Translated from French

UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/GVA/2010/025 (UNAT 1617)
	Judgment No.:	UNDT/2010/172
	Date:	27 September 2010
		English
	Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

LAURITZEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Edward P. Flaherty

Counsel for Respondent:
Shelly Pitterman, UNHCR
Elizabeth Brown, UNHCR

Introduction

1. In May 2008, the Applicant, who at the time was a staff member of the United Nations High Commissioner for Refugees ("UNHCR"), lodged an appeal with the former UN Administrative Tribunal against the High Commissioner's decisions to (i) remove her from her post of UNHCR Representative in Hungary as from 1 March 2004; and (ii) to place and keep her on special leave with full pay until her retirement in June 2008.

2. The Applicant is asking the Tribunal:

   a. To rescind the decision of 9 February 2004 whereby the High Commissioner removed her from her post of UNHCR Representative in Hungary as from 1 March 2004;

   b. To reinstate her in the post she occupied or to appoint her to a position commensurate with her grade, training, skills and experience;

   c. To grant payment of an amount equivalent to the difference between the post adjustment in Strasbourg which should have been paid to her and the one applicable to Budapest which was paid to her from March 2004 to June 2008;

   d. To award her moral damages in the amount of USD250,000;

   e. To award her USD25,000 in respect of costs and expenses;

   f. To grant interest on monetary damages awarded.

3. Pursuant to the transitional measures set out in General Assembly resolution 63/253, the appeal which was pending before the former UN Administrative Tribunal was transferred to the United Nations Dispute Tribunal on 1 January 2010.

Facts

4. The Applicant entered the service of UNHCR on 23 October 1978 as a Clerk-Typist, G-3 level, in Rome, Italy. In 1980, the Applicant's appointment was converted from the General Service (G) category to the Professional (P) category. On 1 July 1988, her fixed-term appointment was converted to indefinite (100 series of the former Staff Rules, rule 104.12(c)). On 1 January 1999, the Applicant was promoted to P-5 level, and on 1 February 2002, she was appointed as UNHCR Representative in Budapest, Hungary.

5. At the time, the UNHCR Representation in Hungary and the Regional Support Unit for Budapest ("RSUB") shared the same premises in Budapest, the former providing administrative support to the latter but not having any direct authority over its activities. Both the Representation and RSUB reported directly to the Regional Bureau for Europe ("RBE"), at UNHCR Headquarters in Geneva.

6. In March and April 2003, within the framework of exchanges of emails concerning a clarification of reporting lines and roles for all UNHCR staff based in Budapest, the Director, RBE, asked the Applicant to provide him with a written assessment of the situation regarding relations between the Representation and RSUB. The Applicant told him that she could not provide such an assessment, as the problem in her view was the need to clarify reporting lines.

7. In July 2003, the Director, RBE, suggested involving the Mediator. The Applicant did not agree with that proposal on the grounds that there were no problems in Budapest that she could not solve herself and/or that would justify intervention by the Mediator.

8. In October 2003, the Senior Administrative Officer, RBE, undertook a mission to Budapest to clarify the respective responsibilities of the Representation and RSUB.

9. From 3 to 4 November 2003, the Director, RBE, and the Head of the Political Unit, RBE (who at the time was the RSUB supervisor), undertook a

mission to Budapest in order to review interpersonal problems between the Applicant and RSUB.

10. On 17 November 2003, the entire staff of the UNHCR Representation in Hungary, including the Applicant, signed and sent to Headquarters, with a copy to the Director, RBE, a petition against the Senior Regional Programme Officer, RSUB.

11. By email dated 21 November 2003, the Director, RBE, criticised the Applicant for signing the petition in question. He considered that such an act on the part of a manager was inappropriate, all the more so as it could only exacerbate existing tensions in Budapest.

12. By email dated 19 January 2004, the Director, RBE, forwarded to the Applicant his report dated 9 January 2004 on his mission of 3-4 November 2003 to Budapest. In his email, the Director regretted that the situation in Budapest did not seem to have improved since his mission, as could be seen by the petition against the Senior Regional Programme Officer, and asked the Applicant to come to Geneva to discuss the measures he intended to take in order to follow up his mission report and to put an end to a dysfunctional situation that had gone on too long. As for the report, it concluded that problems were largely personality rather than structurally driven and that there was a level of tension between the Applicant on the one hand and the Chief of RSUB and the Senior Regional Programme Officer on the other hand. Among the four options envisaged to overcome the problems encountered was the appointment of a new Representative in Budapest, which was justified as follows:

> The continued failure by the principal protagonists to engage constructively in building relations between the Representation and the RSUB may require a change of Representative. The actual and potential costs of continuing dysfunctionality are too high.

The other options proposed were an inspection, a team-building exercise facilitated by the Staff Counsellor, and the intervention of the Mediator. The two latter options were however immediately ruled out as being unlikely to resolve the situation.

13. On 29 January 2004, the Applicant travelled to UNHCR Headquarters in Geneva to discuss the above-mentioned report with the Director, RBE. At the meeting, the Director informed the Applicant that, given the situation in Budapest, he had decided—in consultation with the High Commissioner—to withdraw her from her functions as Representative, effective as of 1 March 2004. That same day, he sent the Applicant a note for the record on the meeting and gave her the opportunity to submit comments.

14. On 30 January 2004, the Applicant sent an email to the High Commissioner requesting an inspection in Budapest prior to her withdrawal.

15. By email dated 4 February 2004, the Applicant asked the Director, RBE, when the Division of Human Resources Management ("DHRM") would contact her regarding the implementation of the decision to remove her from her post. That same day, the Director, RBE, replied that DHRM was waiting for the note for the record on their meeting, into which the comments from the Applicant received the previous day had just been incorporated and which would be forwarded immediately.

16. On 6 February 2004, the Applicant sent an email to the Inspector General of UNHCR, requesting an inspection in Budapest prior to her withdrawal.

17. By letter dated 9 February 2004, DHRM informed the Applicant of the administrative formalities further to the High Commissioner's decision to relieve her of her functions as UNHCR Representative in Hungary as of 1 March 2004 and in particular of the fact that she would be placed on special leave with full pay as a staff member in between assignments ("SIBA").

18. By email dated 10 February 2004, the UNHCR Inspector General advised the Applicant that the decision to withdraw her from her functions as Representative in Hungary was not a matter for an inspection.

19. On 17 February 2004, the Applicant wrote to the Secretary-General requesting review of the High Commissioner's decisions to (i) withdraw her as UNHCR Representative in Hungary and (ii) to place her on special leave

with full pay instead of immediately reassigning her to a post commensurate with her grade, training, skills and experience.

20. On 18 February 2004, the Applicant wrote to the Secretary of the Geneva Joint Appeals Board ("JAB") to request a suspension of action. On 25 February 2004, the JAB recommended to the Secretary-General to reject the Applicant's request for suspension of action. The Secretary-General accepted the said recommendation the following day.

21. On 10 March 2004, the Applicant provided the Administration with a medical certificate.

22. On 24 March 2004, the Director, DHRM, informed the Applicant of the High Commissioner's decision to appoint her as Chief of Mission in Turkmenistan.

23. The Applicant did not take up her functions because she was placed on sick leave from 28 April 2004 until 31 July 2004. As of that date, she remained on special leave with full pay until her retirement on 30 June 2008.

24. On 11 May 2004, the Applicant lodged an appeal with the Geneva JAB.

25. On 6 July 2004, the Applicant submitted a request to the Special Constraints Panel ("SCP") for an exception to the staff rotation policy, due to the health status of a dependent child. By letter dated 3 September 2004, the Director, DHRM, informed the Applicant that on the basis of a recommendation by SCP, her appointment to Turkmenistan had been rescinded and her applications to posts in Geneva and Europe would be supported.

26. On 5 July 2006, JAB submitted its report to the Secretary-General, recommending that the Applicant's appeal be rejected. JAB concluded, first, that an appeal against the decision to appoint her as UNHCR Representative in Turkmenistan was not receivable because the Applicant had not requested administrative review of the said decision, which had moreover been rescinded. It further concluded that the decisions to remove the Applicant from her post as UNHCR Representative in Hungary and to place her on

special leave with full pay on SIBA status flowed from the proper exercise of the Secretary-General's discretionary authority.

27. By letter dated 14 July 2006, JAB informed the Applicant that its report had been sent to the Secretary-General.

28. By letter dated 19 December 2006, which the Applicant says she never received, the Under-Secretary-General for Management forwarded to the Applicant a copy of the JAB report and informed her of the Secretary-General's decision to follow the JAB recommendation and not to take any further action in the case.

29. On 27 September 2007, Counsel for the Applicant informed JAB that neither he nor his client had received the JAB report and the Secretary-General's decision on the said report. That same day, the JAB Secretary forwarded them to Counsel for the Applicant.

30. By letter dated 16 October 2007, the Applicant informed the former United Nations Administrative Tribunal of her intention to contest the Secretary-General's decision and first asked that the Tribunal rule on the admissibility of her case, given the delay with which she had received the Secretary-General's decision.

31. The Applicant presented a medical certificate for the period from 3 December 2007 to 29 February 2008, which was extended until 31 March 2008.

32. By letter dated 6 December 2007, the Administrative Tribunal informed the Applicant that if an appeal was lodged, it would take into account the reasons that could have prevented her from lodging her appeal within the time limit.

33. On 6 May 2008, after having requested and received two extensions from the former Administrative Tribunal, the Applicant submitted her appeal.

34. On 30 June 2008, the Applicant retired, having reached mandatory retirement age.

35. On 12 March 2009, after having requested and received three extensions from the Administrative Tribunal, the Respondent submitted his response to the appeal. The said response was forwarded that same day to the Applicant who, after having requested two extensions, submitted observations on 3 July 2009.

36. On 14 December 2009, the Respondent submitted comments on the Applicant's observations.

37. The case, on which the former Administrative Tribunal was unable to rule before it was abolished on 31 December 2009, was transferred to the United Nations Dispute Tribunal on 1 January 2010.

38. By letter dated 26 August 2010, the Tribunal informed the parties that a hearing would be held on 22 September 2010.

39. By letter dated 2 September 2010, the Applicant informed the Tribunal that she wished to call two witnesses to the hearing and asked to be given until 15 September 2010 to disclose their identity. On 3 September 2010, the Tribunal answered, asking the Applicant to submit their written testimony no later than 14 September 2010.

40. By email dated 14 September 2010, the Applicant submitted to the Tribunal the testimonies of three serving or former staff members of UNHCR. The Tribunal received a signed version of the said testimonies on 15, 19 and 20 September 2010, respectively.

41. On 22 September 2010, a hearing was held in the presence of the Applicant, Counsel for the Applicant and the two Counsel for the Respondent.

42. At the hearing, the Tribunal asked the Respondent for a brief clarifying the exact chronology of the facts and decisions that had led to the decision to remove the Applicant from her post. The Respondent submitted the requested information on 24 September 2010. On 27 September 2010, the Applicant provided additional information.

Parties' contentions

43. The Applicant's contentions are:

a. The decision to remove the Applicant from her post as UNHCR Representative in Hungary was a disguised disciplinary measure. Given that she was not guilty of misconduct, she could not be punished and her placement on SIBA status constituted an abuse of the Respondent's discretionary authority for which redress has to be granted;

b. Since the contested decision was in fact a disciplinary measure, or a suspension pending investigation and disciplinary proceedings, the Administration should have followed the procedure laid down in Chapter X of the Staff Rules in force at the time and in administrative instruction ST/AI/371, which it failed to do. This constitutes a *détournement de procedure*, which deprived the Applicant of her due process rights, in particular her right to defend herself. In addition, despite her requests, no investigation was initiated before she was removed from her post;

c. The punitive measure applied to the Applicant is disproportionate to the facts held against her, namely, her poor management of the Representation and the signing of a petition;

d. The decision to remove her from her post was taken on the basis of rumours and a bias against her, rather than on legal grounds and in the interest of the service; it is therefore vitiated by a *détournement de pouvoir*. The Director, RBE, placed the blame on the Applicant for all of the problems encountered, whereas previously he had consistently praised her. Contrary to what the Administration maintained, she had not had problems with all RSUB members, but only with the Senior Regional Programme Officer, who was in fact the person responsible for the situation;

e. The decision to remove her from her post was taken in violation of the principle of equal treatment of staff members. First, the attempt to

appoint her without consultation as Chief of Mission in Turkmenistan was contrary to UNHCR practice not to reassign staff members to a post in a category D duty station in which they had previously served. Second, contrary to UNHCR practice of letting staff members on SIBA status choose between remaining in their current duty station, relocating to their place of home leave or choosing an alternative place of relocation, the Administration did not give the Applicant the option of staying in Budapest;

f. The High Commissioner's failure to appoint her to another post commensurate with her grade, training, skills and experience caused her irreparable moral damage. The attempt to appoint her without consultation as Chief of Mission in Turkmenistan was contrary to the exception to the UNHCR rotation policy, which SCP granted the Applicant from July 2004 to July 2005;

g. Contrary to what the Administration claims, the Applicant was not solely a candidate for D-1 level posts, but also for P-5 posts. Between March 2004 and June 2008, she applied unsuccessfully for 51 posts, of which 17 were P-5 and 34 were D-1. In addition, she benefitted from the exception to the staff rotation policy only until September 2005. The Respondent is thus unable to explain how, despite the many posts for which the Applicant applied, she was not appointed to any of these and remained on SIBA status until her retirement in June 2008.

44. The Respondent's contentions are:

a. The appeal is inadmissible insofar as it aims to annul the decision to appoint the Applicant to Turkmenistan, given that this decision was not the subject of a prior request for review to the Secretary-General and was subsequently rescinded by the Administration. Moreover, no text applicable to UNHCR precludes a staff member from being reappointed to a post he or she has already held;

b. The decision to remove the Applicant from her post in Budapest is neither a disguised disciplinary measure nor a suspension, but rather a management decision in order to improve the functioning of the service pursuant to the discretionary power conferred on the Secretary-General under regulation 1.2(c) of the Staff Regulations in force at the time and recognized by the case law of the former UN Administrative Tribunal;

c. The Applicant was fully informed of the problems encountered with regard to relations between the UNHCR Representation in Hungary led by the Applicant and RSUB, which was housed on the same premises but was under the direct authority of the Deputy Director, RBE, in Geneva. The Director, RBE, took several initiatives to help the Applicant resolve the situation, to no avail. On the contrary, rather than using her position to reduce existing interpersonal tensions, the Applicant aggravated the situation by signing a petition against the Senior Regional Programme Officer;

d. The decision to remove the Applicant from her post respected the principles of due process because she had every opportunity to submit comments as the events which led the Administration to take the impugned decision unfolded. For example, the Applicant was able to submit her observations on the note prepared by the Director, RBE, after their meeting on 29 January 2004;

e. The Applicant's allegations that the decision to remove her from her post was only based on rumours and improper motives and constituted a *détournement de pouvoir* have not been established;

f. The placement of the Applicant on special leave with full pay as SIBA is the legal status for staff members who have to leave their posts before being reassigned to a new post, and was in accordance with UNHCR procedures and practices. This measure neither violated the rights of the Applicant nor caused her irreparable damage;

g. Subsequently, it was difficult to find a new post for the Applicant for several reasons: (i) her personal situation had enabled her to obtain an exception to the UNHCR staff rotation policy and only apply for posts at Headquarters and elsewhere in Europe, making it difficult to find a suitable position; (ii) she had been placed on sick leave status from 28 April to 31 July 2004; (iii) she had primarily applied for D-1 level posts, further limiting her chances of obtaining a post; (iv) she had stopped applying in March 2007;

h. All of the Applicant's candidatures had been fairly and duly considered, but regrettably, she was not found to be the most suitable candidate for any of the posts. Taking into account that the Applicant was only a few years short of her mandatory retirement age, she was offered voluntary separation, which she refused;

i. The Applicant did not suffer any financial loss as a result of her placement on special leave with full pay as SIBA because she continued to draw her salary at P-5 level until her retirement as of 30 June 2008;

j. The Applicant did not establish that she had been a victim of unequal treatment in relation to the other staff members in the same situation. The option of staying in Budapest was not offered to the Applicant as it did not seem relevant for her to remain in the same duty station as her successor and she had no personal reason for doing so;

k. There are no grounds to grant the Applicant's requests for costs;

l. It is pointless to grant the Applicant's requests for documents or to call witnesses.

Judgment

45. The only decisions which the Applicant has asked the Secretary-General to review and is contesting before the Tribunal are those whereby,

first, she was removed from her post of UNHCR Representative in Hungary, and second, she was placed and kept on special leave with full pay.

46. The Tribunal therefore only has to rule on the legality of these two decisions.

47. The Tribunal considers first of all that the Applicant's request for documents to be produced in her case can only be rejected, given that the said documents are either non-existent or inconclusive.

With regard to the legality of the decision to remove the Applicant from her post

48. The Applicant holds first of all that, contrary to what the Respondent claims, the decision to remove her from her post as Representative in Hungary was not taken in the interest of the service but is really a disguised disciplinary measure taken against her.

49. Staff regulation 1.2(c) in force at the time stipulated that:

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations.

50. Whereas this provision allows the Secretary-General to remove a staff member from his or her functions in the interest of the service, when in reality the decision constitutes a disciplinary measure, it can only be taken if the procedure foreseen in the event of misconduct is followed.

51. The Tribunal must therefore examine whether the decision to remove the Applicant from her post constituted a disguised disciplinary measure.

52. The Applicant took up her position as UNHCR Representative in Hungary in February 2002. Whereas her direct supervisor was the Director, RBE, the Regional Support Unit in Budapest—which was hosted on the same premises as the Representation—was not under her authority but rather reported directly to the Deputy Director, RBE, in Geneva. This situation

automatically implied a working relationship between the Applicant and the RSUB Senior Regional Programme Officer. However, it is clear from the evidence on file that the working relations between these two staff members deteriorated rapidly.

53. In March and April 2003, the Director, RBE, asked the Applicant to provide him with an assessment of the problems encountered. In July of that same year, this same Director suggested involving the Mediator, which the Applicant refused to do. In October 2003, the Senior Administrative Officer, RBE, undertook a mission to Budapest to clarify the respective responsibilities of the Representation and RSUB; then on 3 and 4 November 2003, the Director, RBE, travelled to Budapest to review management problems between the Applicant and RSUB. Finally, on 19 January 2004, the Director forwarded his mission report to the Applicant. In that report, four options were proposed to resolve the conflict in Budapest, one of which was a change of Representative.

54. It emerges from these missions and reports that problems were largely personality rather than structurally driven. The Applicant's supervisors did not criticise her for misconduct which could give rise to disciplinary proceedings, but at most for professional behaviour which reflected her inability to resolve the interpersonal difficulties in which she was implicated, even though she was not the only person responsible. The fact that the Director, RBE, expressed his surprise to the Applicant that she, despite her position as Representative, had signed a petition by certain staff members against the Senior Regional Programme Officer does not suffice to establish that her supervisor had the intention of punishing her for that act, or even that there were grounds to institute disciplinary proceedings.

55. Consequently, the Applicant has failed to establish that the decision to remove her from her post in Budapest constitutes a disguised disciplinary measure.

56. Nor can the Applicant hold that the impugned decision constitutes a disguised suspension pending investigation or disciplinary proceedings, given that the decision to remove her from her post was not a provisional measure but rather a final one; in addition, the Applicant was not accused of any misconduct and there was therefore no reason to launch an investigation, or *a fortiori* disciplinary proceedings.

57. The above-cited staff regulation 1.2(c) gives the Secretary-General broad discretionary powers when it comes to the organization of work. Yet this power is not unfettered—it is subject to the supervision of the Tribunal. In its judgment 2010-UNAT-021, *Asaad*, the United Nations Appeals Tribunal clarified the scope of the Judge's oversight of the way in which the Administration exercises its discretionary power:

> 11. Nonetheless, as the former United Nations Administrative Tribunal ruled on many occasions, the Administration's discretionary authority is not unfettered. The jurisprudence of the former Tribunal provides that the Administration must act in good faith and respect procedural rules. Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration (see, for example, Judgement No. 952, *Hamad* (2000). We would add that its decisions must not be based on erroneous, fallacious or improper motivation.

58. Thus, it is not for the Tribunal to substitute its judgment for that of the Respondent regarding the appropriate organization of work which in this instance fell within the discretionary authority of the Applicant's hierarchical supervisors; rather, the Tribunal's competence is to verify that the decision has not been taken for unlawful reasons.

59. However, it can be seen from the facts described above that the disagreements between the Applicant and the Senior Regional Programme Officer negatively impacted the smooth functioning of the service and that it was necessary to put an end to this situation. The decision to remove the Applicant from her post was a means to that end, and it is not for the Judge to assess whether another measure might have been taken.

60. Notwithstanding, whereas the impugned decision is not a disciplinary measure, the said decision was taken based on the personal circumstances of the Applicant and could only have been lawfully taken if she had had an opportunity to submit her views, which the Applicant denies she was given.

61. Yet in March 2003, the Applicant was informed of problems between UNHCR staff members stationed in Budapest and had an opportunity to express her views on those difficulties on several occasions throughout 2003. Subsequently, on 19 January 2004, the Director, RBE, forwarded to the Applicant his report of 9 January 2004 in which, among the four options envisaged to resolve those problems, only two were retained, including the appointment of a new UNHCR Representative in Budapest. Even though she was not explicitly asked to do so, nothing prevented the Applicant from submitting her written observations on that report which, moreover, she was asked to come to Geneva to discuss. On 29 January 2004, the Applicant thus had a meeting with the Director, RBE, in the course of which she was informed of his decision, taken in consultation with the High Commissioner, to remove her from her post. Subsequently, she had an opportunity to comment on the note for the record on that meeting.

62. Thus, contrary to which the Applicant claims, she had an opportunity, prior to the date on which the impugned decision was taken, to present her observations on her possible removal from her post and on the grounds for the said decision.

63. It follows that the Applicant has failed to establish the illegality of the decision to remove her from her post of UNHCR Representative in Hungary.

With regard to the legality of the decision to place her on special leave with full pay and to maintain that status for four years and four months

64. Staff rule 105.2(a) in force at the time provides as follows:

> (i) … In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full

> pay if he considers such leave to be in the interest of the Organization;
>
> (ii) Special leave is normally without pay. In exceptional circumstances, special leave with full or partial pay may be granted;

65. It is clear from the above-cited rule that placing a staff member on special leave with full pay was not illegal as such.

66. However, it is also clear from the rule in question that, even though it is used by UNHCR to justify the payment of staff members' salary on SIBA status, it may only be used on an exceptional basis and for a limited duration, given that special leave with full pay may only be granted in the interest of the Organization, and it cannot be seriously argued that it is in the interest of the Organization to pay a staff member for several years—four years and four months in this instance—without giving her any work.

67. The Respondent claims that whereas the Applicant, who was at P-5 level, applied during the above-mentioned period for 51 posts, of which 17 were P-5 and 34 were D-1, it was not possible to appoint her to a post matching her qualifications. Assuming that these allegations are exact, it was thus for UNHCR to draw the necessary conclusions and, after having noted that the Applicant's services were no longer of use to the Organization, to terminate her appointment pursuant to staff regulation 9.1(c) of the former Staff Regulations applicable at the time to staff members like the Applicant who had been given indefinite appointments. This regulation stipulates that "the Secretary-General may, at any time, terminate the appointment [of a staff member with an indefinite appointment] if, in his or her opinion, such action would be in the interest of the United Nations". Consequently, the Respondent cannot claim that there were no solutions other than keeping the Applicant on special leave with full pay for over four years.

68. The Respondent, who clearly did not envisage a termination of the Applicant's appointment, explained at the hearing the circumstances which led to the situation. He first mentions the constraints specific to UNHCR in

terms of the mandatory staff rotation policy. He further refers to factors specific to the Applicant, namely, first of all her relatively high grade and the fact that she was nearing retirement age, which made it more difficult to find her an assignment; second, the fact that until September 2005, she had benefited from an exception to the UNHCR staff rotation policy which had enabled her to apply only for posts at Geneva Headquarters and elsewhere in Europe, which were the most in demand; and finally the circumstance that, for all of the posts for which the Applicant had applied, there had always been a more qualified candidate.

69. Whereas the High Commissioner has discretionary power to assign staff members to the posts he wishes in view of the various personnel management constraints, staff members, as long as they are in the service of the Organization, have not only the right to be paid but also the right to be given work. It is thus for UNHCR to show that every possible effort was made to propose and give work to the Applicant, which it has not done in the case at hand, whereas the Applicant, as far as she is concerned, has established that she did her utmost to be given a new assignment.

70. Consequently, the decision to keep the Applicant on special leave with full pay for over four years up until her retirement is illegal insofar as it is contrary to the above-mentioned staff rule 105.2(a), which only authorizes the Secretary-General to place, on his own initiative, a staff member on special leave with full pay if it is in the interest of the Organization.

71. The Tribunal can only recall the remark of the Appeals Tribunal on the problem of SIBA status in its judgment 2010-UNAT-012, *Parker*:

> We also note that Parker was on an indefinite appointment as SIBA from January 2007 to date [30 March 2010]. We consider such a practice to be against the interest of the Organi[z]ation as a staff member receives salary and other benefits though no work is available for him/her to do. We recommend that the Organi[z]ation revisit this type of appoint and at least put a ceiling on the duration within which a staff member can remain in such a position.

72. Likewise, the former UN Administrative Tribunal, in its judgment No. 1411 of 25 July 2008 concerning a staff member at D-1 level placed on special leave with full pay as SIBA by UNHCR for over three and a half years, had deemed that situation unacceptable.

With regard to the damage suffered and the amount of compensation

73. The Tribunal must compensate the damage suffered by the Applicant flowing from the illegality committed by keeping her on special leave with full pay as SIBA for more than four years.

74. As for the material damage suffered, the Applicant, who received full pay for the entire period, merely points out that during the said period, she received a lower post adjustment than the one she should have received, given that she received post adjustment at the rate applicable to Budapest whereas she was living in France. The Tribunal notes that the Applicant, who had contested the post adjustment rate with her Administration, did not follow up the Administration's refusal on 18 May 2004 to grant the post adjustment corresponding to her place of residence. The Tribunal therefore considers that this involves a dispute that is separate from the one which has been properly brought before it.

75. As regards the moral damage suffered by the Applicant, the Tribunal should clarify that, since that it has ruled above that the Applicant failed to establish the illegality of the decision to remove her from her post, it does not have to compensate the moral damage flowing from this decision but solely the moral damage suffered by the Applicant as a direct result of her being kept on SIBA status without work for four years and four months.

76. In this case, the illness which the Applicant justified by producing a medical certificate for the period of April to July 2004 is a result of the former and not the latter decision. On the other hand, the Tribunal considers that the illness certified for the period of December 2007 to March 2008 can be at least partly ascribed to her being kept inactive. In addition, the Applicant, who applied for a great many posts unsuccessfully and without

receiving any serious job offers from UNHCR, became increasingly anxious as time passed and her retirement date came closer. Finally, the Applicant explained at the hearing that owing to the long period of inactivity, she had lost all of her contacts at UNHCR and her desire to work in the humanitarian sector after she retired had been negatively affected.

77. In the light of the foregoing, the Tribunal sets the compensation for moral damage at USD15,000.

Payment of legal costs

78. Finally, the Applicant claims compensation for her legal costs.

79. Article 10, paragraph 6 of the Statute of the Tribunal allows it to award costs against a party that has manifestly abused the proceedings before it. In the case at hand, the Tribunal did not find any abuse of proceedings by the Respondent, and there is therefore no need to award costs against him pursuant to the aforesaid article 10, paragraph 6.

80. Moreover, the Tribunal recalls that it stated in its judgment UNDT/2010/130, *Applicant*:

> 82. However, as the applicant filed his application with the former United Nations Administrative Tribunal (UNAT), it must be determined whether, under the old internal justice system, he was entitled to compensation for his legal costs.
>
> 83. The practice of the former UNAT was to award applicants costs only in exceptional circumstances. In its Judgement No. 237, *Powell* (1979), UNAT stated: "As regards costs, the Tribunal has declared in its statement of policy contained in document A/CN.5/R.2 dated 18 December 1950 that, in view of the simplicity of its proceedings, the Tribunal will not, as a general rule, grant costs to Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal."

81. In this instance, as in the above-mentioned case, the Tribunal does not see any reason to depart from the practice of the former UN Administrative Tribunal and refuses to award costs in favour of the Applicant.

Decision

82. In view of the foregoing, the Tribunal DECIDES:

1) The Respondent is ordered to pay the Applicant USD15,000 as compensation for the moral damage suffered due to the latter being kept on special leave with full pay for four years and four months;

2) The above-mentioned compensation shall bear interest at the rate of five per cent per annum as from 60 days following the date on which the present judgment becomes executable and until payment is completed;

3) All other claims are rejected.

(*signed*)

Judge Jean-François Cousin

Dated this 27th day of September 2010

Entered in the Register on this 27th day of September 2010

(*signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva