UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/006/ JAB/2007/050
Judgment No.: UNDT/2009/078
Date: 20 November 2009
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

KOH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brian Gorlick with Hamutal Shamash, OSLA

Counsel for Respondent:
Natalie Boucly, UNDP

Introduction

1. The applicant began his career in the United Nations as an information officer (P-3) with UNICEF in April 1987. In January 2001 he was seconded to UNDP assuming the position of Chief, Internet/Editorial Section (P-5), Communications Office of the Administrator, UNDP New York. In January 2005 he was made a permanent UNDP staff member. The Communications Office was restructured in early 2005 and the applicant's position was abolished. He participated in the ensuing job fair. He was not selected for the two posts for which he had applied and, on 7 July 2005, he was notified of his status as a "displaced staff member" (a staff member whose position has been made redundant). The applicant then commenced appeal proceedings in respect of the termination of his appointment. These proceedings were settled by agreement on 3 April 2006. As a result, he was put on Special Leave Without Pay (SLWOP) from 1 April 2006 to 2 April 2007, the date of separation. It was an additional term of the settlement that UNDP "would continue to advocate on your behalf [and] provide dedicated career support by our career transition unit (CTU) and external career counselor". UNDP's principal recruitment and selection process is periodically undertaken in a "QUARRY" exercise in which a consolidated list of vacancies is published and applications are processed in bulk. Posts which are not notified in time for a QUARRY exercise but need to be filled before the next QUARRY exercise are advertised separately and attempts are made to have them consolidated in the then current QUARRY process. These are called "*ad hoc* posts".

2. The applicant has been unable to find another suitable appointment. He contends that the reason for this situation is the failure of the respondent to fulfil its obligation under the settlement agreement to assist him to do so. He says that on a number of occasions his ability to access the UNDP Intranet site on which vacant posts are advertised was removed, so that he was unable to make timely applications. He claimed, in particular, that this problem prevented him from applying for two *ad hoc* posts that he thought would have suited him. These were advertised on 26 October 2006 with foreshortened application times of only seven days rather than the two weeks which he understood to be the required period. He was unaware both of

these notifications and of the possibility that an application time could be so short. The applicant also alleged that, in breach of the settlement agreement, there was no actual advocacy undertaken on his behalf in respect of any vacant post which he was qualified to fill. The applicant also submitted, in substance, that he should not have been treated merely as a member of the class of unassigned internal candidates but that the obligation to give him "dedicated" assistance included the obligation to bring to his attention suitable vacancies, including in particular those of 26 October 2006.

3. On the other hand, the respondent contends that all reasonable steps were taken to fulfil its undertaking and that the substantial cause of the applicant's being unable to obtain another appointment is that he has not applied for any suitable positions.

Notification of *ad hoc* posts

4. It is convenient to first deal with the vacancies advertised on 26 October 2006. Two New York posts were advertised on the UNDT Intranet jobsite: External Communications Team Director and Chief, External Communications Team, each a one year appointment and an internal vacancy. Notification had been approved at about 10:20 pm on 26 October 2006 and it is fair to infer that it was not until after that time that they were posted on the jobsite. The application deadline was 3 November 2006, effectively giving eight days for applications to be made.

5. The applicant testified that he was due to return to Singapore from New York on 31 October 2006 and had checked the jobsite on or about 26 October. He said that he did not see the notifications, which is not surprising given the time they were posted. On 1 November the applicant arrived in Singapore. He spent a few days securing an internet connection and did not attempt to access the jobsite until about 7 November. Unfortunately, he was unable to gain access because, unknown to him, his online access to the Intranet had been mistakenly deactivated. On 10 November 2006, following an enquiry, access was restored on 14 November. By this time, it seems, the advertisements of 26 October had been removed from the site. The applicant only found out about them much later.

6. Although the applicant complained that his email access had been interrupted on a number of occasions and this hindered his ability to be aware of post vacancies, he did not lead any evidence of any vacancies that failed to come to his attention because of this problem. He focused on the interruption from 7 to 14 November but it is evident from the chronology of events as set out above that this interruption played no part in his inability to apply for the posts notified on 26 October. There is no merit in this part of the applicant's case.

7. A more significant question arises from the reduced deadline for applications. The applicant testified that he believed it was a requirement that QUARRY notifications were open for two weeks and that it was this time limit he had in mind when he checked the jobsite periodically for job notifications. Of course, by the time he accessed the jobsite on 7 or 8 November 2006, the time for applying for the positions advertised on 26 October had expired. Had the two weeks' time limit applied, he still would have had two days to submit his applications.

8. The Chief of Recruitment for UNDP was called by the respondent to give evidence. He explained that the QUARRY exercise comprised over 80 distinct steps with an expectation that deadlines would be respected for the submission of documents required for the timely filling of vacancies. Consequently, when a post became vacant soon after being advertised in QUARRY, in the interest of timeliness it was common practice to notify these posts on an *ad hoc* basis to enable them to "catch up" with the ongoing QUARRY exercise in order to fill the vacancies expeditiously. I did not, however, gather that selections can *only* be made as part of a QUARRY process. Thus, in respect of the posts notified on 26 October, all formalities had to be completed by 23 November 2006 to enable candidates to be considered as part of the QUARRY exercise then under weigh. This timetable necessitated limiting the time for applications to eight days.

The guidelines

9. The Guidelines for the Recruitment and Selection of UNDP Staff, promulgated on 16 September 2006 include, so far as is relevant, the following "highlights" in its Executive Summary (italics added) –

- The new Recruitment and Selection Guidelines, and the principles they contain, are applicable to the entire recruitment domain in UNDP, including QUARRY vacancies.
- The QUARRY recruitment and selection process, and indeed all recruitment and selection in UNDP, is underpinned by five broad principles – competition, fairness, objectivity, transparency and accountability.
- QUARRY vacancies (and most other international vacancies) will be *advertised for a minimum of two weeks* in the newly consolidated UNDP jobs website as either internal or external vacancies.

The highlighted elements, of which of the above are the only relevant ones, make no reference to *ad hoc* appointments but the parenthesis suggests that the two weeks' requirement does not apply to some international vacancies.

10. The substantive text of the Guidelines emphasises at the outset the fundamental policy they reflect, namely the need for consistency and transparency across the whole range of posts in the UNDP. Thus, under the rubric "Applicability" it states, in conclusion –

> … The alignment of all recruitment and selection to this single set of guidelines is intended to improve consistency and transparency across the organization, irrespective of posts, contractual modalities or hiring unit and to bring greater staff confidence in UNDP's placement and recruitment systems.

The text under "Vacancy Announcements (VAs) and Advertisement" states, so far as is relevant (the italics and paragraph numbers are added) –

> [1] When approved by OHR, VAs are automatically posted … [at specified websites] (for all vacancies including internal) *for a minimum of two weeks*. These websites have replaced all the previous online jobs sites managed by OHR except that of the Inter Agency Mobility Program (IAMP) website. All applications for international posts are now on-line through the job sites listed above…
>
> …
>
> [2] When staff are successful in filling vacant posts, their existing posts are vacated. For this reason, to encourage inter-unit mobility, to meet other corporate staff placement targets and to manage talent holistically, decisions relating to filling UNDP's core posts are made collectively through periodic QUARRY exercises. Thus most vacancies that are generated from staff being selected for a post in one

> QUARRY exercise are packaged for inclusion in the following QUARRY exercise. Depending on demand, four to six QUARRY exercises will be scheduled each year.
>
> [3] Advertisement of 100 series vacancies outside of the QUARRY process as an *ad hoc* vacancy requires the prior approval of the Director of OHR. All such exceptions should still be *subject to the processes described in these guidelines, unless otherwise noted.* Moreover, to the extent possible, the selection process will still be directly linked with any ongoing QUARRY process. For example, a corporate panels are screening short-listed candidates through an ad hoc vacancy advertised after the QUARRY may be timed alongside other corporate panels for the QUARRY announced posts and the *ad hoc* post may be included in the next QUARRY review meeting."

Paragraph [1] applies the time limit of two weeks to "*all* vacancies", and paragraphs [2] and [3] explain that vacancies are divided between those involved in the QUARRY process and those outside it, described as "exceptions". It is evident that, so far as possible, all vacancies are to be considered in the same way. As it were, the default mode is the QUARRY process. Thus, the italicised phrase should be read as "subject to the *QUARRY* processes". The method of consideration of *ad hoc* appointments is to depart from that process only to the extent that the departure is "otherwise noted".

11. What is meant by the phrase "otherwise noted"? In my opinion, though this is certainly not free from doubt, it means "otherwise noted *in these Guidelines*". It could, as a matter of grammar refer to a note made with the, presumably written, approval of the Director, but this is awkward usage. One would expect the verb "decided" and its cognates, and an identification of the decision-maker. A note is a record and, at least commonly, does not denote a communication. If departure from the QUARRY processes is authorised when some note of whatever kind is made somewhere in unspecified circumstances in respect of some unspecified part of the process, this would radically undermine the Guidelines' clearly articulated primary purpose of consistency and transparency. Such a meaning should not be attributed to the phrase unless there were no choice. Accordingly, as I have stated, the phrase should be construed as referring to a variation noted in the Guidelines. It follows that the reduction of the otherwise mandatory two weeks' application period is not a

departure from the QUARRY process that can be "otherwise noted". If this had been intended, the phrase used would have been "otherwise *notified*" and not "otherwise *noted*" but, again, this would amount to a substantial departure from the explicit policy objectives of the Guidelines. Given that these objectives are stated in paragraph [1], which precedes paragraphs [2] and [3] and does not itself suggest any exception, it is unlikely as it seems to me that it is correct to interpret paragraph [3] as permitting such a significant change as halving the time limit for applications merely to enable the selection process to "catch up" with a current QUARRY process. After all, in addition to certainty, the purpose of a two week period is to ensure an adequate pool of appropriate candidates. If it were intended to give management the discretion to reduce the application time for *ad hoc* appointments, it would have been very easy to have simply said so and to state the circumstances in which this could be done. That this approach was not taken is a strong indication that it was not intended to confer such a discretion. Nor do the Guidelines mandate appointment *only* by way of the QUARRY process but simply "to the extent possible". It is also significant, I think, that the example given in paragraph [3] relating to the "catch up" does not hint at the alternative possibility of truncating the time limit for applications to enable this to be done, but refers only to the timing of a corporate panel for screening of *ad hoc* candidatures and, inferentially, similar adjustments so that the post can be included in the next QUARRY Review meeting. When all these considerations are taken into account, it seems to me that the overwhelming weight of argument favours the interpretation which I have given.

12. With regard to the evidence of the Chief of Recruitment as to the exigencies of urgent appointments, it is worth noting that it is not strictly necessary, although it is obviously desirable, to link consideration of *ad hoc* appointments to any particular part of a QUARRY exercise then being undertaken. The need to make such an appointment does not have to be accommodated by reducing the time limit for applications: a distinct selection process can plainly be undertaken. In short, the appointments sought to be made in this case need not have been the subject of shortened application times – other steps in the selection process could have been adjusted, such as the timing of the corporate panel meeting. The Guidelines

constitute an administrative issuance made by UNDP management and certainly should have been followed by the managers involved in the present matter. The respondent did not seek to submit otherwise. Whilst one can see the reasonableness from the Chief of Recruitment's point of view of truncating the time for applications for the positions here in question, this could not trump the requirements of the Guidelines.

13. Two matters should be mentioned as tending to the contrary conclusion. The first is the highlights to which I have already brought attention. It is fair to say that the author of the Executive Summary understood that there were some, though a minority, of international vacancies other than QUARRY vacancies to which the two weeks' minimum advertisement rule did not apply. The second is that, although the Guidelines referred to a number of ways in which 100 series staff might be differentiated from other staff in terms of the applicable processes, none of these appear to refer to *ad hoc* vacancies, so that as the Guidelines stood in September 2006 there was no exception contained in them that was "otherwise noted".

14. It is obvious from this discussion that the question of whether the Guidelines permit reduction of the two week time limit for vacancy advertisements is a difficult one to answer. (It should also be noted that the email notifying the staff of the QUARRY exercises states "the QUARRY is the mechanism to fill *all* of UNDP's international 100 series rotational posts…" (italics added) and no reference is made to the possibility of the *ad hoc* appointments.) It is sufficient to say that the applicant believed that vacancies were required to be advertised for a minimum of two weeks and that this belief was based upon an interpretation of the Guidelines which was probably correct and certainly reasonable.

15. The previous Guidelines (called "Placement Exercises") dated May 2005 required that advertisements for *ad hoc* appointments have a two week application time and permitted no exception. If the succeeding Guidelines had made such a significant change as the respondent submits, it is extraordinary that this variation was not specifically referred to, at very least in the Executive Summary. It would seem to follow that it was indeed not intended that the new Guidelines would make a

change to the timeline for these posts, though it envisaged that such a change might be provided for in the Guidelines.

16. In the circumstances, I think that the following observation needs to be made. All the rules, regulations and applicable instruments of the Organisation need to be in clear and precise language. Sometimes this will mean that a legalistic approach is necessary to ensure precision but often the use of ordinary language will suffice and certainly is desirable. The Guidelines concern the recruitment and selection of the staff of the UNDP, a major agency of the United Nations. It is designed not only to assist managers but also to explain the relevant processes clearly to potential applicants. Clarity is especially important in this context, particularly since many applicants, otherwise completely competent, may find it difficult to understand complex written material of this kind. Obviously such documents should be cast in language likely to be understood by the ordinary person. The evident failure even to make the attempt is baffling. The Zen masters considered that meditation on the mysterious leads to enlightenment. They may have been right. But it is not a useful management tool. Obscurity it is not merely bad practice, it is also unfair and in this case it was unfair to the applicant.

Responsibility of UNDP for unassigned staff

17. The UNDP accepts that it has the responsibility to give job search support to staff who "become unassigned" as a result of corporate restructuring, abolition of posts, reduction in staff, return from peacekeeping missions or inter-agency secondments and loans and return from special leave. This significant responsibility has been delegated in a large part to the Career Transition Unit (CTU), staffed by an HR Specialist and an HR Associate, of whom the former gave evidence which was, in substance, not in dispute. The HR Specialist struck me as an entirely honest and candid witness whose approach to her work involved not only considerable expertise but also genuine concern for the staff members it was her duty to assist. It is clear that she would have liked to provide more assistance to them but was unable to do so because of the limited staff resources available to her. I wish to state at the outset that my criticisms of the UNDP are in no sense directed at the HR Specialist.

18. The HR Specialist testified that, at any point in time, CTU works intensively with approximately twenty to thirty staff who are actively searching for immediate replacement. This number can increase to sixty, plus staff on assignment with other UN agencies and staff on special leave who plan to return to UNDP. The UNDP Intranet contains a web page giving an overview of career transition and outlining briefly the services available from the CTU. Examples given of typical services and resources provided are career transition management and counseling upon displacement, information on job opportunities in UNDP and the UN system, job search information sessions and workshops, job search support such as advice, tips, advocacy for placement etc, resume and CV preparation, interview practice, referral to other job search resources and external career counselors and advice and counseling on "agreed separations". It is pointed out that the CTU "cannot 'place' a staff member in a new assignment" and that all staff must apply for specific vacancies advertised on the Intranet and go through the standard selection processes, although CTU will advocate on behalf of displaced staff to ensure that their internal status is recognized.

19. The HR Specialist emphasised that it was imperative that staff members undertook responsibility for identifying job opportunities and therefore to regularly and frequently check the Intranet for advertisements. She said that at all initial interviews with unassigned staff she explained the importance of this responsibility and that the CTU was unable to bring any such positions to the staff member's attention. In the end, however, my understanding of the substance of her evidence is that, although indeed she did explain the need for checking the jobsite, in most cases she did not point out that *ad hoc* vacancies might on occasions occur and that in these cases the time for making an application might be significantly lessened. If a staff member were informed not only that he or she must check the jobsite frequently but that some of vacancies might only have a one week window, this would not only give necessary information not imparted or effectively imparted in the Guidelines for recruitment but explain why a frequency of access more than weekly was necessary. This was especially significant having regard to the misleading statement in the emails customarily notifying staff of QUARRY exercises.

20. As it happened, the applicant did not attend the usual initial interview when this matter would have been discussed. He explained that he did not believe that this would be useful since he was already consulting an external consultant who had been involved in organizing the job fairs. This person's expertise was a matter of some controversy but, as it seems to me, he was sufficiently well-qualified to make the decision to consult him reasonable. Whether it was reasonable not to attend an interview with the HR Specialist is another question but, since it is doubtful that he would have been told of the crucial matter, namely, that there were some 100 Series appointments advertised on an *ad hoc* basis which might have truncated application times, I do not have to determine this question. Since the Guidelines did not permit reduction of the time for making applications, it was all the more important that the (mistaken) practice of reducing that period for some *ad hoc* posts should have been clearly stated on the career transition website. This was essential information since it gave a timeframe for the necessary frequency of accessing the jobsite and warned that the assumption which staff members might well have had, as a result of the Guidelines and the QUARRY information emails, that they would always have two weeks was quite mistaken.

21. The CTU also provides individualized advice to staff on job search strategies, feedback on resumes and mock interview practice through an experienced external career counselor who has over twenty years of experience working with UNDP and UN staff in transition. Doubtless, this could be very helpful to many staff members. However, the applicant had been with UNDP at a senior level for many years. He testified that he did not think that this kind of help was what he needed.

22. "Advocacy" does not mean, as one might have thought, that the CTU would in some way participate in the selection process or communicate with a selection panel or decision maker on behalf of a staff member being assisted to commend his or her suitability for appointment. The "advocacy" undertaken by the Unit is to bring to the attention of relevant decision-makers the fact that a particular staff member is unassigned and therefore entitled to priority consideration. This circumstance should, at all events, be evident from the application itself but, it seems, it can on occasions

be overlooked, hence the desirability of this kind of advocacy. The Unit also brings unassigned staff members to the attention of hiring units which might be considering temporary appointments.

The applicant's complaints about assistance

23. The first of these complaints was of a general kind in which the inability of the applicant to obtain positions for which he was a candidate was attributed, at least in part, to the lack of effective advocacy by CTU on his behalf. The applicant, before he was placed on SLWOP, had unsuccessfully applied for some seven UNDP and twenty UN posts. Not surprisingly, he was disappointed with this outcome, especially when external candidates were successful. However, it is not possible to infer from the fact that the applicant was unsuccessful that this was attributable of a failure by the CTU to advocate on his behalf. I think that the applicant may have hoped that this advocacy would have involved more than merely bringing to the attention of the selection panel or appointing body the fact that he was an internal candidate, for example by highlighting particular experience or personal attributes that made him a suitable choice. However, there was no basis for him to labour under this misapprehension and there was nothing in the settlement agreement that suggested the CTU would take on this additional task. Quite apart from the problem of the Unit's limited resources, this kind of advocacy would have been inconsistent with the nature of the selection processes. The applicant complained that the CTU did not propose his appointment to suitable positions. It is clear from the HR Specialist's evidence that this would have been an impossible task for the CTU to undertake and it was not reasonable for the applicant simply to have assumed that it would. It would be otherwise if, upon inquiry, he had been informed otherwise but he did not make such an inquiry.

24. The second complaint was that there were a number of positions for which the applicant might have been able to apply but of which he was unaware because the CTU did not inform him about them. It is clear from the CTU website that this was not regarded by CTU as one of its tasks. Again, it would have been beyond its resources.

25. If the applicant's expectations about the extent of assistance were reasonable and consistent with the respondent's obligations, of course it would not have been an answer for the respondent simply to point to the limited resources of the CTU. There would have been a corresponding obligation to provide sufficient resources to enable its obligations to be fulfilled. However, I am not satisfied that, in general, the tasks undertaken or able to be undertaken by the CTU were less than the responsibilities owed to unassigned staff by the UNDP.

26. In the end, the applicant was unable to point to any posts that he could have applied for but did not and focused on the *ad hoc* appointments of late October, which I have discussed above, that were not brought to his attention in the same way as impending QUARRY announcements, by a specific email to this effect. Had this been done prior to 26 October or indeed at some time during that day rather than late at night he would have been aware not only of the vacancies but also of the reduced application time. It seems clear, however, from the examples tendered in evidence of the emails bringing the attention of staff to a QUARRY exercise that these were posted when the notices had already been placed on the jobsite. It might have been reasonable for the applicant to expect that, in the same way, *ad hoc* notifications would be brought to the attention of staff, but this would not have been useful to him in the particular circumstances of late October 2006, since he would not have seen such an email until it was too late. As I have mentioned, the applicant has not established that there were any other *ad hoc* positions for which he could have applied but did not because he was unaware of them.

27. In addition to his complaints about the CTU, the third limb of the applicant's case pointed to his failure to obtain an appointment as evidence that the UN did not take seriously his priority as an internal candidate. In order to make good this allegation, it would be necessary to examine each selection process in which he was involved. The applicant did not do this (except for the single case mentioned in the following paragraph) but, for obvious practical reasons, relied simply upon his own evident qualifications – which are certainly impressive – and his failure to be selected, even in many cases, not being shortlisted. This disappointing fact does not,

however, establish any substantive or procedural shortcoming or unfairness: the applicant's contention is simply a *non sequitur*, albeit an understandable conclusion from his lack of success.

28. The applicant gave evidence about a particular selection process following his application for a position advertised in the fourth QUARRY exercise of 2006, of which he was notified on 20 September. In October 2006 he underwent a written test for the post and was shortlisted for an interview which occurred several days later. He was not recommended for appointment. He later found out that, in its evaluative summary, the panel made two references to his being "set in his ways". The applicant took exception to this comment as meaning that he was too old for the post and reflected a prejudice based on age which, he also believed, affected other applications as well as this particular one. I do not understand the comment in this sense: it simply reflects an assessment, well within the panel's duty to make, that the applicant had demonstrated in his interview a disinclination to consider new ways of doing things and a degree of inflexibility considered undesirable. The panel acknowledged that he had shown strong relevant technical skills and had an excellent understanding of work planning. On the other hand, it was noted, the applicant was already a P-5 at a high level which would have funding implications for a P-4 post and impose other organizational misalignments. In the end, the applicant has failed to make good this complaint about ageism.

Did the UNDP comply with the settlement agreement?

29. In my view, UNDP had an obligation to its staff to make it clear that the time frame for making applications for *ad hoc* posts might be less than the two weeks period mandated for QUARRY positions. This was so because otherwise staff did not have sufficient information to enable them to appreciate how frequently it was necessary to access the jobsite if they wished to seek another post. It was also necessary because of the misleading effect of the Guidelines, even assuming that they permitted less than two weeks for *ad hoc* posts, and the circular emails to staff concerning QUARRY exercises.

30. It is clear that not all management best practice will create legal obligations or rights to enforcement. However, whether the obligation to inform which I have identified is a legal obligation generally to staff or to unassigned staff is not necessary for me to determine in this case, since I am satisfied that the applicant's settlement agreement created such a legal obligation by virtue of the undertaking to provide "dedicated career support". In the context, this created an obligation in the respondent to advise the applicant as an individual rather than apply to him what was, at all events, a management responsibility to all unassigned staff. The crucial matter in issue for the applicant was, as the previous litigation had made abundantly clear, the difficulties he was experiencing in obtaining another position, especially poignant in his case given that he was so close to retirement. In my view, the respondent was legally obliged to inform the applicant of all critical information necessary to permit him to apply for positions for which he might have been suitable, at least in respect of posts within the UNDP. It follows that he should have been informed of the possibility of *ad hoc* posts becoming available outside QUARRY exercises and that applications for such posts might well need to be made within seven days of advertisement. Even accepting that the first of these possibilities is stated in the Guidelines and, therefore, arguably need not have been specifically brought to the applicant's attention, the time frame was of critical importance and was not accessible from the Guidelines. It was not sufficient, in the circumstances, to hold this information back for disclosure during some interview with the HR Specialist, especially since his relationship with the Unit had been continuing for some time and was somewhat fraught. At all events, I have concluded that the particular information would probably not have been imparted to the applicant, had the interview taken place, unless for some reason the matter was specifically raised which was unlikely, considering the assumption under which the applicant was labouring, induced at least in part by the respondent's publications. I should add that the UNDP wrote to the applicant on 7 July 2005 providing certain information on his obligations to seek work. Not surprisingly, given the terms of the then applicable "Placement Exercises" guidelines, there was no reference to the timeline for making applications which was then, as I have pointed out above, two weeks for all positions including *ad hoc* posts.

Regrettably, when the position appears to have changed, at least from the management's perspective, this variation was not brought to the applicant's attention. For the reasons stated below, there was a duty to do so.

31. In the particular circumstances, the respondent had a legal obligation to review its communications in writing with the applicant and ensure (through the CTU no doubt but however it might be done) that they were sufficient to enable him to effectively make timely applications for positions as they arose, including *ad hoc* positions. The failure to do so was a breach of the settlement agreement.

Was there an administrative decision?

32. Article 2 of the Statute of the Tribunal gives it jurisdiction "to hear and pass judgment" on an application concerning "an administrative decision that is alleged to be in non-compliance with…[a staff member's] terms of appointment or the contract of employment", which terms include all the pertinent regulatory instruments. The respondent did not seek to argue in this case that, if the UNDP failed to fulfil its obligations under the settlement agreement, this could not amount to a relevant administrative decision. This implicit concession is justified. The terms of the settlement agreement became part of the applicant's contract of employment which had not at that stage been terminated, although he was not assigned to any post. As I have said, the decision to limit the application times for the posts advertised on 26 October was not permitted by the Guidelines. The respondent, by virtue of the settlement agreement, was obliged to comply, amongst other things, with the Guidelines, especially since they dealt with the subject of the agreement, namely support for the applicant's attempts to obtain another post. Another approach involves focusing on the administrative decision to apply to the applicant the same management processes as was generally applied to unassigned staff members, rather than considering that his particular situation might require more specific or different actions. Where, as I have found, there was a particular duty to inform imposed by the settlement agreement and the failure to inform constitutes a breach of the agreement a decision not to undertake that duty is of course an administrative decision whatever form it might have taken or however it was made. Certainly it occurred at the hand of

an agent of the respondent. Thus, a decision that all that needed to be done was to provide to the applicant what was usually provided to unassigned staff was an implicit decision in the circumstances not to inform him of the time frame for making application for *ad hoc* positions. In my view this was also an administrative decision within the purview of the Tribunal and it was wrong. I reiterate, however, that this was, in substance, conceded by the respondent.

Conclusion

33. The respondent made an administrative decision contrary to the applicant's legal rights under his contract of employment and is therefore liable to compensate the applicant. It is, however, not possible for me to determine what relief should be ordered on the state of the evidence as it stands. I should indicate, however, my tentative view that the evidence would not permit relief calculated upon the basis that the applicant would have been selected for one or other of the positions advertised on 26 October 2006 but rather upon the basis that he lost a chance of appointment which might be valued as a percentage of the relevant emoluments. I emphasise that this is far from a concluded view and indicated only in an attempt to assist the parties to determine and clarify the issues and evidence that need to be considered on this matter.

34. The respondent sought to argue in the substantive proceedings that the applicant should be denied relief because he had not mitigated his damages. Once liability is established, it is for the respondent to prove on the balance of probabilities that the applicant has failed to mitigate his or her damage so that compensation should either be reduced or even not awarded at all. The basis of the respondent's submission in this respect was a reference in a list of advertised posts to several positions for which the applicant, on the face of it, might have applied but did not. Without, however, establishing that the applicant would probably have succeeded in being selected for one of them, this evidence led nowhere. At all events, the applicant gave a reasonable explanation for not applying for the positions in question. The respondent's case on mitigation should therefore be rejected.

Ancillary directions

35. Accordingly, I direct the applicant to file and serve within twenty-one days a statement specifying the relief sought, the grounds upon which he is entitled to that relief, and outlining the evidence upon which he relies to establish those grounds either being evidence which has already been produced or evidence which it is intended to adduce. Within twenty-one days of receiving this statement (not counting the seasonal recess) the respondent is to file and serve a statement setting out the facts, matters and things with which issue is taken and outlining the evidence, if any, upon which he intends to rely.

(*Signed*)

Judge Adams

Dated this 20th day of November 2009

Entered in the Register on this 20th day of November 2009

(*Signed*)

Hafida Lahiouel, Registrar, New York