed excellent ideas with a real visionary approach to HR related issues, including learning and development. The panel noted that he is a positive and energetic individual with a passion for developing staff member's skills and competencies. His strengths are in his innovative approach and the ability to strategize and take ideas to a new visionary level and direction. However, the panel noted that he did not demonstrate awareness of how the Section could work towards delivering on the organizations' learning mandate, and what is needed to take the function to the next level. [He] is currently the Chief of Talent Management, overseeing performance management and career development, both of which will be transferred to the OLDS. It was noted that he is on abolished post.

26. The applicant has submitted, in substance, that the panel's conclusion must have been wrong, since he was rejected in favour of a fixed-term staff member at the P-4 level with only a few years experience in UNICEF, with no reference to his permanent status or to the provisions of Staff Rule 109.1(c). Staff Rule 109.1(c) provides that –

> … if the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilised, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments.

Of course, that rule cannot be relevant to an evaluation of the comparative attributes of candidates: it cannot make the staff member who is entitled to invoke it a better candidate. Nor did it require the applicant to be recommended for appointment in preference to a better qualified candidate. He was entitled to preferential appointment over a staff member with a fixed-term or indefinite appointment only if his qualifications in substance matched those of the other staff member. I note that the reference to the abolition of his post indicated that the panel was aware of the potential application of this rule – it necessarily implied in the circumstances a reference to his permanent status which, of course, they must have known.

27. The evidence does not permit the conclusion that the panel was mistaken in its evaluation of the comparative claims of the applicant and the preferred candidate. On the contrary, the reasons given by the panel adequately explain its recommendation, providing of course that they correctly record the conscientious judgment of its members. There is every reason to consider that this was the case and no reason to conclude otherwise. Nor is there any reason to suppose that the members of the panel were influenced by any extraneous or irrelevant factors, including any adverse opinion of the applicant (if there was one) by the Director or the Deputy Director.

28. Accordingly, the preponderance of evidence supports the conclusion that the recommendation of the successful candidate for Chief/OLDS was entirely proper.

29. The APC met on 3 October 2007. The minutes record the endorsement by the APC of the interview panel's recommendation and its unanimous recommendation of the successful candidate, stating –

> [T]he case was referred directly to the Committee because APC members participated in the interviews, which were thus held in lieu of an SAP. The Committee noted that a staff member on an abolished post and another on secondment had applied to the position, and inquired as to their candidature. It was noted that, in line with HR guidelines, both candidates had been given due consideration along with other qualified applicants, but neither were found to be the most suitable candidate for the position. The candidates would be encouraged to continue applying to suitable positions.

I do not see any error in this summary of the position.

30. The applicant submits rightly that the stipulated minimum requirements for the position included fluency in English and one other UN language, a requirement that he satisfied but the successful candidate did not. However, the importance of this requirement (though stated as mandatory) is not altogether clear and I am not persuaded that this shortcoming was not considered by the panel in the interviews. I do not accept that it vitiated the judgment that the successful candidate was the superior appointee. Another objection to the process submitted by the applicant is that the job description did not include the functions that were transferred to OLDS following the abolition of his post. I am very doubtful that this is entirely correct as a matter of substance, but the minutes of the panel evaluation demonstrate, as it seems to me, an adequate understanding of the requirements of the post and expressly refer to the transfer of some of the functions of TMS to OLDS. Even assuming that his submission is correct, the applicant has not presented any evidence that this resulted in any prejudice to his chances of becoming the preferred candidate. Indeed, the qualifications as to the applicant's attributes expressed by the panel appear to me to relate to undoubtedly common or cognate requirements.

Other applications and the Pakistan post

31. The applicant applied for a number of P-4 and P-5 posts within DHR after learning of the impending abolition of his post. His applications included one for the P-5 position of Senior Human Resources Manager, UNICEF, Pakistan (Pakistan post).

On 24 October 2007 he and five other candidates participated in telephone interviews for the Pakistan post. In a candidate assessment matrix, it was noted that the panel "was not oblivious to the fact that [the applicant] is already at the P-5 level, is undoubtedly a qualified and capable colleague on an abolished post. However, given the contextual considerations described above, the panel's unanimous recommendation is [another candidate]." The panel noted it was not comfortable with making an alternate recommendation, including the applicant, if the selected candidate was not available, but checked a box in the matrix noting its overall assessment of him as being "suitable".

32. On 14 November 2007 the SAP met to discuss the interview panel's assessment of the Pakistan post. The minutes recorded that three candidates had emerged as suitable for further consideration after the interviews, including the applicant, but that he was not the recommended candidate. It was noted that the applicant was a "viable candidate" for the post and that DHR had confirmed that he was "on an abolished post and the holder of a permanent appointment". The minutes stated further that –

> The APC and HR representatives did not concur with the final sentence of the Office recommendation wherein it was stated that if the preferred candidate was unavailable, the recruitment process would have to be repeated. The Country Representative raised the point that placement of staff members on abolished posts was a global concern and that [the applicant] should be considered for all vacant HR positions, not only for Pakistan … [despite the Country Representative and SAP recommendations] the APC and HR representatives maintained the position that there were two qualified candidates for this post and due regard had to be given to [the applicant's] candidature.

Noting the SAP's failure to reach unanimity, the case was submitted to the APC for consideration.

33. On 23 November 2007 the Deputy Executive Director of UNICEF wrote to the Executive Director of UNICEF, stating that, while it was not strictly his business, he had concerns regarding the perception that was being created by the fact that the

applicant, a senior DHR staff member with an excellent reputation, was on an abolished post but was unable to obtain another position "because he is seen as not being in the good books of DHR management" in light of his complaints about harassment. On 28 November 2007 there was a meeting of the APC. The minutes of this meeting, noting that the SAP had failed to reach agreement, unanimously recommended the applicant for the post, with the other previously recommended candidate to be appointed should the applicant decline, stating –

> The Office recommended [other candidate] as the sole qualified candidate … [h]owever, at the SAP, DHR and the APC representatives were of the view that there were two equally suitable candidates for the position, [another candidate], P-4, and [the applicant], a staff member at the P-5 level, on a permanent contract and on an abolished post. During its deliberations, the Committee felt that the Office's assessment of [the applicant] was not consistent with the breadth and scope of his experience and qualifications [which] were on par with the Office's recommended candidate … given that [the applicant] is already at the P-5 level on a permanent contract and on an abolished post, these factors gave weight in favour of his application, in accordance with Staff Rule 109.1(c) which was read to the APC by its Chair.

The applicant points to the application of Staff Rule 109.1(c) in connection with his selection for this post and submits that this demonstrates an inconsistency with the approach taken in considering him for the OLDS post. However, the situations were completely different: in the latter, he was less suitable than the recommended candidate; in the latter he was "on a par" with the recommended candidate. There is no inconsistency here.

34. On 29 November 2007 the applicant was offered the Pakistan post, with a seven-day deadline for a response attached. The applicant accepted the post within this period. The applicant submits that this was an unreasonably short time in which to require him to accept the offer. I do not see why this was so. He was an applicant for it, which indicated a certain intention. And, if there were some special reason why he wanted to delay acceptance, he could have requested an extension of time in which to respond, but he did not.

35. After the applicant's arrival in Pakistan he was informed that the Pakistan post was a P-4 post and that it was only temporarily adjusted to a P-5 level. Both the advertisement and the offer to the applicant referred to the P-5 level of the post without suggesting any restrictions or qualifications. However, as of 10 January 2008 this post was not approved for upgrade to the P-5 level, as noted in a document entitled "list of changes not endorsed by Global PBR for 2010–11". On 28 January 2010 the Director was copied on an email stating that the Pakistan post would be upgraded to P-5 from P-4 for the 2008–09 biennium with funding to be provided by the Regional Contingency, and that an extension would need to be sought for 2010–11.

36. (I point out that, in light of the clear representation both in the vacancy announcement and the letter of appointment to the applicant that the post was P-5 without the slightest suggestion that this was temporary, representations upon which he relied in applying for and accepting appointment, it would appear that he has a very strong case of a legitimate expectation, quite apart from the obligations of good faith that this was indeed the case and that the Organization is therefore bound to remunerate him at that level or pay him compensation if it does not, which amounts to the same thing. This matter is not within the scope of the present case and, of course, if it unfortunately came to be litigated, this expression of opinion would not bind another judge of the Tribunal. I mention it, however, in the hope that this issue can be settled without the need for any litigation.)

37. The applicant submits that there were available six P-4 or three P-5 vacancies in DHR following the abolition of his post into which he could have been placed and contends that the reason for not doing so was the scheme to remove him from DHR, of which the absence of any such appointment provided cogent evidence. The applicant points in particular to the post of Chief of HR Planning that had been upgraded from P-4 to P-5 in the second restructuring but was not advertised until 3 December 2009, though the Director had approved its job description on 10 August 2007. The respondent submits that this upgrade had not been approved by the Board

of Directors until January 2008 and was thus not available until then. I do not think that this can be correct, considering the post was advertised on 3 December 2007. The other P-5 post in DHR was that of Chief/Human Resources Services whose incumbent was already serving beyond retirement age in 2007. It was thus known to DHR management that the post would have to be advertised shortly, which it was, in April 2008. The applicant also applied for four P-4 vacancies in DHR. One was the HR Policy Specialist post advertised on 1 October 2007. The Director testified that the applicant's qualifications were not suited for this post, but the applicant points out that he had served as Deputy Chief Personnel Policy Section at a P-4 level as well as Personnel Policy Officer at the P-3 level in the headquarters of the UN agency, UNRWA.

38. The applicant contends that he could have been placed in these posts rather than having been, as it were, forced to apply for and accept the Pakistan post. He points to the circumstance, which was certainly known to management, that he was a single parent having the care of his daughter who had a learning disability and was being educated in the United States and, accordingly, he naturally wished to remain in that country. The applicant submits that the Director could simply have placed him in one of the P-5 posts or even the P-4 posts pending the availability of a P-5 post.

39. The respondent denies that the Director had the authority to act as the applicant contends. Certainly, the Director was not cross-examined about this subject. Furthermore, aside from the contentions on either side, there is no evidence one way or another that the Director did have the suggested authority. In my view, as earlier explained, the omission to raise such issues with the witness whose conduct is in question must make it unfair to have regard to the imputation. I therefore do not accept the submission that the Director was in a position to place the applicant in these positions. Nor can the applicant make much of the submission concerning his qualifications for the HR Policy Specialist post unless he can show that the Director's position was untenable: a mere disagreement of opinion is insufficient. The failure to cross-examine on this point is decisive. The same is so of the P-4 positions, in respect

of which the additional allegation is made for the first time, in final submissions, that the announcements of their vacancy were deliberately delayed to prevent the applicant from applying for them rather than proceeding with the Pakistan post. The applicant has tendered emails that suggest that reasons given in evidence before the Tribunal by other relevant witnesses as to delays in classification and announcements of vacancies were untruthful or at least inaccurate. However, I am uncertain about the true effect of that material and doubtful that it is complete. Moreover, in light of the lack of cross-examination about the alleged contradictions, I consider that it would be unjust both to the witness under attack and the respondent to take notice of these allegations when there has been no opportunity provided to the witness to explain.

40. The unfairness of holding back an attack until a final submission is obvious: it is trial by ambush. It is also unpersuasive merely to make a counter assertion or even to provide some documentary evidence such as emails, since it is well within the bounds of reasonable possibility that the witness might have an explanation for the apparent contradiction or, for example, the documentary evidence might be incomplete. It is also inappropriate to make allegations of dishonesty in such circumstances when the basis for so doing is an apparent and untested contradiction between testimony and a document: on the face of it, it is not altogether common for people to recollect every email they have sent or seen or even every document they may have signed. Some practical commonsense is required in considering these situations. Fundamentally, it needs to be clearly understood that it is both good sense and consonant with principles of open justice that the primary arena for litigating a case is in the courtroom, not in a closing submission long after the relevant witnesses have departed. In this respect I should mention the applicant's reliance in final submissions on statements made by persons for another purpose (here, the harassment investigation) or perhaps in another context (e.g. the Joint Appeals Board (JAB) proceeding). Such statements are not on the face of it admissible except by consent since the witness is, *ex hypothesi*, not available to testify in the Tribunal or be tested by cross-examination. The respondent has not objected to the use of this material,

preferring simply to submit that they should be given little weight. I have already referred to this issue in passing but I wish to make it clear that I do not see how much reliance can be placed on such statements in respect of significant matters in real dispute between the parties.

41. I am inclined to accept the reasonableness of the evidence of the Director and the Deputy Director that there are sound administrative reasons for not placing a person holding a P-5 permanent position in a P-4 post; or, to put it perhaps more precisely, it is in the interests of the Organization to place a P-5 staff member in a P-5 post. Certainly the evidence does not justify the conclusion that such a view is so unreasonable as to bespeak either error or impropriety. If the applicant disputed this evidence, then this should have been made clear by cross-examining the witnesses at the hearing to provide the opportunity for them to explain and, it might well be, justify their evidence. And he was also given the opportunity to prove in his case that the Director had the asserted authority and it would have been manifestly unreasonable not to have exercised it in favour of the applicant in the circumstances. A submission, however indignant, is no substitute for evidence and the applicant has proved neither that the Director had the power to place the applicant in such a position at the Director's own discretion, nor that he had any legal obligation to.

42. It is worth noting, in relation to the controversy about placing the applicant in an available P-4 post that the Deputy Director testified that she was confident that the applicant would be placed in a P-5 post before the separation date and would have been given a P-4 post if it seemed that this was not going to happen, even though this was not desirable.

The investigation of the harassment complaint

43. As mentioned above, on 15 July 2007 the applicant submitted a formal complaint of harassment and abuse of authority against the DHR management. The relevant procedures are set out in the Policy Circular CF/AI/2005/017 of 16 December

2005 (the Policy) which provides for both informal and formal processes. The applicant initiated a formal process which, because it concerned a complaint about the conduct of the Director and Deputy Director of DHR, was addressed to the Executive Director who, in due course, delegated the conduct of the matter to her Deputy. On 27 July 2007 the complaint was sent to the alleged offender(s) for comment under para 35(c) of the Policy and then to an "appropriate investigative body" which under para 35(d) "shall be made up of one to three persons, as appropriate under the circumstances ... " who must be suitably qualified as specified under para 35(e). The investigative body then undertakes the task of fact-finding in accordance with paras 36 to 38, which do not need to be referenced further except to note the specific injunction in para 36(b) that it is to "remain neutral throughout the investigation and note that due process is essential to the integrity of the investigation … " and the right of the parties, under para 38, to suggest witnesses to be interviewed, the decisions as to which is "at the discretion of the investigating body".

44. The applicant submitted that sending the complaint to the Director and Deputy Director did not comply with the Policy for reasons that are unexplained but, at all events, quite mistaken and contended that this was therefore "a disparate ad hoc treatment of the applicant's complaint because it was against senior officials in DHR". This contention is baseless.

45. On 25 September 2007 the applicant was informed that the investigating body would comprise an investigator from the office of internal audit and an official from the office of the Executive Director. It appears, however, that this official had been himself the subject of serious allegations of harassment by a female staff member which, for reasons of personal embarrassment, were not the subject of a formal complaint. A statement has been tendered by the applicant from a past senior employee who confirms that the staff member had made a complaint about the official to her and had decided not to proceed formally. She was contacted by counsel for the respondent in response to a query made by me to ascertain whether any formal investigation was conducted and has obviously misunderstood the nature of his

inquiry. She says that she was told that the official's contract had been extended for the purpose of an investigation but I am satisfied that this was not said and, indeed, it was not the case. The witness did not give evidence in the Tribunal and the use of her statement by the applicant is an example of the dangers of untested written statements. Be that as it may, I am satisfied that there was indeed an allegation that the official had committed harassment though, of course, it is impossible to know whether the allegation is true or not. There is no evidence that the Executive Deputy Director was aware of any such allegation when the official was appointed to the investigative body. There is some second-hand hearsay that suggests the official was aware of the complaint but this is not a proper basis for drawing any conclusion one way or another. Counsel for the applicant, as part of his submission that the official should not have been appointed an investigator, asks a number of rhetorical questions about this matter which seem to me to be based on false assumptions and do not call for discussion. More problematically, the official had from 1991 to 1996 worked in the same office as the Deputy Director although there was no evidence that they were friends or anything more than happenstance work colleagues and, of course, that was some considerable time ago. An additional issue as to the official's objectivity is raised by the applicant's submission that, although he was subject to mandatory retirement in August 2008, his employment was extended. There is evidence, which I accept, that the Executive Director strongly opposed extensions beyond retirement age and the Director's attitude was that only those that have corporate impact and are completely unavoidable would be referred on by him for her consideration. Despite information passed on by counsel for the respondent that the official's appointment was not extended, I accept that indeed it was, though there was a gap of something over a month before he was reappointed to a position in UNICEF where, after several extensions, he is still employed. There is no evidence, however, that the Director or Deputy Director were involved in any of these extensions. Even so, the fact that an extension was given, though after a break in service, leads to the troubling likelihood that this issue had been raised or was, at least, alive at the time of the official's involvement in the investigation. The hope of any advantage (other than the

completely conventional ones in the ordinary course) must give rise to a conflict of interest. Although, here the hope was that the Executive Director would approve an extension of his contract and, as I have said, there is no evidence that the Director or Deputy Director were involved, the fact they were so senior and the reputation of the Department was thus engaged, the circumstances overall gave rise to reasonable apprehension of bias constituted by a conflict of interest.

46. An additional, and to my mind, more significant issue concerning independence is raised by the fact that the investigator from the office of internal audit submitted an application, whilst the investigation was underway, for a P-4 post in DHR, with a closing date of 15 October 2007. The fact that he was not even short-listed, put forward weakly by counsel for the respondent as a defence to the integrity of the report, is plainly irrelevant.

47. On 15 October 2007 the report of the investigating body was delivered to the Deputy Executive Director. The applicant's complaints were rejected.

48. In my view, the investigation was hopelessly compromised by the lack of apparent independence of both investigators. As to the official, the evidence as to the earlier complaint about his conduct is not a sufficient basis to conclude that he was not adequately independent, although had he been the subject of a formal investigation and found guilty, this matter would acquire an altogether different aspect. Generally speaking, the test of integrity must be that which was applied to his wife by Julius Caesar, as quoted by Suetonius: "*Meos tam suspicione quam crimine iudico carere oportere*" ("My wife should be as much free from suspicion of a crime as she is from a crime itself"). The circumstances concerning the official's imminent retirement, however, do create a reasonable apprehension of bias. Although the investigating body is not a judicial entity, and merely finds facts, the integrity of the entire process depends upon not only the absence of bias or conflict of interest but the absence of any reasonable apprehension of bias or self interest. The investigator from the office of internal audit had, by his application, also placed himself in a position of

a clear conflict of interest: it would be in his interest to do what he thought might have made his chances of success greater which, of course, might have been to give the Director and Deputy Director reason to be grateful. It matters little whether this was for the purpose of winning the post he sought or because it might be a useful edge to have in the future should he have obtained the post. It matters not whether he thought of the possibility of taking advantage of his position. The existence of a conflict of interest is an objective fact and does not depend on any particular intention or motive. Put in another way, the interests arise because of the circumstances, not any state of mind. So far as the official was concerned, although he was employed in the Office of the Executive Director of the very Department the conduct of whose senior officials was in question, one of whom had been a colleague working in the same office for some six years, this by itself does not infer that an apprehension of bias could have been reasonably entertained by an objective bystander. However, this rather depends on the nature of the contacts, if any, that he had with the alleged offenders. It seems certain that the Director and Deputy Director, given their responsibilities, would have had extensive personal interaction with the Executive Director's Office over a considerable period and, hence, in all likelihood with the official. Of course this is surmise, but it is based in practical common sense on what is known. The respondent did not seek to deal by evidence with this issue or the circumstances of the exceptional extension beyond the mandatory retirement date, though in respect of the latter point, counsel was apparently unaware of his return after a brief break.

49. The respondent candidly accepted (after putting the weak submission which has already been mentioned) that the "necessary appearance of impartiality and objectivity was tarnished by the investigator's application though and his non disclosure of this manifest conflict of interest and the respondent is thus willing to not seek to rely on the investigation report". However, the question is not whether the respondent can "rely on" the report but whether the applicant has got the investigation that he is entitled to have. The respondent has submitted that the Tribunal should decide the applicant's complaints of harassment, based on the limited oral evidence it

has heard and the statements of various witnesses that have been tendered. Leaving aside the obvious point that it is almost certain that the Tribunal does not have jurisdiction to do so, given the way in which these matters came before it, its duty is to make a judicial determination, not conduct an investigation and produce a fact-finding report, and this requires a proceeding far different in my view from that envisaged by the Policy.

50. It is important to note that the question is reasonable perception and not the reality. Despite some suggestions in material produced by the applicant, there is not the slightest evidence of any cogency that the investigators were in fact biased or their investigation anything but appropriate. The fact is that they made discretionary judgments about a range of matters from who to interview to what parts of the evidence was credible and such decisions must be made by investigators against whom no reasonable suspicion of bias or conflict of interest could arise. That it is impossible to conclude that their decisions were actually inappropriately influenced cannot restore the integrity of the investigation.

Other matters

51. A question arose as a collateral issue as to whether one of the persons who was nominated by the applicant as a witness to be interviewed by the investigators and had provided a statement on his behalf but was not, in the result, interviewed, had been the subject of retaliatory action by the Chief/RSS. The circumstances of the proposed retaliation were complicated but, as they unfolded, it became clear to me that there was no retaliatory motive behind what happened. Quite apart from this, the simple answer is that, at the time, the Chief/RSS was not aware of the investigation, though he was aware of the complaint and, more importantly, did not know, and had no reason to know, that the person involved was a proposed witness or in any way involved in the matter. As this is a collateral matter at all events, I do not propose to go into it in further detail.

52. This case was hard fought on both sides, which is not surprising considering the nature of the issues. However, the submissions made by counsel on both sides – especially, I regret to say, on behalf of the applicant – betrayed an inappropriate lack of objectivity and professional courtesy. It is important that counsel feel free to make all submissions thought to be proper on their client's behalf, but they are not their client's mouthpieces and should not make allegations of serious moral turpitude unless the evidence, realistically considered, justifies them. Nor is it proper, unless the circumstances are most exceptional, to make personal attacks on opposing counsel. It will be rare, at all events, that righteous indignation is effective advocacy but, more importantly, it is an abuse of the privilege accorded counsel to say what is believed to be necessary. It also embarrasses the Bench.

Conclusion

53. So far as the applications in respect of the abolition of the applicant's post and his non-selection for the Chief/OLDS post are concerned, they are dismissed.

54. So far as the application concerning the conduct of the investigation of the applicant's complaints of harassment is concerned, the Tribunal finds that the respondent was in breach of its contractual obligations to the applicant as embodied in CF/AI/2005/017, and directs that the investigation report of 15 October 2007 be quashed and, if the applicant indicates in writing within 14 days of the date of this judgment that he requires a fresh investigation, such an investigation is to be initiated and undertaken with all due diligence.

55. This breach also requires compensation. The staff member's protection from harassment in the workplace is a very important human right and essential to the proper operations of the United Nations. The cognate right to a properly conducted investigation of complaints of harassment is therefore a very valuable and important contractual entitlement. Although its breach may not directly lead to economic loss, it is not at all unknown for harassment in the workplace to make it impossible for the

worker to remain in that employment and still retain his or her dignity. The existence of an effective investigative process hopefully operates to deter harassment and is thus very closely related to the economic and well as personal interests of the staff member. Although the applicant may still have his complaints investigated if he wishes, that investigation must inevitably be more difficult and less satisfactory because of the lapse of time. Compensation for the breach is appropriate and should not be merely nominal. I assess the amount payable at USD5,000. It is to be paid on or before 46 days after the date of this judgment and, if not by paid then, interest shall accrue at eight per cent per annum.

56. The respondent has asked for costs. It is enough to say that there was nothing in the conduct of this case on the applicant's behalf that could justify such an order.

(*Signed*)

Judge 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