



UNITED NATIONS

Introduction

1. The Applicant, a former Special Advisor at the D-1 level, step 5, in the Bureau for Development Policy (“BDP”) of the United Nations Development Programme (“UNDP”), contests her “forma

opportunity to amend his reply accordingly or to submit his comments on those allegations.

6. On 4 August 2015, the Tribunal (Duty Judge) issued Order No. 176 (NY/2015) instructing the Applicant to file a submission addressing the issues of receivability raised in the Respondent's reply. The Applicant's Counsel filed this submission on 1 September 2015.

7. On 1 September 2015, the case was assigned to the undersigned Judge.

8. By Order No. 285 (NY/2015) dated 10 November 2015, the Tribunal instructed the parties to file a jointly signed statement on or before 1 December 2015 in which they were to set out the agreed and disputed legal issues and facts, the necessity of additional evidence as well their views on informally resolving the case through the Office of the Ombudsman or through *inter partes* negotiations. The parties were further instructed to attend a case management discussion ("CMD")

leave through 31 July 2015, after which she was separated from service. Medical reports covering that period can also be provided”.

16. By submission in response to Order No. 21 (NY/2016) of 24 February 2016, the Respondent stated that “none of the witnesses proposed in the Applicant’s submission of 10 February 2016 [were] relevant to these proceedings” and provided explanations therefore. To the submission, the Respondent appended a number of documents in response to the Tribunal’s instructions in Order No. 21 (NY/2016).

17. By joint submission in response to Order No. 21 (NY/2016) of 24 February 2016, the parties stated that they had agreed on the dates of 7 and 8 April 2016 for a hearing, with the possibility of extending the hearing through the following week, if needed.

18. By motion to submit additional evidence dated 26 February 2016, the Applicant requested “leave to submit the following additional documentation relative to her tess ohe Jaddiseng]TJ-19.2 -055D-.0001 Tc.0701215[(No. dispu26)]on uf 7 an8.82 0

successfully passed the United Nations Resident Coordinator Assessment test and was thereafter qualified for appointment for Resident Coordinator/Resident Representative/Designated Official/Humanitarian Coordinator (“RC/RR/DO/HC”) positions.

29. In October 2009, the Applicant was appointed Director of the Brussels Liaison Office of the UN Development Fund for Women, a P-5 level position.

30. On 1 June 2010, the Applicant was appointed as RC/RR for the United Arab Emirates (“the UAE”) at the D-1 level.

31. On 27 April 2012, the Applicant was instructed by the then Assistant Administrator and Regional Director for RBAS, Ms. AS (“RBAS Regional Director”), to undertake a mission to New York in order to conduct consultations with relevant parts of Headquarters, including with the Management Consultancy Team to reach a sustainable solution to some alleged management issues in Country Office in the UAE.

32. During her stay at the Headquarters in May 2012, it was agreed that the Applicant was to leave the UAE and be moved to UNDP’s Headquarters, New York, to work as a Special Advisor at D-1 level.

33. On 4 June 2012, as results from an email with the subject-matter “Note for the Record“ sent by Ms. FW (unknown title) to the Applicant and the then Deputy Regional Director of RBAS, (“the Deputy Regional Director”), that during a meeting of the same date, it was agreed that:

- a. The Applicant’s contract would be extended for two years effective 1 June 2012;
- b. Terms of Reference would be developed during the following week for a post at the D-1 level in the “BDP Governance Unit”,

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54. On 1 July 2014, the Applicant received the response to her request for management evaluation from the Management Bureau Director. In the considerations, it was indicated that:

have I been redeployed against an

performance appraisal of 2013, her supervisor as assessed her performance as “outstanding”—and the fact that she was two years away from retirement at age 62 at the time of her separation, the Administration’s practices and policies constituted express promise for creating an expectancy for renewal;

e. In the management evaluation, it was argued that the claims made by the Applicant that she was not affected by the restructuring were not receivable as they are time-barred. It is claimed that the Applicant received the email from Mr. W on May 21, 2014 and “it was incumbent upon her to file a request for management evaluation of that decision within the statutory sixty days”. The Applicant explained her

applied and has been de facto blacklisted is the subject of a separate application but is equally applicable to the issue of her termination;

h. What is clear is that the Applicant's displacement is the result of the Respondent's failure to implement, in good faith, the agreement to return to Headquarters. The Applicant requested and was granted exemption from the "tour of duty" of serving full term (four years) in her reassignment on the

b.

failed to do so and the Applicant's claim that she was not affected by the structural review is time-barred and not receivable;

d. The Applicant's claim that her reassignment to the position of Special Adviser, BDP was as "unassigned" is also time barred. As stated, the Applicant requested management evaluation of the purported decision to designate her as unassigned on 2 June 2014. UNDP reviewed this claim in its management evaluation of 1 July 2014. To the extent that the Applicant wished to challenge this management evaluation, as per staff rule 11.2(c), it was incumbent on her to submit her appeal to this Tribunal by 29 September 2014, but the Applicant did not do so;

e. The Applicant's claim that her status as Special Adviser, BDP was "unassigned" is incorrect. The Applicant's post was located in BDP for a limited term at the Applicant's level, in her area of expertise in democratic governance and with consultation and input from the Applicant. It is not disputed that as per the agreement of 4 June 2012 between the Applicant and UNDP, the Applicant was reassigned to BDP as a Special Adviser, until 1 July 2014. It is also not in dispute that the Applicant was paid during this period, nor is it in dispute that she was performing functions. In substance, the Applicant does not dispute that she was reassigned as Special Adviser, BDP; a fact borne out by the Applicant's internal resume indicating her reassignment to these functions. As provided in section II (Scope) of the Structural Review Policy, "[t]he People Realignment Policy and Processes covers HQ and regional level functions where there will be a structural change". Given that the Applicant was assigned to BDP, she could not but be subject to the structural review that turned BDP into the Bureau for Policy and Programme Support ("BPPS");

f. It is not clear on what basis the Applicant maintains that she was unassigned and not affected by the structural review, nor the relevance of this

point given that, even had the Applicant been unassigned, she would still have been affected by the structural review, as provided in section V of the Structural Review Policy, which provides that unassigned staff, i.e., staff in the Business Solutions Exchange, are affected. As also provided in the Structural Review Policy, “Staff members who remain without a position as a result of the realignment process will be separated in accordance with the UN Staff Regulations and Rules”. Consequently, even had the Applicant been unassigned while performing the functions of the post of Special Adviser, BDP, to which she had agreed, she would still have been affected by the structural review;

g. At no time was the Applicant provided with an express promise that her appointment would be renewed after 1 July 2014. To the contrary, she was scrupulously kept informed of the length of her assignment in BDP as well as of the structural review. When the then Officer-in-Charge of BDP/DGG met with the Applicant on 25 October 2013, he reiterated to her that her assignment with BDP/DGG was time bound, and that no assurance could be given to her, or to any other staff member in BDP/DGG, that following the restructuring she would definitely still have a position;

h. The Applicant’s time-bound assignment had concluded over six months prior to the date of the impugned notice of separation on 29 January 2015. As she had been unsuccessful in her applications for a new post and encumbered a post she had accepted with the knowledge that it was time-bound, the Applicant could have had no reasonable expectation that her appointment would be renewed, save to allow her to benefit from the full benefit of her sick leave entitlement;

i. The Applicant has not been discriminated against or harassed. Regarding the Applicant’s claim in this context that her communication with UNDP has so upset her that her doctors have recommended that all

communications from UNDP go through her counsel, the Applicant felt sufficiently calm and competent to engage in friendly and detailed discussions with the Administration on the matter of her U.S. visa. The status of her G-4 visa was not part of a series of retaliatory actions linked to the alleged discrimination. Between 2012 and 2015 UNDP repeatedly asked her to provide copies of her G-4 visa so that UNDP could report her legal presence to the U.S. authorities as required, but the Applicant failed to provide these copies. On 5 January 2015, she entered the U.S. on a B-1 visa, breaching the UN's requirements, of which she was aware, according to which she was to enter the USA only on a G-4 visa. Having entered in this manner, the Applicant approached UNDP on 23 February 2015 regarding assistance in extending a G-4 visa, having failed to inform UNDP that she had in fact entered the USA on a B-1 visa; a visa that

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abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

(i) Staff members holding continuing appointments;

(ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;

(iii) Staff members holding fixed-term appointments.

...

(f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty stations.

Rule 9.7

Notice of termination

(b) A staff member whose fixed-term appointment is to be terminated shall be given not less than 30 calendar days' written notice of such termination or such written notice as may otherwise be stipulated in his or her letter of appointment.

65. Staff rule 6.2 states, in relevant parts, concerning sick leave that:

Rule 6.2

Sick leave

(a) Staff members who are unable to perform their duties by reason of illness or injury or whose attendance at work is prevented by public health requirements will be granted sick leave. All sick leave must be approved on behalf of, and under conditions established by, the Secretary-General.

Maximum entitlement

(b) A staff member's maximum entitlement to sick leave shall be determined by the nature and duration of his or her appointment in accordance with the following provisions:

(i) A staff member who holds a temporary appointment shall be granted sick leave at the rate of two working days per month;

(ii) A staff member who holds a fixed-term appointment and who has completed less than three years of continuous service shall be granted sick leave of up to 3 months on full salary and 3 months on half salary in any period of 12 consecutive months;

(iii) A staff member who holds a continuing appointment, or who holds a fixed-term appointment for three years or who has completed three years or more of continuous service shall be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years.

66. From the UNDP Recruitment and Selection Framework, issued and effective on 1 July 2009 (most recently reviewed on 22 March 2012) follows, in relevant parts:

...

102. In accordance with Staff Regulation 1.2 (C)II, management may decide in the interest of the Organization to assign a UNOP staff member to another post in the same field of work with similar functions at the same level without competitive process. The decision for a lateral move is at the discretion of management and only after consultation with the concerned staff member. While a staff member may express his/her interest in moving laterally to another position in the same business unit, a lateral move is not an entitlement. The management decision to fill a post through competitive process instead of lateral move is discretionary.

103. Lateral moves without a competitive process may only apply to similar posts in the same field of work with similar functions as documented in the job descriptions of both posts (the post encumbered by the staff member and the post considered for lateral move), at the same level requiring the same or a similar set of competencies and in the same business unit.

...

106. The manager must discuss the proposed re-assignment or exchange with the staff members concerned in order to seek their views. While the staff members are subject to their management's authority to reassignment to any of the similar posts with similar functions at the same level in the office, they must be consulted prior to the lateral moves and, as far as possible, their consent for the lateral

moves should be secured. However, the consent of the staff members concerned must be secured in writing when the lateral move, although taking place in the same business unit, entails a change in duty station [Footnote: This would be the case for instance, for two similar posts like Policy Advisors within the same Headquarters Bureau, e.g. BCPR or BDP but in two different duty stations or two similar posts within the same Headquarters Office, e.g. two Audit posts with OAI, or two similar posts with the Security Team, but in different duty stations].

...

109. The process leading to lateral moves must be fully documented. The job descriptions must be provided to support that the two posts have similar functions and are at the same level. Prior consultation with the staff members concerned and their written consent in the event that the lateral moves entails the change of duty stations, must be evidenced. A copy of the signed approval with the relevant documentation and clearance must be provided for implementation of the necessary action:

- (i) to OHR/BoM for P and D, as well as HQ GS staff members;
- (ii) to the HR focal point in the relevant business unit for other GS and NO staff members.

...

119. As far as possible, the post to be filled on an urgent basis should be given to a UNDP staff member meeting the requirements for the post and already at the level of the post. However:

- a) in the event that the post is exceptionally filled by an outsider and since the selection will not be submitted to the relevant Compliance Review body prior because of the urgency, the letter of appointment will specify that his/her appointment is limited to the specific post in question and he/she will not be considered as an internal candidate for the

- b) Bureau Directors and Directors of Independent Offices
 - (i) Locally recruited FTA G1-G7 at Headquarters (with clearance of Director, ORR)
 - (ii) P1-P-5 Staff Members (with clearance of Director, OHR)
 - (iii) D-1/P-6 Staff members (with clearance of AA and Director, OHR)
- c) Regional Directors/Resident Representatives/Head of Liaison Office
 - (i) GS and NO staff members within their Office (with clearance of HR Unit)

127. A Bureau Director may, on a very exceptional basis, propose the lateral moves of current incumbents of Deputy Resident Representative, Country Director, Deputy Country Director, Operations Manager positions from a country to another within the same region, outside the normal reassignment process through the candidate pools mechanism. The proposed lateral move will be submitted by the Regional Bureau Director, through the Director, OHR/BoM, to the Associate Administrator for clearance, with the relevant documentation supporting the exceptional circumstances justifying the lateral move, demonstrating the consent of the staff member to the resulting change in duty station and providing the cost analysis of the relocation.

...

128. Since the selections and reassignments of Resident Coordinators/Resident Representatives are subject to inter-agency consultations, the present lateral moves policy does not apply to Resident Coordinators/Resident Representatives. Decisions on Strategic Placements.

129. Decisions on strategic placements remain within the authority of the Administrator and Associate Administrator as follows:

- a) Administrator
 - (i) D-2/P7 staff members
- b) Associate Administrator
 - (i) All other posts

...

67. The UNDP specific rules on, “Termination of Appointment for Reasons of Health”, with effective date on 29 May 2005, provides, in relevant parts, that:

...

4. For a staff member’s appointment to be terminated for reasons of health under UN Staff Regulation 9.3 (a) (iii) the staff member’s incapacity must be established by conclusive medical evidence that results in the award of a disability benefit under UNJSPF [United Nations Joint Staff Pension Fund] Regulations.

...

5. The provisions of this policy apply to all UNDP staff members governed by the UN Staff Regulations and Staff Rules.

...

6. When a staff member has taken an extensive period of continuous or cumulative sick leave (SL), a request must be sent to the UN Medical Director for determination of whether the staff member’s illness or injury is currently or potentially a case of incapacity for further service. This should be done as early as possible and not later than six months before the staff member exhausts his/her paid leave entitlement, both SL and annual leave (AL).

7. The request must be submitted for:

a) Internationally-recruited staff members, by the OHR Business Partner serving the duty station or organizational unit;

...

...

13. If a delay occurs in the determination by the UN Medical Director of the staff member’s incapacity and the staff member concerned has exhausted all his/her SL entitlement (at both full pay and half pay) under UN Staff Rule 6.2, and AL entitlement, the staff member will be placed on special leave with half pay pending the medical determination.

14. If the medical determination is that an impairment does exist, a request must be submitted as soon as possible to the United Nations Staff Pension Committee (“the Committee”) for the award of a disability benefit to the staff member.

15. The request must be submitted for:

- a) Internationally recruited staff members, by the OHR Business Partner serving the duty station or organizational unit

...

21. When the UNJSPF Committee has decided to award a disability benefit, a recommendation for the termination of the staff member's appointment for reasons of health under UN Staff Regulation 9.3 (a) (iii) as appropriate, must be submitted as expeditiously as possible to the OHR Director for approval on behalf of the Administrator, for:

- a) Internationally recruited staff members, by the OHR Business Partner serving the duty station or organizational unit

...

22. Following the approval by the OHR Director of the termination of the staff member's appointment, the appropriate notice of termination, as indicated in the next paragraph, will be issued to the staff members as follows:

- a) For internationally recruited staff members, by the OHR Business Partner serving the duty station or organizational unit

...

25. Separation from service will take effect as of the date established in the notice of termination. In establishing such date, the following conditions will be observed:

...

- c) If, on the date of notice, the staff member has already exhausted all his/her SL entitlement and has been placed on special leave with half pay under paragraph 13 and/or 19, the separation will be effective on the date the notice is given, but the notice will specify that compensation will be paid for the full period of notice

...

35. When a staff member on a fixed-term appointment is incapacitated for service by reason of an illness that continues beyond the date of expiration of the appointment, he/she shall be granted an extension of the appointment, after consultation with the UN Medical Director, for a continuous period of certified illness up to the

maximum entitlement to SL at full pay and half pay under UN Staff Rules 6.2.

...

68. The UNDP specific rules on, “Sick Leave”, with effective date on 22 February 2016, provides, in relevant parts, that:

...

5. Staff members are entitled to sick leave, inclusive of certified and uncertified sick leave as described below and in accordance with UN Staff Rule 6.2:

...

c) A staff member holding a permanent or continuing appointment or who has completed three or more years of continuous service on a fixed-term appointment shall be granted sick leave up to 195 working days on full salary and 195 working days on half salary in any period of 48 consecutive months. Nine months are equivalent to 195 working days.

...

18. When a staff member has exhausted all of his/her entitlement to sick leave on full pay, further sick leave will be charged to the sick leave on half-pay entitlement as per paragraphs 5 (b) and (c) until the entitlement to sick leave on full pay arises again after the four-year period for the initial entitlement.

...

21. When a staff member on a fixed-term or temporary appointment is incapacitated for service by reason of an illness that continues beyond the date of expiration of the appointment, he/she shall be granted an extension of his/her appointment, after consultation with the United Nations Medical Director or designated medical officer, for the continuous period of certified illness up to the maximum entitlement to sick leave at full pay, and in the case of fixed-term appointments at half pay as per paragraphs 5 (b) and (c).

...

24. In cases where a staff member is approaching exhaustion of his/her entitlement to sick leave with full pay, the designated HR focal point must bring the situation to the attention of OHR, which will contact the United Nations Medical Director in order to determine

whether that staff member should be considered for a disability benefit under article 33 (a) of the Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund (UNJSPF) while the staff member is on sick leave with half pay. The UN Medical Services, via OHR, shall periodically contact offices with instructions for the submission of cases for consideration for disability benefit. (Refer to Termination of Appointment for Reasons of Health)

69. From the Convention on Termination of Employment, 1982 (No. 158) follows in relevant parts:

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.
2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:
 - (a) workers engaged under a contract of employment for a specified period of time or a specified task;
 - (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
 - (c) workers engaged on a casual basis for a short period.
3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.
4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.
5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of

the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms *termination* and *termination of employment* mean termination of employment at the initiative of the employer.

Article 4

The employment of a worker shall not be terminated unless there is a

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term the workers' representatives concerned means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

...

Receivability

70.

Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment” (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

72. It results that in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability *ratione materiae*

73. The Tribunal notes that it is uncontested that the decision to abolish the Applicant’s post was notified to her on 29 January 2015 and that she filed a management evaluation request on 2 March 2015, within 60 days from the date of notification of the contested administrative decision. Therefore the application is receivable *ratione materiae*.

Receivability *ratione personae*

74. The Tribunal notes that the Applicant is a former staff member and the application is receivable *ratione personae*.

Receivability *ratione temporis*

75. Pursuant to the mandatory provision of art. 8.1(d)(i)(a) of the Dispute Tribunal's Statute, for an application to be receivable, it must be filed within "90 days of the applicant's receipt of the management evaluation of his or her submission" in cases like the present one, where a management evaluation of the contested decision is required under staff rule 11.2(a).

76. The Tribunal notes that the management evaluation response was communicated to the Applicant on 1 April 2015 and that the present amended application was filed on 30 June 2015, within 90 days from the date of notification. Therefore the application is receivable *ratione temporis*.

77. The Tribunal underlines that the decision to abolish a post is the result of a complex process, which has to follow specific procedural steps resulting in preliminary/interlocutory decisions like, for example, the decision to determine the posts and/or staff member affected by the structural review process, as well as temporary contract extension(s) for a limited period of time. Such preliminary decision(s) cannot be appealed separately and they are reflected in the final decision to abolish the post. Therefore the legal review in the present case is related only to the final contested decision to abolish the Applicant's post issued on 29 January 2015 which is receivable *ratione temporis* as presented above.

The impugned decision and the process of abolition

78. The Tribunal notes that the decision contested in the present case is the decision to abolish the Applicant's post "Policy Advisor D1 in UNDP, BCCP (former BDP)". The Tribunal considers that the process of abolition was initiated on 21 May 2014 when the staff members received the general announcement and, in the Applicant's case, was finalized on 29 January 2015 when the decision to abolish the post was notified to her. The termination was effectuated on 31 July 2015.

Reasons for separation from service

79. Under the staff regulations and rules, the Secretary-General may separate a staff member from service in accordance with her terms of his/her appointment or for any of the reasons specified in the staff regulations 9.1 to 9.3 and staff rules 9.1 to 9.6.

80. The reasons for separation from service can be organized into five categories:

I) Separation *ope legis*

81. There are certain types of separation from service that do not involve unilateral action from one of party (Organization or staff member) or the parties' consensus. These include:

- a. expiration of the contract in accordance with the terms of appointment (staff rule 9.1(iii) and 9.4);
- b. death of the staff member (staff rule 9.1(vi));
- c. retirement (staff regulation 9.2 and staff rules 9.1(iv) and 9.5).

II) Separation by parties' agreement prior to the expiration of the contract (staff regulation 9.3(a)(vi) and staff rule 9.6(c)(vi))

82. According with the general principle of legal symmetry—*mutuus consensus*, *mutuus disensus*—the labor contract, which is a consensual contract, can be terminated by agreement between the parties.

83. All types of appointments (temporary, fixed-term or continuing) can be terminated in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that this action is not contested by the staff member.

84. A termination based on this reason can only take place if the action is not contested by the staff member. In other words such an action can only be legally

implemented by the Secretary-General if the staff member agrees with it. The staff member's agreement is a conditional requirement for the application of this rule and the Secretary-General's initiative to terminate the contract is in this case an offer to the staff member. If the staff member accepts freely and unequivocally the offer then is an agreed termination and the parties can come to an agreement orally or in writing.

85. In *Jemai* UNDT/2010/149, the Tribunal held that an agreed termination on terms negotiated free from any duress or misrepresentation is an essential feature of good employment relations and should be given effect and honored by the contracting parties.

III) Separation initiated by the staff member

86. There are two types of separation which may be initiated by a staff member:

- a. Resignation (staff regulation 9.1 and staff rule 9.2); and
- b. Abandonment of the post (staff rule 9.3).

IV) Separation initiated by the Secretary-General

87. There are five sub-categories in the types of separation which may be initiated by the Secretary-General:

- a. Termination for reasons (grounds) not related to the staff member: abolition of posts or reduction of staff (regulation 9.3(a)(i) and staff rule 9.6(c)(i) and 9.6(e)).
- b. Termination for reasons (grounds) related to the staff member:
 - i. If the staff member is, for reasons of health, incapacitated for further service (staff regulation 9.3(a)(iii) and staff rule 9.6(c)(iii));

- ii. If the services of the staff member prove unsatisfactory (staff regulation 9.3(a)(ii) and staff rule 9.6(c)(ii));
- iii. If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light and, if they had been known at the time of his/her appointment, should under the standards established in the Charter of United Nations have precluded his or her appointment (staff regulation 9.3(a)(v) and staff rule 9.6(c)(v));
- iv. If the conduct of the staff member does not meet the highest standards of integrity required by art. 101, para. 3, of the Charter of the United Nations (staff regulation 9.3(a)(iv));
- v. Disciplinary reasons in accordance with staff rule 10.2(a)(viii)–(ix) (rule 9.6(c)(iv). Rule 10.2(a) states that disciplinary measures can take only one or more of the following forms:
 - (i) Written censure;
 - (ii) Loss of one or more steps in grade;
 - (iii) Deferment, for a specified period, of eligibility for salary increment;
 - (iv) Suspension without pay for a specified period;
 - (v) Fine;
 - (vi) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
 - (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
 - (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
 - (ix) Dismissal.

c. Termination in the interest of good administration of the Organization (staff regulation 9.3(b) and staff rule 9.6(d)):

i. In addition to the reasons given in the letter of appointment and from staff regulation 9.3(a) “in the case of a staff member holding a continuing appointment, the Secretary General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary General, such action would be in the interest of the good administration of the Organization to be interpreted principally as a change or termination of a mandate and in accordance with the standards of the Charter”.

ii. This additional reason for termination is distinct from the ones presented above and can be understood as being:

(a) Applicable only to a staff member who holds a continuing appointment;

(b) A termination without the consent of the staff member;

(c) A direct result of the Secretary-General’s unilateral opinion that the termination is in the interest of the good administration of the Organization; the Secretary-General’s authority to determine the interest of good administration of the Organization and his discretionary power to terminate a staff member’s contract are provided for by the Staff Regulations and Staff Rules.

d. This termination is to be interpreted principally as a change or termination of a mandate.

e. The written notice is three months.

88. Staff regulation 9.3(b) and staff rule 9.6(d) are applicable when the Secretary-General's action is taken without the consent of the staff member in cases other than the ones mentioned expressly in staff regulation 9.3(a) and staff rule 9.6(c) respectively when the General Assembly decides not to extend the mandate of a mission or there are no funds available. According to the text, this reason itself can be interpreted in two ways change of the mandate or termination of the mandate. No ambiguity about this reason for termination is possible since the plain reading of the rule is clear in this sense and this reason cannot be assimilated or compared with any other because it is related directly to the extension of the UN mandate and/or the availability of funds.

The termination of the Applicant's fixed-term appointment

89. The Tribunal notes that, in the present case, the Applicant's fixed-term

relevant administrative issuances and that your appointment will be extended in line with the UN Staff Regulations and Rules.

We will be tracking the sick leave entitlements and keep you informed of the timelines. Should you exhaust the entitlement of sick leave and as per the recommendations of your physician and UNMSD, UNDP will support the submission of any requests for disability benefit with the UNJSPF. Please be aware that at the moment you will no longer be on certified sick leave, your notice period in accordance

Did the Applicant's assignment with the former BDP end on 31 January 2015?

Facts relevant to the Applicant's end of assignment on 31 January 2015

93. The Tribunal notes the following relevant facts:
- a. The Applicant's contract as RC in UAE was extended for two years effective from 1 June 2012 until 31 May 2014;
 - b. On 4 June 2012, she was officially informed that, as agreed with the UNDP management in May 2012, she was to be "reassigned" to a D-1 level post in BDP/DGG at UNDP Headquarters in New York, starting on 1 August 2012 and that she would have to report to her new office on 4 September 2012. This assignment would be "for 22 months, being the balance of the two year extension [and] during this assignment [the Applicant] could apply for other HQ posts, without being bound by the usual 'time post limitation'";
 - c. On 4 June 2012, she was also informed that the Terms of Reference for her new position would be developed during the following week for a post at the D-1 level in the "BDP Governance Unit";
 - d. On 12 June 2012, Ms. FW forwarded the Terms of Reference to the Applicant. In these Terms of Reference, the Applicant's post title was titled, "Policy Advisor on Public Service", its level was stated as D-1, and it was located in New York. Under the heading, "Duties and Responsibilities", it was indicated that the Applicant would work under "the overall direction of [the DGG Director] and the direct supervision of the Senior Public Administration Advisor/Responsive Institutions Cluster Team Leader";
 - e. The Applicant left UAE on 31 July 2012, proceeding on home leave, and reported for duty in BDP on 4 September 2012;

f. The official Terms of Reference for Applicant's post were finalized and signed by her supervisor on 9 April 2013. The document sets out two important elements: an extension of the Applicant's initial mandate with BDP until 13 December 2013 and the description of her duties and responsibilities for 2013 and for the future period 2014 to 2017 as follows:

...

The Special Advisor *will play a leading role* in disseminating the messages and findings of the first Flagship Democratic Governance Report and *support the Practice Director* in building momentum and consensus on the key messages and reform recommendations of the Report amongst traditional and emerging donors, the G77 Group, UN agencies, OECD and other multilateral and bilateral donors. To that effect, the Special Advisor will represent UNDP/DGG, along with the DG Report team, in this dialogue with traditional and emerging donors seeking new partnerships and renewed commitment to democratic governance as key pillar to achieving MDGs/SDGs, Post 2015 Agenda development, women empowerment and social protecti

the social contract and have produced a number of working discussion papers in this area. OGC has also created a new stream of work in its 2013 workplan specifically dedicated to support UNDP's analytical work, dialogue and knowledge sharing of the governance elements In political transitions and has articulated some concrete ideas for follow up to support UNDP to play a stronger leadership role in this area.

...

The Special Advisor will lead on developing a new strategy for UNDP Intervention and leadership on democratic governance in countries undergoing political transitions, including the Post 2015 Agenda and support countries in defining and articulating a new governance model and social contract which will form the basis for the Post 2015 Agenda. In carrying out this work, the Special Advisor will be supported by a small team of researchers to ensure quality products and timely delivery of results.

...

... **Contribution to UNDP Strategic Plan 2014-2018**

...

Within the current context of the new Areas of Work as identified in the new UNDP Strategic Plan 2014-2017, and DGG commitment to an integrated approach to deliver the outcomes and results of Work Area 2 of the SP- with high policy impact at national levels, DGG will pursue widening inclusion, expanding choice and opportunity, and advancing effectiveness, inclusiveness and responsiveness of governance across all new Areas of development work. DGG support to the new UNDP Strategic Plan Includes, among other key results, assistance for governance transitions, advocating governance innovation and reform, supporting equitable access to services, developing comprehensive approaches to state building in postconflict settings and providing assistance to state-building to improve capability, accountability, responsiveness and legitimacy.

...

the Arab Region, building on the findings and recommendations of the Global DGR anticipated to be launched in Summer 2013.

The actual status of the Applicant's assignment

94. The Tribunal concludes that the Applicant's initial assignment as a Policy Advisor at the D-1 level, which was supposed to be for 22 months and expire on 31 May 2014, was extended until 31 December 2014. The Tribunal further notes that, while the duties included in the Applicant's initial Terms of Reference of June 2012 were related to the UNDP Strategic Plan 2008–13, the final Terms of Reference of April 2013 expanded her duties and responsibilities, indicating that the Applicant's assignment was expected to last until 2017 in order to implement the major governance processes as detailed the 2014–17 Strategic Plan, as adopted by the UNDP, the United Nations Population Fund and the United Nations Office for Project Services on 2 August 2013. The Tribunal concludes that, on the preponderance of evidence, the Applicant's assignment as a Policy Advisor at the D-1 level in BDP did not end in December 2014 but was expected to continue until 2017, at least until 28 August 2017 (the retirement date of the Applicant). Furthermore, the Tribunal notes that UNDP did not take into account the extension of the Applicant's contract from 1 June 2014 to 31 December 2014, which had otherwise been approved by the then Practice Director of DGG on 9 April 2014 and accepted by the Applicant, as the Applicant's contract was instead extended twice for three-month periods, notably from June to August 2014 and from September to December 2014. As results from the 1 July 2014 response to the Applicant's management evaluation request of the decision not to renew her contract beyond 31 May 2014, the end of her assignment mandate was not stated as the reason but rather that:

Since [her] post [was] affected by the realignment exercise, [her] appointment was not again renewed two years, but only for a period of three months. As indicated, this [was] in line with a decision to limit duration of contract extensions pending the realignment process, which applies to most staff members at UNDP headquarters.

The Applicant's right to be maintained in the Pool of the Business Solution Exchange Mechanism

95. The “Business Solution Exchange Mechanism (BSE)” (submitted by the Respondent on 24 February 2016) states as follows, in relevant parts:

I. Objectives

UNDP is a dynamic and universally present organization. In order to stay relevant, it has to provide a high quality, timely and efficient response to emerging and often rapidly changing development challenges both globally and at the country level. A critical element of its effectiveness and requisite agility is the ability of UNDP to

e. who were selected for a post but were not cleared through an inter-agency process or by

the host Government;

f. who cannot continue in the post due to unforeseen circumstances;

g. who are close to retirement (58 years or older for retirement at the age of 60, and 60 years or older for retirement at the age of 62 [footnote omitted])and are not able to fulfill a complete tour of duty, especially in field positions, before mandatory retirement [footnote omitted].

...

IV. Terms of engagement

...

c. Duration

Being in the BSE pool, including being engaged in a formal temporary assignment through the BSE mechanism, does not change the “between assignments” status of the staff member. (S)he must continue actively searching for a regular assignment, with the support of the HR Business Advisors and the Career Transition Unit (CTU) in OHR/BoM.

The cumulative time during which a staff member can be in the BSE pool is 6 months. If the staff member in the BSE pool gets engaged in a formal temporary assignment, the time in the BSE pool will come to a halt and will resume (not restart) upon the completion of the temporary assignment. The duration of the temporary assignment itself can be flexible and will be agreed with the receiving unit.

These provisions will not fully apply to staff in category g. above, who can remain in the BSE pool for up to 2 years.

d. Funding

Generally, for a staff member in the BSE pool engaged in a formal temporary assignment through the BSE mechanism all costs will be covered by the receiving office.

BoM will cover all relevant costs for staff in the BSE pool for 3 months following the end of the previous regular assignment, which is expected to cover the first 3 months in the BSE pool. BoM will also cover such costs (with the exception of direct costs related to the assignment, e.g. the cost of travel and DSA) for the first 2 months of a formal temporary assignment or several assignments cumulatively since the staff member joins the BSE pool.

correspondence received by the Applicant in June 2012, this post was created for her starting from 1 August 2012. In his submission dated 24 February 2016 to the Tribunal, the Respondent presented the following information:

2. The following is the list of D-1 posts in BDP, and later in BPPS, between June 2012 and the present:

3. In August 2012, BDP included one Director, one Policy Adviser, one Technical Adviser, one Adviser, two Deputy Directors and one Cluster Manager at the D-1 level (a total of seven).

4. In May 2013, BDP included two Directors, two Deputy Directors, one Policy Adviser, one Adviser, and one Team Leader at the D-1 level (a total of seven).

5. In May 2014, prior to the Structural Change, BDP included two Directors, two Deputy Directors, one Policy Adviser, one Adviser, and one Team Leader at the D-1 level (a total of seven).

6. As stated, following the Structural Change on 1 October 2014, BPPS was formed. In October 2014, BPPS included four Directors, six Chiefs, two Regional Cluster Managers, two Managers, one Executive Coordinator, two Regional Cluster Leaders, one Senior Adviser and one Senior Policy Adviser at the D-I level. (A total of nineteen, with two positions slated to be abolished by June 2015.)

7. In January 2015, BPPS included four Directors, six Chiefs, two Regional Cluster Managers, two Managers, one Executive Coordinator, two Regional Cluster Leaders, one Senior Adviser and one Senior Policy Adviser at the D-1 level. (A total of nineteen.)

8. In January 2016, BPPS included four Directors, six Chiefs, two Regional Cluster Managers, two Managers, one Executive Coordinator, one Regional Cluster Leader, and one Senior Policy Adviser at the D-I level. (A total of seventeen.)

100. Comparing this information to that which follows from the management evaluation response, it results that from August 2012 until 1 October 2014, there was only one “Policy Adviser” post in BDP at the D-1 level, which therefore, if anything,

Relations and Advocacy, and part of the Executive Office. It appears that the entire BDP office was therefore integrated in BPPS and no evidence indicate that any post

one of 28 May 2014, it further results that starting from 1 August 2012 she was not officially assigned to any post in BDP.

Was the Applicant actually placed against a post as a “Policy Advisor at the D1 level in BPPS (former BDP) UNDP”?

106. The Tribunal considers that the Respondent appears to have presented two contradicting versions of the Applicant’s contractual status in BDP:

a. That she was “reassigned” (laterally moved) to a D-1 level post in BDP based on an agreement between the releasing entity, RBAS, and the receiving entity, BDP. Such arrangement would require that a vacant D-1 level post already existed in BDP; or

a. As presented in the Respondent’s reply, that the Applicant’s assignment in BDP was a special arrangement that necessitated the creation of a new D-1 level position in BDP with similar responsibilities and duties to the ones of an RC (the Applicant’s former position).

107. In either of these situations, it is clear that a post must have existed in the receiving agency, BDP (now BPPS), otherwise the Applicant could not have been considered a UNDP staff member, being still a RBAS staff member entitled to be laterally moved by the RBAS to another available RC post.

108. The Tribunal also observes that, in June 2012, the Applicant was informed that her D-1 level post in BDP had funding until May 2014. As concluded above, this post is actually still funded, being part of the BPPS and there is no evidence that its

The Tribunal found that the applicant failed to show that UNICEF did not fulfil its obligations.

... In *Dumornay* 2010-UNAT-097, the Appeals Tribunal affirmed *Dumornay* UNDT/2010/004, referring in para. 21 to “reasonable efforts ... to try to find [the Applicant] a suitable post”:

... Dumornay [permanent staff member] was given a three-month temporary appointment after her post was abolished and reasonable efforts were made by the Administration to try to find her [the Applicant—a

... In *Abdalla* UNDT/2010/140 (case concerning the UN Secretariat, affirmed in *Abdalla*)

... In *Rosenberg* UNDT/2011/045 (case concerning UNDP; no appeal), the Tribunal found that reorganization was a valid exercise of the Respondent's discretion and the decision not to retain the staff member further was not unlawful.

... The most recent pronouncement of the Dispute Tribunal is *El-Kholy* UNDT/2016/102 (presently under appeal). Although that judgment concerned UNDP, which has a number of internal issuances concerning abolishment of posts and related matters, the Tribunal provided a detailed examination of the relevant case law and made a number of significant legal pronouncements of general application. The Tribunal stated:

52. It is clear from staff rule 9.6(a), (c) and (e) that a termination as a result of the abolition of a post is lawful provided that the provisions of the Staff Rules are complied with in a proper manner. It is also

separation prior to considering others and giving priority to those holding permanent contracts.

...

86. By simply stating that he could not consider the Applicant for any position for which she had not applied and that she could not be considered for placement or lateral move, the Respondent admits that no consideration whatsoever for any such available posts was given to the Applicant. The Administration did not even look for available posts for which the suitability of the Applicant, by way of placement or lateral move, could have been considered before the termination of her appointment took effect.

...

89. ... [T]he Administration failed to fulfil its obligations under staff rules 9.6(e) and 13.1(d). It also failed in this duty when it did not at least make an assessment of her suitability for other available posts. It follows that the decision to terminate the employment of the Applicant by reason of an organisational restructuring was not in compliance with the duty on the Respondent under staff rule 9.6(e) read together with staff rule 13.1(d). The termination in these circumstances was unlawful.

...

... In Judgment No. 1409, *Hussain* (2008) (concerning a former staff member of UNDP), the UNAdT held that the obligation of the Administration under former staff rule 109.1(c) meant that “once a *bona fide* decision to abolish a post has been made and communicated to a staff member, the Administration is bound—again, in good faith and in a non-discriminatory, transparent manner—to demonstrate that all reasonable efforts had been made to consider the staff member concerned for available and suitable posts”.

... In Judgment No. 910, *Soares* (1998) (concerning a former staff member of UNDP), the UNAdT reiterated that a good faith effort must be made by the Organization to find alternative posts for permanent appointment staff members whose posts are abolished. The Respondent must show that the staff member was considered for available posts and was not found suitable for any of them prior to termination. The Tribunal has held in the past that where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was

given (see also Judgment No. 447, *Abbas* (1989); Judgment No. 1128, *Banerjee* (2003)).

... Although the rulings of the UNAdT referred to above relate to cases involving UNICEF and UNDP, the UNAdT found that a duty to deploy good faith efforts to find alternative employment for the displaced staff member existed for any permanent staff member whose terms of employment were governed by the Staff Regulations and Rules. See, e.g., para. VIII of Judgment No. 1163, *Seaforth* (2003), stating that “where there is an abolition of a 100 series post, the Respondent has an obligation to make a bona fide effort to find staff members another suitable post, assuming that such a post can be found, and with due regard to the relative competence, integrity and length of service of that staff member”. See also para. VII of Judgment No. 1254 (2005).

Administrative Tribunal of the International Labour Organization

... In *El-Kholy* UNDT/2016/102, the Dispute Tribunal included a number of relevant pronouncements of the Administrative Tribunal of the International Labour Organization (“ILOAT”).

... In Judgment No. 1782 (1998), at para. 11, the ILOAT stated:

What [staff rule 110.02(a) of the United Nations Industrial Development Organization] entitles staff members with permanent appointments to is preference to “suitable posts in which their services can be effectively utilized”, and that means posts not just at the same grade but even at a lower one. In a case in which a similar provision was material (Judgment 346: *in re Savioli*) the Tribunal held that if a staff member was willing to accept a post at a lower grade the organisation must look for posts at that grade as well.

... In Judgment No. 3238 (2013), the ILOAT decided that the advertising of a post inviting reassigned staff members to apply would not be sufficient to comply with the duty to give them priority consideration. The ILOAT stated at para. 12:

At all events, in law the publication of an invitation for applications does not equate with a formal proposal to assign the complainants to a new position, issued specifically in order to comply with the duty to give priority to reassigning staff members holding a contract for an indefinite period of time.

... In Judgment No. 3437 (2015), at para. 6, the ILOAT stated:

Applicant had been transferred, between departments, from DFS to UNICRI, in 2012, and that any obligation to make efforts to place her were limited to the “parent department”, which he notes was UNICRI. It is the Respondent’s view that since UNICRI made genuine efforts, and since the Applicant’s candidature to a few positions in the Secretariat were given due consideration, the Administration complied with its duty under the relevant rule.

...

... In determining whether the Administration complied with its duty under staff rule 13.1(d), the Tribunal finds it necessary to take into account the rationale behind the creation of a career service at the United Nations. It notes that from its inception, the United Nations gave particular importance to the consideration of granting staff members the status of permanency. The rationale for the establishment of career appointments at the United Nations is first reflected in the report of the Preparatory Commission of the United Nations (Report of the Preparatory Commission of the United Nations (UN Document PC/20, December 23, 1945), p. 92.), in 1945, which underlined the need for a career service, and its special character:

Unless members of the staff can be offered some assurance of being able to make their careers in the Secretariat, many of the best candidates from all countries will inevitably be kept away. Nor can members of the staff be expected fully to subordinate the special interests of their countries to the international interest if they are merely detached temporarily from national administrations and remain dependent upon them for their future. Finally, it is important that the advantages of experience should be secured and sound administrative traditions established within the Secretariat.

...

... With this in mind, the Tribunal recalls what it held in *El-Kholy* (followed in *Hassanin* UNDT/2016/181) with respect to the obligations of the Administration pursuant to staff rule 9.6(e) and 13.1(d) when considering the termination of the appointment of a permanent staff member:

...

... In light of all of the foregoing, the Tribunal stresses that it is clear that in contrast to Applicant El-Kholy, the permanent appointment of the Applicant in this case was one with the United Nations Secretariat. The duty of the Administration under staff rule

13.1(d) was not limited to a particular office or department. No such limitation can be drawn from staff rule 13.1(e), which only applies to staff members on the General Service category. In light of the above provisions of the Staff Rules, the Respondent's argument that the duty of the Administration to make good faith efforts to place the Applicant against a suitable post extended only to her "parent department", which he defined as being U/nele po"',

116. The Tribunal observes that, as results from Judgment No. *Sarrouh* UNDT/2016/219 in Case No. UNDT/NY/2014/021, as per March 2016, there were at least two vacant RC posts for which the Applicant had actually applied in February 2014 (Nigeria and South Arabia) and to which the Applicant could have been laterally moved.

117. The Tribunal considers that the Applicant had no obligation to secure a temporary or regular assignment with BPPS and the justification included in the contested decision that she was not successful in securing any temporary or regular assignment with BPPS has no legal standing.

118. Consequently, even if the Applicant's post had actually been abolished, the Tribunal concludes that the Applicant's rights pursuant to staff rule 9.6(e)(ii) were not respected.

Was the termination decision in reality based on another reason than end of appointment and abolition of post?

119. The Tribunal notes that, in his reply, the Respondent submitted that "the Applicant had remained on sick leave all this while. While her position had ended on 1 July 2014, due to her sick leave UNDP did not send her a letter informing her that she was to be separated, and as a result, her post was not formally abolished". However, following consultations with the Medical Services Division, which advised UNDP that it would be beneficial to the Applicant's recovery to be advised of her exact job status on 29 January 2015, OHR informed the Applicant that her assignment with BPPS (formerly BDP) had ended and that her post in

proceed in accordance with UN Staff Regulations and Rule 6.2 and the relevant administrative issuances and that your appointment will be extended [...]

We will be tracking the sick leave entitlements and keep you informed of the timelines. Should you exhaust the entitlement of sick leave and as per the recommendation of your physician and UNMSD, UNDP will support the submission of any requests for disability benefit with the UNJSPF. Please be aware that at the moment you will no longer be on certified sick leave, your notice period in accordance with the UN Staff rule 9(c)(i) and UN Staff Rule 9.7 (b) will automatically begin .

...

120. The Tribunal notes that the Applicant was placed on sick leave on 26 February 2014 and, until that moment, she had completed more than three years of continuous service under a fixed-term appointment. According to the UNDP specific rules on “Termination of appointment for Reasons of Health” and “Sick Leave”, she had the right (“shall”) to be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years. As results from the above, the contested decision was issued on 29 January 2015 when the Applicant had already exhausted her nine months of full pay salary on 26 November 2014, but not the remaining nine months of sick leave with half pay.

121. According to the mandatory provisions of the UNDP specific rules on “Termination of appointment for Reasons of Health”, UNDP had the obligation (“shall”) starting from 26 November 2014, when the Applicant had used all her entitlement for sick leave with full pay, while she was on sick leave with half pay, to start the procedure for terminating her appointment for health reasons by bringing her situation into the attention of the Medical Director in order to determine if she should be considered for a disability benefit under art. 33(a) of the United Nations Joint Staff Pension Fund Regulations.

122. The Tribunal considers that, in fact, the notice period indicated in the termination decision is related to staff rule 9.6(c)(iii) on termination for health reasons and not to staff rule 9.6(c)(i) on abolition of posts or reduction of staff

because it explicitly mentioned “as per the recommendation of your physician and UNMSD, UNDP will support the submission of any requests for disability benefit with the UNJSP”. The latter is a specific procedure only to a termination for health reasons and, instead of following the mandatory procedure for such a termination, UNDP invoked two non-existing reasons that involved a more simple termination procedure. Therefore, it appears that the real reason for the termination was the Applicant’s extended sick leave, which is a reason for termination related to the staff member as opposed to a termination for reasons not related to the staff member such as abolishment of post, as invoked by the Respondent. The Tribunal observes that no information was provided by the parties if the procedure for disability benefit was initiated in the Applicant’s case before or after her separation or if a decision was taken in this regards by the Medical Services Division. Moreover, the Tribunal considers that the Applicant was entitled to continue her sick leave on half pay until 26 August 2015, but she was separated before then in breach of the provisions entailed in the Convention on Termination of Employment, 1982 (No. 158) and the UNDP specific rules on “Termination of Appointment for Reasons of Health” and “Sick Leave”.

Relief

The Applicant’s requests for relief

123. In the application, regarding relief, the Application submitted that:

... For all these reasons, the Applicant requests the Tribunal to order the decision to proceed with her separation from service on the basis that she failed to be placed in the Organization’s Headquarters realignment process be rescinded. The Applicant has been denied the fair treatment to which she is entitled as well as all her rights as a long serving staff member. As a proper remedy to make her whole, she should be afforded priority placement.

... As she is now facing eminent separation and has been served the notice of termination (only 2 years before retirement at age 62), the Applicant is asking for compensation for two years at full pay

compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations”.

126. It results that, in case a termination decision is rescinded, the separated staff member is, in principle, to be retroactively reinstated in her/his former position and s/he is to receive his/her salary and other entitlements from the date when s/he was separated until her/his likely date of separation, as determined by the Dispute Tribunal. However, when the a party or both parties expressly indicate that due to the particular circumstances of a case the effective reinstatement no longer constitutes a possible option, the remedy can consist solely of compensation.

127. Taking into account the particular circumstances of the Applicant’s health status, which, in her view, justify a further extension of the sick leave and prevent her from effectively undertaking functions similar to those of her previous position, the Tribunal considers it appropriate not to order the reinstatement and, in lieu of rescission of the termination decision, to order the Respondent to pay adequate pecuniary compensation.

128. The Tribunal notes that from the 1 July 2014 management evaluation response, it results that if the post had not been abolished, the Applicant contract would have been extended for another two years. Taking into consideration also the extension from April 2013 to December 2013, the Applicant’s contract would therefore likely have been extended from 1 January 2014 to 31 December 2016. Furthermore, the Tribunal considers that, as results from the above considerations, her assignment with BDP/DGG was expected to continue in 2017, at least until 28 August 2017, the final year of implementation of the 2014–2017 Strategic Plan adopted in August 2013, at least until 28 August 2017, at the time of the Applicant’s retirement.

129. Therefore, in lieu of rescission, the Tribunal will grant the Applicant’s request for pecuniary compensation consisting in _____ at least until 28 176p consisting in _____

equal to the contributions (staff member's and the Organization's) that would have been paid to the United Nations Joint Staff Pension Fund for the entire period (31 July 2015 to 28 August 2017).

Moral damages

130. The Tribunal notes that art. 10.5(b) of the Dispute Tribunal's Statute was amended by the General Assembly in December 2014 and that the text introduced, as a mandatory new requirement, that the Dispute Tribunal may only award compensation "for harm, supported by evidence". This requirement is both substantive, because the compensation can only be awarded for harm, and procedural, because the harm must be supported by evidence.

131. In *Black's Law Dictionary*, 6th Ed. (1990), "harm" is defined as "[a] loss or detriment in fact of any kind to a person resulting from any cause" (p. 718).

132. It results that, since art. 10.5(b) of the Dispute Tribunal's Statute makes no distinction between physical, material or moral harm, the provision is applicable to any types of harm and that the harm must be supported in all cases by evidence.

133. The Appeals Tribunal stated in *Gueben et al.* 2016-UNAT-692 that the amended text of art. 10.5(b) of the Statute is of immediate application because an award of damages takes place at the time the award is made and not at the time the application is made. According to the Appeals Tribunal, "applying the amended statutory provision is not the retroactive application of law. Rather, it is applying existing law".

134. The Tribunal notes that, in *Asariotis* 2013-UNAT-309, the Appeal Tribunal stated that (emphasis in the original as well as added and footnotes omitted):

36. To invoke its jurisdiction to award moral damages, the UNDT

can be stated, by way of general principle, is that damages for a moral injury may arise:

(i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may of *itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.

(ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.

37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not

additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this judgment becomes executable.

(Signed)

Judge Alessandra Greceanu

Dated this 22nd day of December 2016

Entered in the Register on this 22nd day of December 2016

(Signed)

Hafida Lahiouel, Registrar, New York