



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/008/
JAB/2007/073
Judgment No.: UNDT/2010/147
Date: 18 August 2010
Original: English

Before: Judge Marilyn Kaman
Registry: New York
Registrar: Hafida Lahiouel

TOLSTOPIATOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY

Counsel for applicant:
Duke Danquah, OSLA

Counsel for respondent:
Jorge Ballesteros, UNICEF

Introduction

1. In an appeal submitted to the Joint Appeals Board (JAB) on 9 August 2007, the applicant challenges the circumstances surrounding his separation from UNICEF following the abolition of his post on 31 December 2006. During the applicable “notice period”, the applicant applied for 20 other posts, but was not selected for any of them. By the time of his separation from UNICEF, the applicant had served for more than 21 years with UNICEF in various positions at different duty stations.

2. In essence, the applicant’s case is that his separation violated UNICEF employment rules and regulations in effect at the time, a) because UNICEF did not give the applicant as a relevant UNICEF staff member on an abolished post, an “affected staff member” (“ASM”), the assistance required by those rules and regulations and b) because the selection process for the 20 posts was flawed, in part because the applicant was not given the required priority as an ASM to which he was entitled.

3. In his closing submission, the applicant also claimed that the respondent has ceased payment of his termination indemnity, that the respondent has ceased payment of relevant contributions to the United Nations Joint Staff Pension Fund (UNJSPF) as of 1 January 2010 and that the respondent has blocked applicant’s attempts at sending to the UNJSPF statutory forms (Separation Personnel Action), which had the effect of denying applicant’s request for early separation under the now abolished UNICEF Human Resource Manual, CF/MN/P.I/18 of September 1997 (“the Manual”). However, these claims are not properly before the Tribunal at this time.

Facts

4. In December 1988, the applicant joined UNICEF on a fixed-term appointment at the L-4 level. In 1998, he was awarded the UNICEF Staff Award. In May 1998, he was promoted to L-5, and in June 2000 his contract was changed from L-5 to P-5.

On 1 January 2004, he was reassigned to New York as a Project Manager, Vaccine Security, at the P-5 level in the Programme Division against a project funded post. This fixed-term contract was due to expire on 31 December 2006, but the applicant was ultimately treated by UNICEF as a staff member on an abolished post (i.e., an ASM). In the applicant's last performance evaluation report (PER), covering the year 2005, he received the rating 5 out of 6 for "frequently exceeded expectations" in all assessed categories (professional competence, quality of work, quantity of work, work relationships and communication skills).

5. On 27 July 2006, the applicant received the following letter from the Director of the Programme Division ("the Director"):

Dear [name of the applicant],

As you are aware, the post you currently encumber (PAT # 22224) is funded through the Vaccine Fund. At this juncture, we have been informed that funding has been only confirmed through 31 December 2006. Therefore, I regret to inform you that due to lack of funding your services will be terminated on 31 December 2006. This decision is final and not subject to further review.

Attached is a copy of Chapter 18 of the Human Resources Manual, which was promulgated on 18 September 1997, and which contains procedures for the placement of staff encumbering abolished posts.

We will assist you in identifying and applying for suitable vacant posts in the organization [i.e., assumedly a reference to UNICEF] in accordance with Chapter 18. However, given the present restrictive financial situation and changing needs of the organization, internal placement is limited and likely to remain so for the foreseeable future. Since we cannot guarantee the availability of appropriate openings, we would encourage you to explore all your options and to seek alternative opportunities in other United (UN) Nations agencies as well as outside the UN system.

In accordance with Staff Rule 109.3(a), this letter gives you the required written notice of non-renewal of your contract and separation from service should placement efforts be unsuccessful. Although the Staff Rule provides for three months' written notice, in line with the

applicable UNICEF policy we are giving you six months' notice, which expires on 31 January 2007. At the expiration of this notice, you will be separated from service if the placement efforts are not successful.

6. By memorandum of 1 February 2007, the Director informed the applicant that, in view of the time he had worked for UNICEF, his contract would be extended until 30 April 2007 for him to identify other job opportunities. However, after that date, he would be separated from service if he did not manage to obtain a new position.

7. From the time he was notified of his separation (27 July 2006) and until it was implemented (30 April 2007) (the "notice period"), the applicant applied for 20 positions with UNICEF, without success. On different occasions, he informed the UNICEF Executive Director, the Director of Human Resources and the Director about his readiness to take on a new assignment in a broad variety of capacities and duty stations, but he alleges that he never received any reply from the UNICEF management concerning his applications.

8. On 26 April 2007, the Director informed the applicant that he did not "have a basis for recommending a further extension". However, to provide applicant with an opportunity "to access available positions", the Director informed him on 27 April 2007 that they had "identified a possibility" for granting him a temporary fixed-term project post from June to October 2007. However, on 1 June 2007, the Director informed the applicant that this extension would not be forthcoming, since the relevant governments had rescinded their agreement to the relevant projects and that his separation was therefore set for 30 April 2007.

9. Subsequently, the applicant was reinstated retroactively to 1 May 2007 by using his accrued annual leave in combination with some special leave arrangements, which were part of his termination indemnity, to bridge him to an early retirement at the age of 55 years in March 2010.

Relevant legal provisions of the Manual

10. Aside from the provisions listed below, the parties also referred to other parts of the Manual in their submissions and these are mentioned explicitly where relevant in the present judgment.

Chapter 18: STAFF ON ABOLISHED POSTS

Notice Periods

Advance Notice

18.2.5. After the PBR minutes endorsing recommendations to abolish posts are signed, the Head of Office will give the following advance written notice periods to the affected staff members:

a) six months, if on the date of the advance notice the staff member holds a:

i) permanent appointment; or

ii) fixed-term appointment (either under the 100 or 200 Series of the UN Staff Rules)

and has completed five or more years of active and continuous service with UNICEF (i.e., with no break(s) in service); and

b) three months, if on the date of the advance notice the staff member holds a fixed-term appointment (either under the 100 or 200 Series of the UN Staff Rules) and has completed less than five years of active and continuous service with UNICEF.

During the Notice Period

Actions to Be Taken by the Organization

18.2.16. UNICEF will assist concerned staff in their efforts to find appropriate posts within the organization or elsewhere by:

a) making every effort to place staff on abolished posts under the selection processes of para. 18218;

b) assisting staff in identifying and applying for suitable available posts;

- c) providing, at staff members' request, references to other UN agencies and potential outside employers;
- d) providing, where possible, a resource list of local and/or international recruitment, placement and employment agencies; and
- e) accommodating, where possible, staff members' requests for early separation from UNICEF (see Para. 184 of this Chapter).

Review of Staff

18.2.17. As soon as the advance written notice as per para. 1825 is given, staff members on abolished posts will automatically be put forward as candidates to be reviewed, along with other applicants, for suitable core and non-core posts. Suitable posts will be interpreted as those:

- a) which are vacant or becoming vacant during the advance notice period;
- b) which are in the same occupational group (i.e., programme, operations or external relations);
- c) which are at the same grade level as the staff member or, in exceptional circumstances, one level below;
- d) for which they are qualified in terms of academic qualifications, job-related skills and work-related experience; and
- e) which are for:
 - i) international professional staff, located at any duty station; and
 - ii) local staff, located at their duty station.

18.2.18. The above process will be carried out as follows:

- a) international staff members, by the Recruitment and Placement Para. (RPS) in the Division of Human Resources (DHR);
- ...

18.2.19. Every effort will be made to keep affected staff members informed of the suitable vacant posts against which their name is included for review. In addition to the vacancies identified by the organization, staff on abolished posts may apply for any vacancy (including those at higher levels) for which they feel they are qualified.

18.2.20. The criteria set out below will be applied when reviewing staff members on abolished posts against available suitable posts:

- a) contractual status, staff members holding permanent appointments will be retained in preference to those holding fixed-term appointments, provided that due regard is given in all cases to relative competence, integrity and length of service (see para. 18224);
- b) competence, as reflected in the PERs of the staff members and their official status files;
- c) integrity, which will be considered to be demonstrated by the absence of any proof to the contrary in the official status files of the staff members; and
- d) length of service, in the UN system and, more particularly, with UNICEF.

18.2.21. In the event that a suitable post is found, the staff member will be offered that post. If he/she does not accept it, and to concentrate on the placement of other staff, the organization will not initiate any further placement action. The staff member may continue to apply to vacant posts but if not successful in securing a post by the end of the formal notice period as per para. 18210, he/she will be separated from service on abolition of post and be eligible for any indemnity he/she is entitled to under para.s 18228 and 18230, but not eligible to the additional 50% under para. 18231.

At the End of the Notice Period

Unplaced Staff

18.2.26. If, at the end of the formal notice period, as per para. 18210, the efforts to place a staff member are unsuccessful, then he/she will be separated from service.

Staff Holding Fixed-Term Appointments

18.2.27. Staff holding fixed-term appointments which expire:

a) concurrently with their formal notice period, will be separated from service on expiration of appointment at the end of their formal notice period; or

b) after the end of their formal notice period, will be separated from service on termination of appointment due to abolition of post on the date of expiration of their formal notice period.

Applicant's submissions

UNICEF Manual, Chapter 18

11. Instead of allowing the applicant's contract to expire, UNICEF decided the post encumbered by the applicant would be abolished, and applicant's case is governed by the Manual, Chapter 18.

12. Chapter 18 of the Manual was as an integral part of the applicant's contract of employment and the applicant relied on these provisions when he signed his contract with UNICEF. The respondent accepted the obligations in Chapter 18 when it published the Manual and made the Manual's terms a part of each staff member's appointment.

13. Chapter 18 was adopted to provide an ASM with the necessary support in order to be reemployed as soon as possible. Chapter 18 procedures provided staff members with the assurance that abolishment of posts due to a sudden lack of funding—a feature of the UNICEF employment system—would be tempered by the beneficial treatment of Chapter 18. The provisions of Chapter 18 were to be regarded as a veritable hedge against the occasional oscillations of the UNICEF employment practice. In effect, the provisions constituted a safety net against the pitfalls of temporary unemployment and constituted a deliberate and positive process through which ASMs could be soon reemployed in the Organization.

14. It would be unfair to ASMs for UNICEF to maintain that the relevant provisions of Chapter 18 are without legal effect. If this were the case, this should have been communicated to the staff members when they entered into their

employment relationship, otherwise this would constitute bad faith. No such notice or information was provided to the applicant.

The applicant did not receive the required assistance under Chapter 18

15. Paragraphs 18.2.16(a), (b) and 18.2.19 impose an obligation on UNICEF to make meaningful and effective efforts to have an ASM employed as soon as possible. These cited provisions of the Manual declare, in part, that: UNICEF will make every effort to place the staff on abolished post under “the selection processes of para. 18.2.18”; “assist staff in identifying and applying for suitable available posts”; and ensure that “every effort will be made to keep affected staff members informed of the suitable vacant posts against which their name is included for review”. UNICEF therefore had an obligation to proactively assist the applicant to provide him with a comparable post within UNICEF.

16. In his letter of 27 July 2006, the Director explicitly stated to the applicant that “we will assist you in identifying and applying for suitable vacant posts in the Organization in accordance with Chapter 18”. The letter shows that respondent was aware of its obligations under Chapter 18. However, the Administration failed to provide the assistance: it did not make any efforts to identify suitable posts for the applicant and it did not assist the applicant in applying for any posts.

17. The respondent’s contention that he met the Chapter 18 requirements of assistance by extending the applicant’s contract for three months is untenable; extending the applicant’s contract fell far short of the focused and proactive actions required of the Administration.

18. It was a breach of the applicant’s contract when the applicant was not offered any meaningful recruitment assistance from UNICEF.

ASMs are to be accorded preferential treatment

19. It is the applicant's contention that, according to the Manual, an ASM is to be given preferential treatment and is not required to compete for vacant posts on an equal basis with other candidates. It is clear from the plain language of Chapter 18 *and* the operative UNICEF Administrative Instruction CF/AI/1999-007 that these provisions were meant to be used to grant priority consideration to ASMs so that they could be reabsorbed into the system as soon as practicable. Indeed, CF/AI/1999-007 outlines in detail the steps that UNICEF management must take, in order to fulfill its obligation to assist the ASM to secure a new post. The Instruction does not mention that ASMs are required to compete with other candidates on an equal basis. The series of steps required under Chapter 18 mean that an ASM is to be accorded priority and given preferential treatment over other candidates. It is, therefore, not sufficient merely to give an ASM a full and fair consideration for the posts on equal footing with other candidates.

20. Paragraph 18.2.21 mandates UNICEF to immediately offer a post that is identified as suitable to the affected staff member. The word "suitable" is used in Chapter 18 in its ordinary meaning and not with any qualifications. This means that if an ASM's qualifications meet the basic requirements for a specific position in terms of academia, experience and core competencies, then the post becomes "suitable" for him to be placed against. According to the applicant, para. 18.2.17(d) states that if an affected staff member's qualifications meet the above criteria, then the ASM is determined to be qualified for the post.

21. The only obligation Chapter 18 imposes on the ASM is to (a) find a "suitable post" and (b) accept it if it is officially offered to him without any unreasonable objections.

22. It was a breach of the applicant's contract when he competed with other candidates without special consideration or preferential treatment for posts the applicant had identified as suitable.

23. Given the situation that the applicant was placed in (he had just bought a house when he was notified about the abolishment of his position), he looked to the provisions of Chapter 18 not only to alleviate his financial situation, but to help him obtain a comparable post as soon as possible.

The applicant had a legitimate expectation of contract renewal

24. Based on the applicant's excellent performance evaluations, he had a reasonable expectancy of renewal. UNICEF's inability to renew the applicant's contract was due to a supervening event that in turn obligated it to assist him with finding a post within or outside the organization.

The applicant was qualified for all the 20 vacancies for which he applied

25. For all the 20 posts, the applicant was qualified in terms of academia, job-related skills and work-related experience.

Respondent's submissions

The non-renewal was due to lack of funds

26. The expiration date of the applicant's appointment was precisely 31 December 2006, and the foreseen lack of funds would not have any impact on the contractual relationship between the applicant and UNICEF. In principle, the applicant's situation was covered by para. 14.1.3 of the Manual under which his fixed-term appointment would automatically expire, without prior notice, at the close of business on the expiration date specified in his letter of appointment. [Note: the respondent makes this argument but later recognises that it is a theoretical argument only].

The applicant did not have a legitimate expectation of contract renewal

27. The applicant did not have a "legitimate expectation of contract renewal". Each contract is for a fixed-term, considering the availability of funds and the

necessities of service. Since the applicant joined UNICEF, he has been fully aware that no expectancy of renewal existed. Each appointment would automatically come to an end, without notice, on its expiration date, unless otherwise communicated by UNICEF. As much as there is no “right” to be renewed, there can be no “legitimate” expectation to be renewed.

28. The fact that the applicant had positive performance evaluations cannot create an expectation of contract renewal. Every staff member is expected to perform to the fullest extent of his or her abilities. While poor performance can be a basis for non-renewal, the opposite is not necessarily the case.

The meaning of Chapter 18

29. Recruitment in UNICEF is governed by the need to ensure the highest standards of efficiency, competence and integrity. Chapter 18 refers to the rights and obligations of staff on abolished posts and deals with applicability, notice formalities, recruitment, separation and compensation. Since it refers to recruitment, and this affects not only the staff members on abolished posts, but also other candidates, the interpretation of Chapter 18 has to be done consistent with Chapter 4 (Recruitment and Staff Deployment) of the Manual. Chapter 18 is also related to staff regulations 4 and 9, and staff rule 109. All of these provisions are aimed at securing the satisfaction of the necessities of service and not at protecting ASMs from abolishment of their post. Chapter 4 states that UNICEF’s “overall recruitment and placement objectives and governing principles derive from the UN Charter and the UN Staff Regulations and Rules” (para. 4.1.5). It reproduces the texts of arts. 8 and 101.3 of the Charter, as well as staff regulation 1.2 and 4.2, 4.3 and 4.4. It also reproduces staff rule 104.10(a) and then states the guiding principles for UNICEF recruitment and placement. Of particular relevance to this case are the principles enshrined in staff regulation 4.1.6(c) and (d)—the principle of “competitive selection free of influence or prejudice, and based on securing candidates with the highest levels of qualifications, experience, efficiency, competence and integrity” and the principle of

“priority consideration of qualified UNICEF staff in filling vacancies”. UNICEF’s interpretation of both Chapter 18 and Chapter 4 prioritized securing the highest standards of efficiency, competence and integrity, as mandated in the Charter. As also clearly stated in staff regulation 4.4, in filling vacancies the fullest regard shall be had to the requisite qualifications and experience of persons already in the service of the United Nations. However, this consideration must be “subject to the provisions of art. 101.3, para. 3 of the Charter”, which establishes securing the “highest standards of efficiency, competence and integrity” as the “paramount consideration”. Accordingly, UNICEF’s selection decisions relied on the need to secure the best possible candidate.

30. The respondent acknowledges that the applicant’s case is governed by Chapter 18 on abolished posts. The respondent further acknowledges that Chapter 18 provides for special considerations to be given to staff members affected by the abolition of the posts they encumbered. [Note: these acknowledgments appear to contradict the submission summarized in para. 29 of this Judgment].

31. However, Chapter 18 does not provide an ASM with “a veritable hedge against the occasional oscillations of UNICEF employment practice” or a “safety net against the pitfalls of temporary unemployment” as stated by the applicant. The preference does not amount to an automatic right to a post nor to an obligation to forego an assessment of the qualifications of the candidates who encumber abolished posts.

32. Even if the applicant’s interpretation of Chapter 18 is followed, a consideration of para. 18.2.17 of what is a suitable post is indispensable. The respondent therefore had no obligation to offer the post to the applicant and the applicant was not considered suitable by the hiring offices for any posts.

Scope of the assistance to be accorded to ASMs

33. UNICEF did not have an obligation to secure an appropriate post for the applicant and nowhere in Chapter 18 is such obligation established. Para. 4.1.6(d) identifies the need to “give priority consideration of qualified UNICEF staff in filling vacancies” as one of the broad principles that form the basis of UNICEF’s recruitment and placement policies. Para. 18.2.16 develops this concept when dealing with ASMs and sets out in its subparagraphs a) to e) the requirements of UNICEF in assisting them in their efforts to find appropriate posts (see above).

34. These were the obligations of UNICEF to the applicant. The record shows that, with the exception of the provision of the list of recruitment and employment agencies, explained below, *all* of them were fulfilled. As demonstrated, the applicant was short-listed under the selection processes for all the vacancies to which the applicant had applied. The applicant’s candidacy was considered by all the hiring offices and those that deemed him to meet the minimum requirements for the post included him in the list of candidates to be interviewed. Hence, the obligations under a) and b) were fully met. The applicant did not request references to other potential employers and the respondent had no obligations in this regard in accordance with c). UNICEF did not provide a resource list of recruitment and employment agencies; however this was never requested by the applicant and, since the applicant has only shown interest in continuing serving with UNICEF, no violation of his rights may be alleged. Additionally, the applicant has not referred to this as part of his claims. UNICEF not only accommodated the applicant’s request for early separation but, exceptionally, also authorized to extend the limit of two years established in para. 18.3.4 (concerning eligibility for retirement) and placed the applicant on special leave for 34 months to bridge him to early retirement at the age of 55. Accordingly, obligation e) was also fulfilled. In addition, the fact that the applicant’s contract was further extended for three months was not only a clear good faith effort but also an indication of commitment beyond the obligations set out in para. 18.2.16.

39. Although rejecting the notions of “automatic placement” and “employment assurance”, the respondent recognises that Chapter 18, specifically para. 18.2.21 creates an obligation to offer a post to an ASM “in the event that a suitable post is found”. However, this provision must be read in conjunction with para. 18.2.17, to determine which posts are to be considered “suitable posts”, which establish that a post is suitable only if it complies with all the elements included in subparagraph a) to e) of para. 18.2.17 (see above).

Considerations

The status of the Manual in relation to the applicant’s employment contract

40. Art. 2.1(a) of the Tribunal’s Statute stipulates that “all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance” form part of the employment contract and the terms of appointment. Accordingly, the Manual (as well as UNICEF Administrative Instruction CF/AI/1999-007) clearly formed part of the applicant’s contract with UNICEF, and the respondent was bound by its provisions when dealing with the issues that arose as a result of the abolishment of his post, particularly its Chapter 18. In this regard, the Tribunal specifically notes that the meaning given to Chapter 18 within this Judgment may not be the same interpretation in other situations concerning UN staff on abolished post, since Chapter 18 provisions only apply to UNICEF staff covered by the Manual (the Manual has been abolished and is no longer in force).

The meaning of Chapter 18 of the Manual

41. The respondent is correct when stating that the provisions of Chapter 18 need to be construed in light of fundamental UN employment rules and principles as outlined in Chapter 4 of the Manual—such an interpretation follows from the basic regulatory hierarchy of the UN rules. Similar to the rest of the UN, the need to ensure the highest standards of efficiency, competence and integrity was therefore

also an overriding principle for UNICEF when handling the applicant's case and interpreting Chapter 18.

42. However, this does not negate the fact that special preferential rules are set forth in the Manual, Chapter 18, for UNICEF staff members whose positions are abolished, namely the ASMs. While such rules do not guarantee lifetime employment (the applicant's argument at its extreme), the rationale for providing preferential treatment to ASMs only seems reasonable for an organisation such as UNICEF where, as described by the respondent, its staff is exposed to job insecurity because of its project-based financial foundation.

43. Additionally, although not explicitly stated among the introductory principles of the Manual, such preferential rules would seem necessary for UNICEF in order to ensure staff welfare and employee retention—issues that are crucial to securing and maintaining workplace efficiency, competence and integrity. Thus, no conflict appears between UN employment principles and the Chapter 18 provisions for preferential treatment to ASMs. On the contrary, the concepts appear to be complementary.

Did UNICEF comply with its obligation under the Manual to offer meaningful recruitment assistance to the applicant?

44. The UN Administrative Tribunal in several judgments has ruled that the Organization has a duty to make “a good faith effort” to find a suitable, alternative position for a staff member whose post is being abolished. See, for instance, Judgment No. 943 *Yung* (1999), in which the UN Administrative Tribunal stipulated as follows:

This matter requires the Tribunal to consider the Applicant's rights after the abolition of her posts, the circumstances surrounding her attempts to find new posts as well as the offer and her refusal of a post in Geneva. In resolving these issues, the Tribunal recalls Judgement No. 679, *Fagan*, para. III, (1994), which states that “staff rule 109.1 (c) requires that such efforts [to find a new post] be conducted in good

faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation”.

(See also UN Administrative Tribunal Judgment, No. 1323 (2007), para. V).

45. The Tribunal notes the discussion by its esteemed colleague, Judge Laker, in *Abdalla* UNDT/2010/140 of 4 August 2010 regarding the obligation of the Organization to make a “good faith effort ... to find alternative posts for permanent staff members whose posts are abolished”. While the duty, strictly speaking, originally may have been limited to staff members with permanent appointments, the Organization’s obligation of “good faith effort” can also be read into current staff rule 9.6(e) in respect of the preference given to staff members in cases of abolishment of posts. The burden of proving that the Organization made a diligent search for the applicant in this case rests with the Organization (see UN Administrative Tribunal, Judgment No. 85 *Carson* (1962)).

46. In addition to this general requirement, for UNICEF staff covered by the Manual, Chapter 18 also imposed additional obligations on the Fund.

47. First, ASMs were to be given advance notice of the abolition of the post and during which time (the “notice period”) they were able to find another post (the Manual, para. 18.2.5). It is noted that UNICEF in this case clearly complied with this provision.

48. Second, under para. 18.2.16, UNICEF itself “will assist” concerned staff in their efforts to find appropriate posts. The nature of this obligation to ASMs was mandatory, that is, UNICEF was required to engage in certain supportive measures on behalf of its ASM. The required supportive measures were those entailed in subparagraphs a) to e) of para. 18.2.16.

49. The identification of “suitable” vacant posts for the ASM was defined in para. 18.2.17 and the requirements were those listed as subparagraphs a) to e) of para. 18.2.17.

50. The respondent, in essence, contends at this juncture that it could not identify *any* suitable posts for the applicant, because all of the “suitability” elements in para. 18.2.17 had to be met and that the applicant did not qualify for any UNICEF post with these requirements. On its face, given the Fund’s world-wide operations and the applicant’s long career with it, this seems to be an unlikely contention.

51. As to the applicant, UNICEF had an obligation under the Manual to “identify” “suitable” vacancies for the ASM and to help him in “applying for” suitable posts (see the Manual, para.s 18.2.16, 18.2.17 and 18.2.19). The applicant did apply for 20 different posts, but these were all ones that he himself had identified as being suitable. UNICEF has not stated anywhere in its submissions that it was responsible for identifying suitable posts for the applicant. Further, the applicant has shown that on different occasions he informed the UNICEF management of his willingness to assume new assignments in a variety of locations, but, according to him, he never received a response concerning his applications from the Management, and the Tribunal was not provided any documentary evidence to the contrary.

52. In the respondent’s reply to the JAB, para. 23, it argued that it “regularly sent a full list of all vacant posts at the international professional level on a weekly basis directly to” the applicant; such assistance, however, does not meet the requirement to “identify suitable vacant posts” for the applicant. In doing so, the respondent left the onus on the applicant to find a suitable post and to apply for it.

53. The applicant’s case is similar to that of UN Administrative Tribunal Judgment No. 1039 *Shah* (2001):

III. In its letter giving the Applicant notice that the post would be abolished, the Representative wrote that UNICEF would assist the Applicant in identifying and applying for other suitable posts and

that his candidature would be placed against those available posts at his level for which he was qualified. There is no evidence that this assistance was provided. The Representative suggested that the Applicant apply for posts within and without the United Nations. The Applicant applied for two posts in Islamabad: Education Officer and Assistant Project Officer, Monitoring and Evaluation. For each post it was determined that he did not have the basic requirements for the post, although no rationale was given by the special APC for those conclusions. The Respondent states that the Applicant was considered for other vacant posts but another candidate was always more suitable. There is no support in the record for this conclusion.

54. Third, under para. 18.2.17, as soon as an ASM received notice of her/his post being abolished, UNICEF “will automatically put forward” the ASM as a candidate to be reviewed, along with other applicants, for “suitable core and non-core posts” that have been so identified. Under this paragraph, UNICEF was required to advance forward the name of the ASM, and it had no choice on the matter. On this point, UNICEF did advance the applicant’s name forward, but this was not as a result of UNICEF identifying suitable core and non-core posts; the applicant’s name was put forward only as a result of his own efforts in the application process. In other words, UNICEF did not meet this requirement under para. 18.2.17.

55. In conclusion, the Tribunal finds that UNICEF did not meet the requirements under 18.2.16, 18.2.17 and 18.2.19 of “identifying” “suitable posts” for the applicant and in helping the applicant in “applying” for these posts.

Was the selection process for the 20 posts flawed?

56. To decide this issue, it is first necessary to determine the process which UNICEF was required to follow when evaluating each of the applicant’s applications and then it must be determined whether the applicant was given the required preferential treatment under Chapter 18.

The mandatory process when assessing an ASM

57. Chapter 18 outlined a range of actions which UNICEF was required to take with regard to an ASM. As mentioned above, under para. 18.2.17, UNICEF was required to automatically put an ASM forward as a candidate to be reviewed, along with other applicants, for suitable core and non-core posts. In order to be deemed suitable for the post, the requirements in 18.2.17 had to be met. While 18.2.17, subparagraphs a) to c) and e) addressed objective requirements concerning the post in question, subparagraph d) dealt with the qualifications which the ASM should possess for the post (academic qualifications, job-related skills and work-related experience). In addition to these subjective requirements of 18.2.17, the following criteria were to be applied when reviewing an ASM for a post (para. 18.2.20):

- a) contractual status, staff members holding permanent appointments will be retained in preference to those holding fixed-term appointments, provided that due regard is given in all cases to relative competence, integrity and length of service (see para. 18224);
- b) competence, as reflected in the PERs of the staff members and their official status files;
- c) integrity, which will be considered to be demonstrated by the absence of any proof to the contrary in the official status files of the staff members; and
- d) length of service, in the UN system and, more particularly, with UNICEF.

58. The requirement of 18.2.17 to “automatically put forward” an ASM’s name meant that UNICEF was obliged to review *all* of these suitability requirements contained in 18.2.17 and 18.2.20 for each and every job application the ASM in question submitted as well as for any other post UNICEF identified as potentially suitable. In line herewith, see UN Administrative Tribunal Judgment no. 1323—

The Tribunal is of the opinion that, in the present case, the word “automatically” must be construed as something like “invariably” or “in all cases”, as meaning that it is the duty of the Administration to make good faith efforts to find a suitable, alternative position for a staff member whose post is being abolished ...

59. As a corollary to the Manual's requirement in 18.2.17 that UNICEF "must advance forward" the ASM's name for consideration on suitable and non-suitable posts, UNICEF needed to make "every effort to keep affected staff members informed of the suitable vacant posts against which their name is included for review" (see the Manual, para. 18.2.19).

60. The existence of Administrative Instruction CF/AI/1999-007 should not be overlooked or minimized as an integral part of the process for UNICEF staff on abolished posts. It was an instruction to Management on "managing the effects of abolition of posts" and provided advice, for example, on when to meet with the staff member, when to serve advance notice, when to serve formal notice, repeated which actions must be taken by management, and specified how staff on abolished posts should be reviewed. Para. 12 of CF/AI/1999-007 stated:

12. The criteria to be applied when reviewing staff members on abolished posts against available suitable vacancies remains competence, integrity, contractual status and length of service...

By repeating the directives already set forth in the Manual, the mandate to support staff on abolished posts was clear.

The scope of the preferential treatment to be offered to the applicant

61. Following the principles articulated above on the meaning of Chapter 18 and as a point of departure, Chapter 18's mandates are to be given their precise and literal meaning as set out in the individual provisions. Even if a conflict with the general principles listed in Chapter 1 and 4 might seem to exist, it can also be argued (although not contended by the applicant) that the provisions of Chapter 18 must prevail as *lex specialis*.

62. As to the scope of the preferential treatment given by Chapter 18, the provisions of para. 18.2.21 ("in the event that a suitable post is found, the staff member will be offered that post") appear at first to be in tension with 18.2.17

(“...staff members on abolished posts will automatically be put forward as candidates to be reviewed, along with other applicants, for suitable core and non-core posts.”). From this, the respondent argues that the excellence and paramountcy provisions of the UN Charter applied, and that applicant simply “was not the best candidate” for any of the 20 posts. “[T]he recruitment procedure follows the competitive selection process designed to guarantee that all posts are filled with the most qualified candidates, whether staff on an abolished post have applied or not” (the respondent’s reply to JAB, p. 6, para. 26).

63. For his part, the applicant contends that if a suitable post was found, the staff member “will be offered” that post (see the Manual, para. 18.2.21). Once offered a suitable post, the ASM had to accept the post, or UNICEF will not initiate any further placement action. In the applicant’s view, if a post was suitable on paper, in any event, then the ASM was to automatically be offered the post.

64. The plain meaning of para. 18.2.21 is that an ASM was entitled to a UNICEF post, insofar as such post was identified and deemed “suitable” for her/him and she/he accepted the offer. The paragraph simply cannot be understood in any other way. For the reasons stated above, it does not matter that among UNICEF’s recruitment principles and priorities section 4.1.6(c) stated “competitive selection”, since this simply does not apply to ASMs under para. 18.2.21.

65. Nevertheless, the question still must be answered: what does the reference in para. 18.2.17 mean, when it refers to “candidates to be reviewed, along with other applicants”? Who are these other “applicants”? Is this a reference to any applicant applying for the post, disregarding her/his employment status; or is this a reference limited to UNICEF staff; or is this a reference further limited to other ASMs who also applied for the post? The question is an important one, because the reference to “along with other applicants” could indicate that some comparative evaluation between ASMs and other applicants had to be undertaken. The problem is that no explicit answer anywhere within Chapter 18 was given as to who these “applicants”

were (or anywhere else for that matter). The question, therefore, must be answered through interpretation.

66. This Tribunal finds that the ambiguous language of para. 18.2.17 as to the meaning of “along with other applicants” can only be understood as referring to other ASMs. This finding flows from the clear and unconditional language of para. 18.2.21, as well as from the internationally-recognized principle of *contra proferentem*. Further, such an interpretation is the most—and only—reasonable solution, having regard to the meaning of Chapter 18. If this were not the interpretation given, how else could the UNICEF staff member on an abolished post (the ASM) be given the job assurance which clearly was provided by Chapter 18? The answer is that no other, alternative interpretation of 18.2.17 is possible.

67. In conclusion, under Chapter 18, the preferential treatment given to ASMs, insofar as a post was found “suitable” for an ASM, was that she/he was only to compete with other ASMs applying for the job and not with any other type of applicants.

Were the applicant’s due process rights abridged when he was considered for any of the 20 posts?

68. What procedures were actually undertaken to determine the suitability the 20 posts for which the applicant had applied? As stated previously in this Judgment, UNICEF was required to evaluate each of the applicant’s 20 applications against suitability criteria set out in the Manual. There is no evidence in that UNICEF engaged in such an analysis or that UNICEF otherwise followed the mandatory procedures as outlined above.

69. Moreover, it is undisputed that the applicant—an ASM—was assessed for some posts on exactly the same basis as any other applicant and was not given any priority. Regarding one of the 20 posts for which applicant applied (Project Officer,

Health, L-4, Jakarta, VN-06-681), the respondent admitted that the applicant in this case was not given Chapter 18 priority by stating the following:

- Respondent admits that the short list did mention that candidate 57 was on an abolished post while it did not do so with regards to the applicant; however, this is immaterial at this stage of the recruitment process;
- The fact that the Human Resources officer who prepared the short list added the reference to the abolished post for candidate 57 and did not do so for the Applicant, although worth noting (and Respondent has taken due note for future cases) has in no way jeopardized the applicant's consideration;
- Finally, the respondent admits that the candidate selected for this post was not, technically speaking, an internal candidate. He had served as a consultant with the UN in numerous occasions. Respondent apologizes for the inadvertent oversight, but rejects any bad faith or ill intent, as regrettably suggested by the applicant.

70. As stated by the UN Administrative Tribunal, in Judgment No. 943 *Yung* (1999), UNICEF must follow its own rules:

While the Tribunal does not substitute its judgment for the discretion of the Respondent, he must follow his own rules. By failing to select a candidate who either fulfilled the advertised criteria or could do so within three months UNICEF failed to follow its own rules, including staff rule 109.1, and apparently discriminated against the Applicant.

The errors cannot be considered merely as inadvertent oversight or as immaterial deficiencies in the applicant's case.

Did the applicant have a legitimate expectancy of contract renewal?

71. The Tribunal need not address this legal contention, since several, alternative breaches of the Manual have been determined.

To what damages is applicant entitled?

72. The Tribunal requires further information from the parties on the issue of compensation and will request the same in a separate Order.

Conclusion

73. The Tribunal holds that UNICEF breached its obligations to the applicant under his terms of employment.

74. The Tribunal will call for further submissions on the issue of compensation in a separate Order before deciding that issue.

(Signed)

Judge Marilyn Kaman

Dated this 18th day of August 2010

Entered in the Register on this 18th day of August 2010

(Signed)

Hafida Lahiouel, Registrar, New York