UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2012/037
Judgment No.:	UNDT/2012/118
Date:	31 July 2012
Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ADUNDO *et al.*

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Lennox S. Hinds
Claire Gilchrist

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat
Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. On 17 May 2012, the Applicants, a group of 25 Security Officers in New York, filed an application contesting the administrative decision requiring them, as a condition for further employment or selection for retrenchment or renewal, to undergo an *ad hoc* competitive process, including a mandatory competency test, announced in April 2012. The competitive process is apparently necessitated by the ending of funding for the Capital Master Plan ("CMP"), which is a large-scale, long-term renovation of the United Nations Headquarters Complex in New York. According to the Respondent, the Applicants' posts are funded through CMP; the Applicants dispute this. The main issue in this case is whether the contested decision to subject the Applicant to the *ad hoc* competitive process test is lawful.

2. The Applicants serve at the S-1 and S-2 level in the Security and Safety Service ("SSS"), Department of Safety and Security ("DSS"), United Nations Secretariat. They submit that they should be treated as staff on regular budget posts whose appointments are not affected by the ending of the temporary budget for CMP. The Applicants also submit that they were not informed of any budgetary constraints associated with their contracts until 2012, although they were hired in 2008 and 2009. They also claim that the Organization failed to carry out proper consultations with the affected staff members.

3. The Respondent submits that the present application is not receivable as the decision to carry out the contested process is only a preparatory step relating to future appointment and non-renewal decisions. The Respondent submits that the cutbacks in funding relating to CMP demand a reduction from 85 to 49 posts and that the competitive process is fair, objective, and transparent. The Respondent claims that the Applicants have no legitimate expectation of renewal and that the affected Security Officers and their representatives were properly consulted.

4. On the last day of hearing, the Applicants clarified that the relief they seek is for the Tribunal to find that they should not be subjected to the competitive process as it constitutes an arbitrary and illegal exercise because the Administration failed to act in good faith and failed to properly notify them that they were on temporary budget posts. They ask the Tribunal to find that they were contracted on regular budget posts and that any variation was not brought to their attention by lawful means. In the alternative, the Applicants ask the Tribunal to find that the process adopted by the Administration is arbitrary and fails to account for international principles on the use of seniority (that is, duration of service), past performance evaluations, and competency tests already taken as part of their recruitment.

Judgment on interim measures

5. On 21 May 2012, the Applicants also filed a motion for interim measures under art. 10.2 of the Tribunal's Statute, seeking suspension of the implementation of the contested decision.

6. The motion for an interim measure was considered by the Tribunal in *Adundo et al.* UNDT/2012/077, rendered on 30 May 2012. The Tribunal found that the contested administrative decision requiring the Applicants to undergo, as a condition of future employment, the *ad hoc* competitive process announced in April 2012 was *prima facie* unlawful, that the case was particularly urgent, and that the implementation of the contested decision would cause the Applicants irreparable harm. The Tribunal concluded that the process could not continue and ordered the "suspension of the implementation of the decision to carry out the said competitive process until the present case is disposed of on the merits".

Procedural matters

7. Following the granting of the interim measure on 30 May 2012, this case was listed for hearing on an expedited basis upon the application of the Respondent, there

being no objection by the Applicants. Whilst it disrupted the normal court roll, I deemed it imperative to list this case for such expedited hearing even though it caused considerable strain on the resources of the Tribunal.

8. Recognizing the need for expediency in this case, the Tribunal would have preferred to render this decision earlier. However, during the period of 30 May 2012 to 29 June 2012, I dealt with eight applications for suspension of action, each requiring a decision within five days of service upon the Respondent, in addition to the present matter, which was heard over a period of seven days. Due to the numerous suspension of action cases filed, of which I had conduct as the only available judge in New York, and constraints placed on support staff, this judgment could not be rendered sooner. The process of justice will continue to be slow and delays should be expected if the Tribunal continues to function with inadequate resources.

9. On the first day of the hearing of this matter, I raised some issues of concern with both Counsel. Firstly, the Tribunal had received a purported submission from a third party that there was an anticipated breach of the operative part of *Adundo et al.* UNDT/2012/077 by the Respondent. Under art. 11.3 of the Dispute Tribunal's Statute, the parties are bound by the judgments of this Tribunal and it does not behove the Respondent's agents and representatives to refuse to comply. Fortunately, sensibility reigned in the end and the *ad hoc* competitive process did not proceed.

10. The Tribunal was also aware of a letter that had been circulated by the United Nations Staff Union before the hearing on the merits, commenting on this case and suggesting a suitable outcome. I duly informed the parties that it is equally unacceptable for the Staff Union or anyone else for that matter to be suggesting or predicting the outcome of a case which is still *sub judice* by way of releases on the intranet or by letter to all UN staff members.

11. The case was heard over seven days, on 8, 11, 13, 15, and 18–20 June 2012. At the hearing, each party made oral submissions and called witnesses. Four of the Applicants testified, and four witnesses testified for the Respondent: the Chief of SSS, a former Chair of one of the selection panels for security officer positions, one Security Officer who is also a staff representative, and one Security Officer who is a training instructor for new recruits.

12. The case for the Applicants is clear from the papers. However, in view of the Respondent's insistence that each Applicant be required to testify as to the same matters in person, presumably for no apparent reason other than to test their *viva voce* evidence, all 25 Applicants were prepared to give evidence. Common sense prevailed, however, and having heard four Applicants, no further witnesses were called to testify as it was submitted by the Applicants, and not challenged by the Respondent, that their testimony would be consistent in the material particulars with that of those who had already testified. Likewise, with the Applicants' concurrence, the Respondent submitted at the conclusion of the hearing that he would not be calling two more members of the selection panels, as their evidence would be consistent with the evidence given by the Chair of one of the selection panels.

13. The Respondent was represented by Mr. Stephen Margetts, initially lead Counsel, with Ms. Sarahi Lim Baró assisting. Mr. Margetts informed the Tribunal on the second day of the hearing that he would soon be proceeding on official leave. As the Tribunal had acceded to the Respondent's request for an expedited hearing, Ms. Lim Baró took over as lead counsel. However, at the resumed hearing on 18 June 2012, former lead counsel Mr. Margetts asked to rejoin the proceedings from Europe, eventually agreeing to retain a watching brief by telephone. This was a costly exercise for the Tribunal and a practice that should be refrained from, especially when there is competent Counsel appearing before the Tribunal, as was the case here.

14. On 20 June 2012, the last day of the hearing, the parties agreed that no motions or requests remained outstanding. Following oral closing submissions by both Counsel, the hearing was concluded.

15. These expedited proceedings required extensive effort from both the Tribunal and Counsel. It involved a total of seven days of hearing the oral testimony of eight witnesses over two weeks. As a result of the expedited nature of the hearing, parties continued to tender documents throughout the course of the proceedings; all documents tendered were added to the court bundle prepared for the hearing. Over 1,600 pages of documents were filed in this case. However, in view of the scope of the issues, the relevance of some of these documents was tenuous at best. Nevertheless, all documents were reviewed and considered by the Tribunal.

Relevant background

16. The following background information is based on the documentary and oral evidence, the list of agreed facts filed, and the parties' written submissions.

Initial recruitment of the Applicants by SSS

17. Each Applicant applied for the position of Security Officer, S-1 level, at the United Nations Headquarters, pursuant to a generic vacancy announcement issued in March 2008. The vacancy announcement provided that appointment was "on a local basis" and that employment "is offered on a fixed-term basis with the possibility of extension based on satisfactory performance". The vacancy announcement did not contain any references to limited funding or special projects. All four Applicants who testified came from abroad.

18. The assessment of the candidates took approximately seven to ten days and included a test held in New York on standard operating procedures. Those who were successful were considered for employment and the final selection was made on the basis of the results of all tests, interviews and reference checks. The Chief of SSS,

who assumed his position after the Applicants were recruited, testified that he had been informed that all Security Officers were hired against a generic vacancy announcement and SSS created a roster of eligible candidates.

19. The Applicants in this case were recruited between 2008 and 2009 as Security Officers on fixed-term appointments. Each of the Applicants signed a letter of appointment stating that her or his appointment was a "temporary appointment for a fixed term" and did "not carry any expectancy of renewal". The Applicants' initial contracts were subsequently extended. The contracts of 19 of the Applicants expire in August 2012, whilst those of the remaining six Applicants expire in November 2012.

The winding down of CMP

20. It was submitted to the Tribunal that 85 Security Officers were hired between 2008 and 2011 and that they are all affected by the anticipated winding down of CMP. Seventy-four of them, including the Applicants, are engaged on fixed-term appointments and 11 staff members are engaged on temporary appointments. At the same time, 24 of these Security Officers are on regular budget posts that were used to perform some CMP-related functions, and 61 are allegedly on CMP-funded posts.

21. For reasons explained below, it cannot be determined at this stage which of the affected Security Officers encumber the 24 regular budget posts. The Respondent submits that, at some point in time, only 49 posts will remain available for the group of 85 Security Officers affected by the winding down of CMP and related decrease in funding. Thus, 36 jobs are on the line. It is unclear when exactly the winding down of CMP will be completed, but it appears that it is intended to be a gradual exercise that will primarily take place over the course of 2013. The 49 posts that will remain will consist of 24 regular budget posts and 25 new regular budget posts.

Initial meetings with Security Officers regarding abolition of posts and downsizing

22. In February and March 2012, the Chief of SSS held a series of town hall meetings and several meetings with Security Officers, including some of the Applicants, informing them that CMP was coming to an end and that, as a consequence, SSS would be abolishing a number of posts. The posts to be abolished would come from those of the 85 Security Officers allegedly recruited in connection with CMP.

23. The Applicants submit that the February and March 2012 meetings were the first notice they had received that they had been hired under the CMP budget and that their posts were subject to abolishment upon termination of CMP. The Respondent denies this, and submits that they were informed on recruitment.

Announcement of the ad hoc *competitive process*

24. On 6 April 2012, an internal vacancy announcement was published in the SSS bulletin of 6–9 April 2012 for "the currently vacant regular budget posts" for Security Officers at the S-1 and S-2 level. The bulletin stated:

> With reference to the recent town-hall meetings conducted by the Chief of Service and as guided by [the Office of Human Resources Management ("OHRM")], all Security Officers who have been recruited since November 2008 are hereby invited to apply for the currently vacant regular budget posts for Security Officers at the S-1/S-2 level. This internal announcement will be the first in a number of steps towards establishing a post-CMP staffing table in view of the impending reduction of posts funded under the Associated Cost of the Capital Master Plan (CMP) project.
>
> All officers who joined SSS New York in or after November 2008 are strongly encouraged to apply. The assessment method will include a written test appropriate to the functions performed at S-1/S-2 level and a competency-based interview. Successful applicants will be formally placed against the regular budget posts.

25. The parties stated in the agreed facts submitted on 7 June 2012 that the announcement of April 2012 was made "in light of the cutbacks referred to above and the need to make decisions on the renewal or non-renewal of the appointments of the Applicants". Thus, the competitive exercise had several purposes, including deciding on retrenchments, renewals or non-renewals, and new appointments.

26. The comparative process was points-based and included the following steps: (1) a written test; (2) competency-based interviews; (3) a comparative review; and (4) gender balance review. The first step in the competitive process announced in the SSS bulletin—the written test—was initially scheduled for 2 June 2012, but it did not take place as a result of the suspension of action ordered by the Tribunal in *Adundo et al.* UNDT/2012/077. The format of the test was that those who did not pass it with a score of at least 65 per cent would be excluded from further consideration. Those who passed the test would proceed to competency-based interview and comparative review. Criteria to be considered during the comparative review include performance appraisals, reliability (mainly based on attendance record), seniority, contract type, and language. Each of these criteria was to carry a varying number of points. The Applicants contended, *inter alia*, that the mandatory test is unlawful and that insufficient points were accredited to the length of service. The process was expected to be completed by mid-July 2012, at which point the successful candidates would be placed on a roster for regular budget posts.

27. The Chief of SSS testified that the competitive exercise announced in the SSS bulletin was developed under the guidance of OHRM. The option of placing an advertisement on UN's job website (Inspira) was considered but rejected. The Chief of SSS testified that advertising these posts externally would result in thousands of applications, and he obtained permission from OHRM to allow him to process the vacancies internally as this was both a downsizing exercise and a hiring exercise with a view to appointing existing staff members on new posts.

28. A series of meetings and exchanges took place in March–May 2012 between the staff representatives, the Chief of SSS, the Office of the Ombudsman, and OHRM. The Applicants submit that these meetings did not amount to an effective consultation process and that neither the Chief of SSS nor OHRM properly consulted with them or their staff representatives on the format of the competitive process prior to posting the vacancy announcement.

29. On 9 April 2012, a group of Security Officers delivered a petition to the President of the General Assembly and to the Ombudsman protesting the decision to conduct the competitive exercise. The petition was subsequently provided to the Secretary-General and senior members of the Administration.

30. The Applicants submit that, on 2 May 2012, they were informed that the written test to fill vacancies would be held on Saturday, 2 June 2012. Their request for management evaluation, filed on 23 April 2012, was rejected on the grounds of receivability.

Consideration

What is the nature of the contested decision?

31. Throughout the proceedings, the Respondent made varying and at times inconsistent submissions regarding the nature and purpose of the competitive exercise announced in April 2012. It was and still is unclear if this process is for abolition of posts, retrenchment, consideration for renewal, consideration for selection for new appointments, or all of the above. Initially, the Respondent submitted that the contested decision was neither a decision on renewal or non-renewal nor a decision on selection or non-selection of staff, but an intermediary process of determining future appointment and renewal decisions. The Respondent also referred to the contested exercise as a "promotion session" and submitted that it was the start of a process that will inform future renewal decisions. In his closing submission on

the last day of the hearing, however, the Respondent submitted that "the retrenchment exercise was, in effect, a selection exercise" and the Administration "must select among the candidates as to who is retained and who is not".

32. In view of the evidence in this case and the parties' submissions, the Tribunal finds that this exercise is an *ad hoc* process that combines elements of retrenchment, abolition of posts, consideration for renewal, and selection for new appointments. Having carefully considered the evidence and the parties' submissions, the Tribunal finds that the administrative decision contested in this case is the decision requiring the Applicants, as a condition of further employment or selection for retrenchment or renewal, to undergo an *ad hoc* competitive process with a mandatory competency-based test, as announced in April 2012.

33. The Respondent submitted in his reply to the present application that consideration was being given to making the test non-exclusionary (i.e., those who scored less than 65 per cent on the test would not be excluded from further consideration) and to removing 11 Security Officers on temporary contracts from the pool of staff members permitted to participate in this competitive exercise. However, it would be inappropriate for the Tribunal to consider in the course of this case how the contested decision, which has been suspended by the Tribunal, may possibly be amended by the Respondent in the future and what effect any amendments would have. Accordingly, for the purposes of this case, the Tribunal did not consider how the lawfulness of the contested decision would be affected by hypothetical modifications to the selection criteria.

Is this case receivable?

34. The language of art. 2.1(a) of the Statute is clear—the Tribunal is competent to hear and pass judgment on an application appealing "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

35. The Respondent has raised the argument that the contested decision in this case is of a preliminary and preparatory nature. Although it is possible that the outcome of the competitive process in its current form would be used for various future administrative decisions and actions, this does not change the fact that the decision to launch the competitive exercise and to require the Applicants to participate in it is an administrative decision in its own right. Therefore, the Tribunal finds that to characterise the contested decision as purely preparatory would be incorrect.

36. It should also be made clear that the fact that the competitive process announced in April 2012 has not been carried out has no bearing on the issue of receivability of the present application. The implementation of the decision was suspended by the Tribunal in *Adundo et al.* UNDT/2012/077 until the present case is disposed of on the merits.

37. In effect, the Applicants argue that this is a case of unilateral variation of their contracts, resulting from the introduction of an *ad hoc* competitive process as a new condition for future employment. The Applicants assert that the Organization is under an obligation to consider their continued employment on the basis of their standard performance evaluation reports and other lawful and fair considerations, without having to undergo the *ad hoc* competitive process and mandatory competency-based test. The Applicants advance a number of claims, including with regard to the correctness of the reasons provided for the decision, which require substantive examination. In making these allegations, the Applicants claim, among other things, that the contested decision deprived them of their right to a fair consideration for renewal based on the standard tools for renewal assessment and that the moment the competitive process is put in motion, their rights become affected.

38. When a staff member advances a claim, as the Applicants do in this case, that the contested decision is not in compliance with his or her contract of employment, the Tribunal is competent to examine the matter under art. 2.1(a) of its Statute (see

also UN Administrative Tribunal Judgment No. 99, *Mr. A* (1966), para. II). The Tribunal is therefore satisfied that this application is receivable.

Administrative decisions based on budgetary reasons

39. It is trite law that although appointments do not carry an automatic expectation of renewal, such legitimate expectation may be created. Furthermore, administrative decisions must be made on proper reasons and the Administration has the duty to act fairly, justly and transparently in dealing with its staff members, including in matters of appointments, separation, and renewals (*Obdeijn* UNDT/2011/032, *Obdeijn* 2012-UNAT-201). The Respondent's argument that the contract contained a disclaimer of no expectancy of renewal is not in itself conclusive. Indeed, the Tribunal is surprised that the Respondent plied this argument despite the Dispute Tribunal's ruling in *Obdeijn*, which was upheld by the United Nations Appeals Tribunal.

40. The Respondent submits that the question of which posts the Applicants are assigned against and which budget is used to finance them is of no concern to the Applicants. The Tribunal does not agree. Reasons given by the Administration for the exercise of its discretion must be supported by the facts (*Islam* 2011-UNAT-115). If reasons for administrative decisions are cited as budgetary, budget and post assignment obviously become relevant and the Administration must be able to demonstrate which staff members are affected by the stated budgetary constraints. If it were otherwise, any staff member could be separated at any point in time by blind reliance on unsubstantiated budgetary reasons that are unknown to her or him and that could not be tested. No staff member could ever challenge, and no Judge could ever review, any budget-based administrative decision, no matter how untrue and flawed the alleged budgetary reasons were.

41. Notably, the April 2012 vacancy announcement issued by SSS states that "[s]uccessful applicants will be formally placed against the regular budget posts"—

this is, in fact, an acknowledgement on the part of the Administration that assignments against regular budget post have certain meaning and do matter.

42. The Tribunal agrees with the Respondent that the placement of a staff member against a specific post number does not in itself create an automatic right of continued employment on that post. However, when lack of funding is given as a reason to justify administrative decisions, including those relating to the cessation of employment, and funding is in fact available, the reason for the decision is undermined.

43. If an administrative decision is based on lack of temporary budget, the lack of funding would generally be of no significance to a staff member on a regular budget post not connected to the temporary funding. It becomes important, therefore, to establish who are the staff members recruited against the 24 regular budget posts that were used to perform some of the CMP-related functions.

Were the Applicants informed of the sources of funding upon recruitment?

44. The Applicants submit that they should be considered as placed on regular budget posts and that they were not informed of any budgetary limitations until 2012. In support of this claim the Applicants rely, among other things, on oral testimony of their witnesses; the wording of the vacancy announcement against which they were initially recruited; their contracts of employment; and pre-recruitment checklists which each Applicant signed upon being hired and which state that each Applicant was hired against an "established post". The Respondent submits that the Applicants were not recruited against regular budget posts. The Respondent relies, among other things, on the oral testimonies of witnesses; an article published on iSeek (UN's intranet web resource) in April 2009, which stated that a group of Security Officers was hired "on a special project to provide security for the swing spaces during the Capital Master Plan"; the Applicants' contracts of employment; personnel action

forms allegedly reflecting the source of funding; and the wording of the Applicants' petition of April 2012 to the Secretary-General.

45. The Applicants tendered evidence that, when initially recruited, they were not informed of any special conditions or specific budgetary constraints attached to their appointment, or that their contract renewals were contingent upon the availability of funds related to CMP. The Applicants also submitted and testified that, as Security Officers, they performed various functions pertaining both to CMP and non-CMP security locations. The Applicants submit that, in contrast to them, Security Officers hired in 2010 and 2011 were specifically informed at the time of their recruitment that they were recruited for CMP and that their employment was conditional upon the availability of funding related to that project.

46. At the start of their initial appointments, the Applicants participated in a training course of several weeks. At the conclusion of the training exercise, in April 2009, an article was placed on iSeek (the authorship of which is unknown), which stated that the newly-recruited Security Officers were "hired on special project to provide security for the swing spaces during the Capital Master Plan". The Respondent relies on this article as a strong indication that the Applicants were well aware of their contractual status on recruitment. The iSeek article does not form part of the Applicants' contract and, even if any reliance at all can be placed on it, the article merely indicates that some of the officers were performing CMP-related functions without any references to any alleged budgetary limitations. Of course, performing CMP-related functions and being placed against a limited budget are two different things. The Tribunal considers this to be consistent with other evidence given in the course of the proceedings.

47. Although the Applicants may have been informed verbally that they were hired with respect to some "CMP needs" or some "CMP functions", this is quite distinct from being informed that they were hired under the limited CMP budget and that further employment was conditional upon the availability of future funding.

48. The training instructor for new recruits testified that they were informed they were hired for "CMP needs", and the former Chair of one of the selection panels testified that they were recruited "on CMP" and due to a surge in CMP-related requirements. However, the former Chair stated under cross-examination that "we do not inform candidates of source of funding or the duration of funding when we recruit them". She confirmed that the new recruits were not informed of "the funding aspect" either orally or in writing as it was not considered necessary to inform them of any budgetary restrictions placed on their contracts.

49. The Respondent further submits that upon the Applicants' recruitment, the funding for their positions was assigned from the general temporary assistance ("GTA") budget approved by the General Assembly for CMP. The Respondent submits that this is reflected in personnel action forms that were provided to the Applicants shortly after their initial recruitment. These personnel action forms included abbreviations "CMO" and "GTA". Although the Respondent submits that these abbreviations should have been understood by the Applicants as indicating that budgetary limitations applied to them, the Applicants provided credible testimony that they were unaware what "CMO" and "GTA" stood for or meant. In any event, the Tribunal finds that these personnel action forms cannot be seriously relied on by either party to substantiate any claims in the context of this case. A personnel action form is a print-out of the Administration's internal human resources electronic system; it is an administrative document prepared by the Administration for its own internal needs. It is not a document capable of varying any contractual terms (certainly not unilaterally) or even clarifying them. It is not a document over which staff members have any control or which requires their input.

50. Moreover, it cannot be seriously expected of staff members to be familiar with abbreviations "CMO" and "GTA", used in the personnel action forms. When the Tribunal enquired at the hearing, having not succeeded in identifying in more than 1,600 pages of documents filed in this case, what the abbreviation "CMO" stood for, Counsel for the Respondent could not answer the question, but said that it was

understood by the Administration to refer to some additional funding. The Chief of SSS subsequently gave evidence that it was his understanding that "CM" stood for "Capital Master", although the meaning of "O" remained a mystery; this letter was in all likelihood chosen randomly to create a three-digit code for administrative purposes. This demonstrates the unreasonableness of the Respondent's submission that some legal meaning should be attached to personnel forms containing abbreviations that even the Respondent's own representatives cannot explain.

51. Thus, no direct evidence was given to the Tribunal that the Applicants were informed either verbally or in writing that they were hired on a CMP budget and that the continuity of their employment was based on the availability of limited CMP funds. Having carefully weighed the evidence presented by each side, the Tribunal finds that the Applicants were not informed when recruited or at any time prior to 2012 that they were hired on a limited CMP budget and that the continuity of their employment was based on the availability of CMP funds.

52. However, this finding is not conclusive proof that the Applicants are entitled to appointments on regular budget posts and should be treated as such. Whether or not the Applicants are, in fact, on regular budget posts and whether the contested competitive exercise is lawful is examined in the sections below.

Are the Applicants on regular budget posts?

53. The Chief of SSS testified that, as far as he was aware, 21 Security Officers were hired in connection with CMP in 2008, 32 in 2009, 11 in 2010, and 17 in 2011. Four additional Security Officers joined SSS on dates that were not made clear to the Tribunal. Thus, the Applicants make up 25 of 52 Security Officers hired in 2008 and 2009.

54. The documents and oral evidence in this case indicate that, throughout their employment, the 85 affected Security Officers were financed through various sources and, at different times, were associated with different regular and non-regular posts.

The Tribunal finds on the evidence tendered that there was no coherent process of assigning staff members against budgeted posts and that these staff members were recorded as somehow drifting from one random post number to another. Indeed, it was the Respondent's case that Security Officers were floating between different posts from time to time.

55. It is conceded by the Applicants that there are other staff members among the 85 staff members involved in performing CMP-related functions who are not party to this case but are in the exact same contractual situation as the Applicants. In 2008 and 2009, a total of 52 Security Officers, approximately half of whom are the Applicants, were hired on identical or similar contracts. Finding that these particular 25 Applicants should be treated as having been assigned against 24 regular budget posts when there are other staff members in the exact same position would create a fiction of an accountable decision-making process in SSS regarding the assignment of contracts against budgeted posts. Furthermore, the fact that there are 25 Applicants and only 24 existing regular budget posts would pose a further difficulty as each one of the Applicants appears to be identically situated, and yet one would be inevitably left out.

56. This case demonstrates that there is no accountable contract and budget management process in SSS and that the contractual and budgetary questions, at least with respect to S-1 and S-2 level Security Officers, are not decided in a transparent and clear manner. No contemporaneous paper trail has been provided to the Tribunal demonstrating when, how, and why certain staff members were placed against posts financed from different budgets. It appears to be an acceptable practice in SSS that staff members are moved, apparently randomly, between posts from various budgets regardless of their core functions. Although the Respondent did not argue this, this may be a matter of expediency and efficacy, but it does not make for a satisfactory state of affairs.

57. Thus, it became apparent in this case after seven days of hearing that it is not known, nor did the system established in SSS allow for it to be known, which of the 85 Security Officers allegedly involved in performing CMP-related functions were hired against the 24 regular budget posts.

58. Accordingly, having carefully considered the parties submissions and the evidence tendered, the Tribunal finds that it cannot be established which of the 85 affected Security Officers were hired against the 24 regular budget posts and which of them should be considered as staff on regular budget posts. This was not through any fault of the Applicants, but due to the failure on the part of the Administration to properly administer contractual and budgetary matters in SSS.

Is the contested decision lawful?

59. There are several reasons to find the contested administrative decision unlawful.

Management of contractual and budgetary matters in SSS

60. It is the right of staff members to be treated fairly and reasonably and free from unfair discrimination when it comes to matters of renewal, retrenchment, and selection. They have a right to have decisions affecting them made lawfully, on proper basis, and supported by the facts (*Islam*). The reason provided for the decision to subject the Applicants and other staff members to the announced competitive process is that the contracts of the Applicants, among other staff members, expire in August 2012 and November 2012 and that there is no money to renew them any further. This, however, is contradicted by the Respondent's own submissions and the evidence in this case. It was submitted to the Tribunal by the Respondent's Counsel and testified to by the Chief of SSS that there *is* funding for the renewal of all affected staff members until the end of December 2012 and, furthermore, that funding will remain available for most of the affected staff members through 2013.

61. Further, the reason provided for the announced exercise cannot possibly be true with respect to 24 of the 85 Security Officers. If at all staff members on regular budget posts in this case were to be affected by any type of retrenchment exercise, it would be expected in all fairness, that the "last in first out" (known as "LIFO") principle would have some relevance. It is impossible at this stage to ascertain which 24 Security Officers should not be affected by the budgetary constraints. In the Tribunal's view, the situation created by the lack of proper management of contractual and budgetary matters in SSS should be interpreted in favour of the Applicants.

62. The vacancy announcement issued in April 2012 is also plainly misleading. It refers to "the currently vacant regular budget posts". It is clear that none of the regular budget posts used for CMP needs are vacant and will not become vacant in the near future. Since the 24 regular budget posts used for CMP needs are not dependent on CMP funds but on the regular budget, these posts cannot be included in the pool of posts advertised as vacant at the present time. This further undermines the propriety of the exercise.

63. The Tribunal is not persuaded by the evidence given in this case that the announced exercise is consistent with the actual budgetary requirements. For instance, the internal vacancy announcement issued in April 2012 does not indicate how many posts are being advertised. Furthermore, no clear information has been provided to the Tribunal with respect to the posts that would remain and the posts that would be created. Are these going to be new posts, approved by the General Assembly? Or are these going to be the same posts that are being recycled time and time again, after being labeled "vacant" when they are, in fact, not? It is also unclear how many of these proposed 49 posts would be at S-1 level and how many would be at S-2 level. In effect, 85 Security Officers at the S-1 and S-2 levels are being mixed together to compete for an unknown number of S-1 and S-2 positions (presumably, totaling 49) without any regard to the current level of the Security Officers and without any regard to the differences in the job requirements for S-1 and S-2

positions. This, in the Tribunal's considered view, renders the exercise fundamentally flawed.

Unfair and discriminatory treatment of the Applicants

64. As a result of the confusing nature of the purported exercise, the contested administrative decision amounts to an arbitrary, inconsistent, and unfairly discriminatory treatment of S-1 and S-2 level staff members as compared to other staff members. As this case amply demonstrates, there are a number of concerns in relation to the non-renewal and selection procedures for S-1 and S-2 level staff members. It appears that, due to a lack of properly promulgated administrative instruction, the Administration considers it appropriate to subject S-1 and S-2 level staff members to *ad hoc* processes that no other staff members at higher levels are subjected to. This raises fundamental issues of fairness, due process, and unfair discrimination. In the Tribunal's considered view, it is manifestly unreasonable to have a group of staff members treated so arbitrarily and drastically different from other staff members.

65. Further, no evidence has been provided to the Tribunal that any other offices of the United Nations Secretariat use comparative tests in similar instances or that, indeed, these are within the existing legal framework. In matters of renewal, new appointments and abolition of posts, standard procedures should be followed, which is also not the case in the present matter. The Tribunal notes, in this regard, that the competitive process in this case is notably different from the retrenchment procedures developed in the United Nations Stabilization Mission in Haiti ("MINUSTAH") (see, for example, *Al-Alamy* UNDT/2012/090, *Abedraboh* UNDT/2012/097, *McDonald* UNDT/2012/098, *Okongo* UNDT/2012/099). For example, as explained in *Al-Alamy*, the comparative review process in MINUSTAH was set up on the basis of the staff members' professional competence and their ability to do the job in accordance with evaluation criteria pre-approved by the Comparative Review Panel consisting of representatives nominated by

management and staff representatives. The relevant criteria were prepared by the members of the Comparative Review Panel and announced well in advance, with performance evaluation reports, relevant experience, and length of service among the main factors. Furthermore, staff members at different levels were placed in different pools and the retrenchment process in MINUSTAH envisaged no mandatory exclusionary competency-based test.

66. The Chief of SSS testified that the existing performance evaluation reports were inadequate for the purpose of carrying out of the exercise, which was the reason for conducting a mandatory competency test. In effect, this means that the main, if not the only, reason for the Administration's insistence on the *ad hoc* competitive process announced in April 2012 was to compensate for the inadequacy of the performance evaluation management system. The Chief of SSS testified that the new comparative test was required because the initial test that all Security Officers undertook upon recruitment was a basic test, whereas the new test was an advanced written examination, which would be a better reflection of the staff members' abilities than their performance evaluation reports. When it was suggested to him that there was already an established tried and tested evaluation process within the Organization, the Chief of SSS was very candid in his criticism of the current performance evaluation system as being inadequate. Much as this may be, the Organization is bound to follow its own rules.

67. The announced competitive process has the effect of substituting the standard performance review as it requires staff members, as a first mandatory step, to undergo a written test, followed by a competency-based interview. It also envisages that performance evaluations would be considered only as an "additional evaluation factor" for those who passed the written test. If the Administration considers that its own performance management and evaluation tools are inadequate to make decisions regarding the quality of work of its staff members, this problem should not be solved at the expense of the staff members. Further, on the information before it, the Tribunal does not accept that the combination of the factors in this case is such

that no reasonable decisions regarding employment could be arrived at on the basis of lawful and properly established procedures. If future employment decisions are to be done by way of renewal, it is unclear on what basis a decision on renewal will be made on some *ad hoc* competitive process rather than the established evaluation procedures (see, e.g., ST/AI/2010/5 (Performance Management and Development System)).

Summary of findings regarding unlawfulness

68. In cases of *bona fide* retrenchment exercises, the Respondent has a wide, but not unfettered, discretion in its implementation, in which the Tribunal would not readily intervene. However, the circumstances in this case are exceptional. Whilst the Administration has to take into account operational requirements and the need for the efficient operation of the Organization, it must also establish fair and reasonable procedures, including fair and objective criteria, and its decisions must be supported by the established facts.

69. The Tribunal finds that the announced *ad hoc* competitive exercise is of an arbitrary and confusing nature as it combines elements of retrenchment, non-renewal, abolition of posts, and selection for new appointments. No such combined process is envisaged by the United Nations legal framework. Further, the announced competitive exercise is ambiguous with regard to the affected posts and with regard to its true scope. It affects diverse categories of staff members by unjustifiably and arbitrarily mixing them in one pool. Specifically, it mixes staff members on regular budget posts with those on temporary posts; staff who joined in 2008 under one contractual arrangement and staff who joined in 2011 under a different contractual arrangement; and staff at different post levels. In addition, the announced process is inconsistent with the process applied in at least some other parts of the Organization and amounts to an arbitrary, inconsistent, and unfairly discriminatory treatment of S-1 and S-2 level staff members as compared to other staff members. It also has

the effect of substituting the standard performance review mechanisms with an arbitrary process.

70. The Tribunal finds that, in all the circumstances of this case, the *ad hoc* competitive process announced in April 2012 is manifestly unreasonable and unlawful. The exercise in the announced form will place the Applicants in a prejudicial position in disregard of, among other fair, relevant and lawful factors, the existing performance evaluation tools.

Observations

Observation on selection of S-1 and S-2 level staff

71. It was submitted by the Respondent that the allegedly vacant posts are at the S-1 or S-2 levels. There are no rules in the Organization on how selection for S-1 and S-2 level positions is to be conducted (see sec. 3 of ST/AI/2010/3 (Staff selection system)), which is an unsatisfactory state of affairs. ST/AI/2002/4 and ST/AI/2006/3—two previous redactions of ST/AI/2010/3—stated that "[a] separate administrative instruction will be issued for the recruitment and promotion of staff up to the G-4, S-2 and TC-3 levels" (see footnote (c) on page 5 of ST/AI/2002/4 and footnote 11 on page 5 of ST/AI/2006/3). This text is notably absent in ST/AI/2010/3, and apparently no administrative instruction has been promulgated regarding the selection of staff up to the S-2 level despite the lapse of several years. The present dispute would likely have been avoided had the Administration promulgated such an administrative instruction.

72. The Tribunal notes that the Chief of SSS testified that all new positions are going to be at the S-1 and S-2 level. Nevertheless, the Tribunal finds it appropriate to observe that, if any of the proposed posts are going to be at the S-3 level, the Administration must comply with ST/AI/2010/3. Any selection exercise for a

position above the S-2 level not in compliance with ST/AI/2010/3 would undoubtedly be unlawful.

73. It should be mentioned here that it is not entirely clear at this stage whether it is appropriate under the current rules to carry out recruitment exercises for regular budget posts at the S-1 and S-2 levels by way of internal vacancies; however, this issue was not raised by the parties in the context of the present proceedings.

Observation on consultations

74. Whilst it is recognised that an employer may restructure or reorganise its workforce for legitimate reasons and based on its operational requirements, fair, reasonable, and equitable procedures must be followed. This includes a full and meaningful consultation process. It is generally accepted that employers that intend to embark on a retrenchment exercise are required to carry out effective consultations with their employees or their representatives. Among the goals of the consultation process is ensuring that staff members have a say in the process, that they receive proper notice, and that their interests are taken into consideration.

75. It is clear that some consultations between management and their representatives were held, but whether or not these consultations satisfied the applicable standards is unclear, and, furthermore, in view of the findings in this case, need not be determined. The Tribunal observes, however, that, based on the evidence given in this case, it is clear that at least one of the reasons why the present case is before it is the failure on the part of at least some of the staff representatives to properly and fully appraise SSS staff members of the staff representatives' discussions with management.

Observation on future conduct of the parties

76. In the course of the present proceedings the Respondent submitted that he was willing to consider the scope of the proposed exercise by making the test non-

exclusionary and by removing 11 Security Officers who were hired in 2011 and are on temporary appointments from the pool of 85 affected Security Officers that would be permitted to participate in the competitive exercise. The Tribunal cannot adjudicate cases involving decisions of a changing nature. Although the Respondent considered the proposed competitive process capable of various changes, the litigation was pursued to the very end, despite several interventions by the Tribunal for an amicable resolution, which is regrettable.

77. It is not the function of the Tribunal to unduly interfere or instruct the manner in which the Administration carries out retrenchment or selection exercises, but it is apparent in this case that the parties need to go back to the drawing board. If any new process is going to be established to solve the situation, it must be transparent, fair, reasonable, and respect the applicable rules and regulations of the Organization.

Observation on the tone of the proceedings

78. It is regrettable that at some moments during the hearing, the tone of the proceedings did not auger well for those personalities still involved in a working relationship, through no fault of their own. There was, for instance, an allegation made by Respondent's Counsel at the outset of the oral proceedings that the Applicants were being dishonest and were in collusion in fabricating this case. All of the witnesses in this case appeared credible and their demeanor did not indicate that they were being untrustworthy. In the end, not a shred of evidence was produced to support this allegation, which was not pursued by the Respondent during the remainder of the hearing or during closing submissions. The unsubstantiated allegation that 25 Security Officers—whose continued employment is premised on a relationship of trust and confidence and who are entrusted by the Organization to protect the security of its staff—were colluding, hardly contributes to maintaining harmonious industrial relations in a continuing working relationship. Counsel should refrain from making unsubstantiated and outlandish allegations of collusion, fabrication, and dishonesty on the part of applicants or witnesses if these cannot

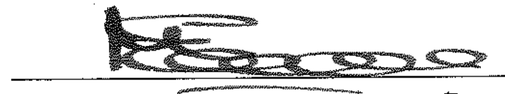
clearly be substantiated, particularly where there is acceptable evidence in rebuttal, as was the case here.

Conclusions

79. The Tribunal finds that the *ad hoc* competitive process announced in April 2012 is unlawful. In view of the particular circumstances of this case, the Tribunal finds that the appropriate form of relief in this case is the rescission of the decision to carry out the *ad hoc* competitive process announced in April 2012.

Order

80. The decision to carry out the *ad hoc* competitive process as announced in April 2012 is unlawful and is hereby rescinded.



Judge Ebrahim-Carstens

Dated this 31st day of July 2012

Entered in the Register on this 31st day of July 2012

for

Hafida Lahiouel, Registrar, New York