UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/008/ JAB/2007/073
Judgment No: UNDT/2011/012
Date: 13 January 2011
Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Santiago Villalpando

TOLSTOPIATOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON COMPENSATION

Counsel for Applicant:
Duke Danquah, OSLA

Counsel for Respondent:
Jorge Ballestero, UNICEF

Introduction

1. The matter before the Tribunal is that of compensation following Judgment *Tolstopiatov* UNDT/2010/147 dated 18 August 2010 wherein the United Nations Dispute Tribunal ("UNDT") determined that the United Nations Children's Fund ("UNICEF") breached its obligations to the Applicant following the abolishment of his post with UNICEF.

2. Specifically, in Judgment No. 147 the Tribunal held that UNICEF had breached its obligations to the Applicant under his terms of employment under the then-applicable, but now abolished, UNICEF Human Resources Manual, CF/MN/P.1/18 of September 1997 ("Manual"). In essence, since the Applicant was a UNICEF staff member on an abolished post, it was found that during his "notice period" (i.e., from the time he was notified of his separation (27 July 2006) until it was implemented (30 April 2007)):

a. UNICEF did not follow its own mandatory procedures for granting preferential treatment when the Applicant applied for some positions with UNICEF; and

b. UNICEF did not comply with its obligation to offer meaningful recruitment assistance to the Applicant.

3. On the issue of compensation, it was stated that further information was required from the Parties.

4. In Order No. 221 (NY/2010) of 18 August 2010, the Tribunal directed the Parties to file and serve submissions on compensation, which they did. In Order No. 275 (NY/2010) of 14 October 2010, the Tribunal directed the parties to file and serve additional submissions. The Parties also complied with this Order.

Relevant facts

5. For a full account of facts supporting the liability determination, the Tribunal refers to Judgment UNDT/2010/147. Relevant facts supporting the present Judgment on Compensation follow.

6. On 27 July 2006, the Applicant received a letter from the Director of the Programme Division to the effect that the post the Applicant was encumbering would no longer be funded as of 31 December 2006 and that the Applicant would be terminated as of that date.

7. 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.

8. During his "notice period", the Applicant applied for 20 positions with UNICEF, without success.

9. The Applicant was separated from UNICEF as of 30 April 2007.

10. Subsequently, UNICEF on an exceptional basis reinstated the Applicant retroactively to 1 May 2007 by using the Applicant's accrued annual leave in combination with some special leave arrangements, to bridge the Applicant to an early retirement at the age of 55 years on 17 March 2010. The reinstatement and leave arrangements generally followed the provisions of the Manual and administrative instruction CF/AI/1999-007, but where those provisions would have prevented the Applicant from being bridged to early retirement UNICEF granted exceptions with a view to qualifying him for early retirement.

11. On 23 July 2007, the UNICEF Human Resources specialist wrote to the Applicant, outlining the terms of the Applicant's separation from UNICEF as follows:

> Boris,
>
> We acknowledge receipt of your e mail dated 17 July 2007 informing us that you are not opting for the additional 50% of termination indemnity and are requesting the option of special leave with partial pay followed by special leave without pay in accordance with chapter 18 of the Human Resources Manual and Administrative Instruction CF/AI/1999-007 dated 28 June 1999.
>
> The modalities will be as follows:
>
> 1 May 2007 till cob 25 July 2007 – Special Leave With Full Pay ["SLWFP"], utilizing 60 days of annual leave. Your last increment was in May 2006. The next increment would be due in May 2008.
>
> 26 July 2007 till cob 25 July 2008 – Special Leave With Partial Pay ["SLWPP"], in lieu of payment of 12 months of termination indemnity. During your SLWPP, post adjustment and mobility and non-removal allowances will be discontinued. You will not be eligible for a step increment. You will not be covered under Appendix D during SLWPP.
>
> 26 July 2008 will cob 17 March 2010 – Special Leave Without Pay ["SLWOP"] – to be bridged till early retirement age of 55. You will not be covered under Appendix D during SLWOP.
>
> Furthermore, you are requesting to discontinue health, dental and life insurance during the period of SLWFP and SWLPP. Please be advised that if you are not an active participant in the health and dental plan while on pay status, you will not be eligible to enroll in the After-Service Health Insurance (ASHI) at time of retirement, i.e., 17 March 2010. Therefore, if your intent is to enroll in ASHI, you will need to reapply for medical and dental during the annual campaign in June 2008 and continue your enrollment during SLWOP. At commencement of SLWOP, you will be required to pay the full premium per month (yours and Organization's) up to retirement date. Furthermore, during SLWOP you can continue participation in Pension by paying both yours and Organization's contribution up to retirement date. If you wish to continue participation from commencement of SLWOP please let us know and we will advise

> you of the monthly cost of the contribution. By discontinuing your Life insurance coverage, you will not be eligible to reapply at a later date…
>
> [Signed, UNICEF Human Resources specialist]

12. On 24 July 2007, by email to the UNICEF Human Resources specialist, the Applicant wrote (in entirety):

> Dear [Human Resources specialist],
>
> Your information is noted. Please forward to me the provisions on Life insurance coverage. The rest (health & dental insurance) remains the same as per my previous message. Please equip me with your mail address so I can send you a copy of the G-4 Visa together with the completed Exit Interview Form.
>
> Best regards,
>
> Boris

13. UNICEF implemented the provisions of the separation package outlined above, although it did so incorrectly by continuing to make payments to the Applicant after 26 July 2008, when the Applicant should have been placed on SLWOP. In a 28 January 2010 letter, and again in a 3 May 2010 letter, the Human Resources specialist communicated with the Applicant on this matter. The relevant passages of the latter letter read as follows:

> As indicated in our letter of 28 January, there is the matter of the outstanding recovery of $117,497.91, which results from the overpayment of salary to you during the period 26 July 2008 to 31 March 2010 while on SLWOP.
>
> In addition, you had indicated in correspondence to DHR [assumedly the Department of Human Resources] in July 2008 that you wanted to continue paying life insurance and pension while on special leave. In accordance with Conditions of Special [Leave] without Pay (ref CF/AI/2007-007), the staff member will pay the full pension contributions (the organization's plus the staff member share).
>
> In summary, the outstanding amounts owed by you to UNICEF are as follows:

Salary from 26 July 2008 thru 31 December 2009	$117,497.91
Pension contribution while on SLWOP	$ 78,817.95
Life Insurance from 1 May 2007 thru 17 March 2010	$ 2,940.00
TOTAL	$199,255.86

We would kindly ask that you make arrangements immediately to refund this amount to UNICEF.

Applicant's compensation requests

14. The Applicant requests the following categories of compensation:

a. The retention of SLWFP from the date of the Applicant's separation on 30 April 2007 until he reached early retirement age on 17 March 2010, which represents the difference between the SLWPP actually paid to him from 30 April 2007 to 17 March 2010 and the SLWFP he is claiming for that same period of time, USD244,310 rounded (Applicant's 15 September 2010 submission, para. 1);

b. Five years' net base salary (from 18 March 2010 to 17 March 2015) at 8% rate of interest, being the years lost for productive services until his full retirement (Applicant's 15 September 2010 submission, para. 1);

c. Payment of compensation for moral injury and management's oppression, as well as for the massive stress and professional trauma suffered by the Applicant and other financial losses endured by the Applicant (Applicant's 15 September 2010 submission, para. 1);

d. Loss of earning capacity, as "the enhanced earning capacity the Applicant would have otherwise earned, had he been separated at normal retirement age" (Applicant's 15 September 2010 submission, para. 7);

e. Loss of pension, valued as "the difference between what would have been paid to the Applicant, had he retired at 60"; the Applicant has made

calculations of the cost of an annuity (USD635,448) (Applicant's 15 September 2010 submission, paras. 8 and 12);

f. The amount of the full contributions to United Nations Joint Staff Pension Fund ("UNJSPF") from 1 January 2010 to the date the separation notice is sent to UNJSPF (Applicant's 15 September 2010 submission, para. 15(ii)).

15. The Applicant's total claimed compensation is USD2,528,060 (Applicant's 15 September 2010 submission, para. 13). The Applicant contends that since the UNDT cap on compensation of two years' net base salary in his case is USD194,478, the "substantial difference" between the cap and the claimed amount qualifies the Applicant's case as an "exceptional circumstance justifying an award more closely approximating just compensation than compliance with the cap would permit" (Applicant's 15 September 2010 submission, para. 14).

16. The Applicant has been asked to reimburse the Organization for the full amount of the overpayment outlined in para. 13 of this Judgment, as per CF/AI/2009/002, secs 1.1 and 5.1.

Consideration

17. In accordance with the Statute of the Dispute Tribunal, art. 10.5, the very purpose of compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its contractual obligations (*Warren* UNAT-2010-065 (para. 10), *Castelli* UNDT/2010/011 (para. 10)).

18. On the issue of liability, the Applicant generally contended that he would have received a new contract with UNICEF ("New Contract"), had the Administration complied with its obligations, and that he should therefore be compensated for his estimated, lost earnings and entitlements under this New Contract.

19. In determining the issue of liability, the Tribunal in Judgment UNDT/2010/147 agreed with the Applicant, that:

> 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.
> …
> 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.

20. The issue to be determined is what compensation is owing to the Applicant for the breach by UNICEF of its obligations under his terms of employment. For this purpose, the Tribunal shall first determine the likelihood that the Applicant would have been offered the hypothetical New Contract, and thereafter, if relevant, the characteristics (term, type, renewal, etc.) of this New Contract.

The likelihood the Applicant would have been offered a New Contract

21. The Respondent submits that the Applicant only lost a chance of being considered in priority with other staff on abolished posts and that the Applicant was not guaranteed of being awarded a New Contract. The Respondent appears to take his arguments from *Koh* UNDT/2010/040 and argues that the compensation owing to the Applicant is the "pecuniary value of that advantage that the Applicant lost" (Respondent's 29 September 2010 submission, para. 9).

22. However, given the Applicant's right under the Manual to be given priority consideration for positions, UNICEF's obligation to assist him, the many positions (20) for which he had applied, as well as his demonstrated readiness to take on a new assignment in a broad variety of capacities and duty stations, the Tribunal finds that the Applicant did not just lose a chance of being considered for a new position; rather, it is only reasonable to assume that the Applicant would have been offered a New Contract, had UNICEF properly complied with the Manual.

23. As a result, it must be determined what the conditions of such a hypothetical New Contract would have been, what its monetary value to the Applicant is, and whether any offsets must be applied in awarding damages to the Applicant.

New Contract—term and type

24. The Applicant submits that the term of a New Contract would have been five years, and bases this on the fact that he:

> … was holding a five-year appointment as a core staff member in the capacity of the UNICEF Area Representative in the Caucasus prior to his transfer to the UNICEF CEE/CIS Regional [it is unclear to what these abbreviations refer] and NYHQs [New York Headquarters]. Furthermore, if the Applicant had been selected for one of the various core positions, to which he applied and was duly qualified, [he] would have received a five-year New Contract [Applicant 26 October 2010 submission, para. 3.]

25. The Respondent contends that the Applicant would have only been offered a fixed-term appointment with a maximum term of two years, based on:

a. CF/AI/1996-006 (Cessation of the granting of permanent appointments) of 1 July 1996;

b. CF/AI/2009-005 (Types of appointment and categories of staff) of 22 July 2009, sec. 1.1: defining types of appointments with UNICEF as "temporary, fixed-term and continuing";

c. CF/AI/2009-005, sec. 1.6: defining a fixed-term appointment as "a time-limited appointment which may be issued initially for a period of one year or more, up to two years". Under CF/AI/2009-005, sec. 1.7, it is stated that a fixed-term appointment does not carry any expectancy of renewal or conversion, irrespective of the length of service. Under CF/AI/2009-005, sec. 1.9, longer contracts can only be issued for "continuing appointments" which are "open-ended."

26. CF/AI/1996-006 defines the contractual status of a UNICEF staff member already serving on fixed-term appointments as follows:

> Therefore, the following measures will now go into effect:
>
> > a) External recruits: All new external recruits will receive fixed-term appointments, regardless of the funding source of the post for which they are recruited. This will be clearly indicated in letters of appointment.
> >
> > b) Fixed-term project personnel: All staff currently holding fixed-term New Contracts against project funded posts under the 200 series of the Staff Rules who subsequently are appointed to a core post, will remain under fixed-term appointment.
>
> This decision will not affect the contractual status of existing permanent staff or staff holding fixed-term appointments against core posts, who will progress towards permanent appointment in the normal manner subject to good performance and as long as they occupy core posts.

27. The Applicant joined UNICEF in 1988 on a fixed-term contract at the L-4 level. When CF/AI/1996-006 took effect on 1 July 1996, nothing in the case records suggests any change of the Applicant's contractual status (away from fixed-term status) occurred as a result of implementation of the administrative instruction. Moreover, since nothing in the record suggests that the Applicant held a fixed-term appointment "against [a] core post" (despite the Applicant's contentions to the contrary, which are without any evidentiary support in the record), it is assumed that the Applicant fell under the category of "fixed-term project personnel" who would "remain under fixed-term appointment".

28. The Tribunal finds that the Applicant's argument that he was holding a five-year appointment as a "core staff member" at the time of the abolishment of his post and that a New Contract would have had a term of five years (Applicant's 26 October 2010 submission, para. 3) is speculative.

29. The Tribunal therefore finds that, if UNICEF had fulfilled its obligations, the Applicant would have been offered a New Contract as a two-year fixed-term appointment, which would have started the day after his actual separation (i.e., 1 May 2007) and would have lasted until 30 April 2009.

Would a New Contract have been subject to renewal?

30. In making his claims for compensation as outlined in this Judgment, the Applicant in effect also contends that if the Organization had only renewed the New Contract for two years (i.e. from 1 May 2007 to 30 April 2009), the clear evidence on the record shows that both of the Applicant's reporting officers would have decided to renew the Applicant's contract for yet *another* term of two years (i.e., 1 May 2009 – 30 April 2011) and that the New Contract would have been renewed, not only until the Applicant reached early retirement age, but until the Applicant reached normal retirement age on 17 March 2015 (Applicant's 15 September 2010 submission, para 3).

31. The Tribunal agrees with the Respondent that:

> There is no possible way to know in advance if at the end of the appointment the [New Contract] would be renewed or even if there would be funds to continue with the post. If there were funds available for the post, and again this is within the realm of mere speculation, it cannot be assumed that the Applicant would fully meet performance expectations in a new post, at a different duty station (different country, culture, language, etc.), with new functions and responsibilities, and with new supervisors and colleagues [Respondent's 29 September 2010 submission, para. 18]

32. The Tribunal finds that it cannot be assumed that, had the Applicant been offered a New Contract, then this contract would automatically have been renewed indefinitely; the Tribunal therefore limits the compensable period of time for his lost compensation to the two-year term of a New Contract.

33. In reaching this determination, the Tribunal has, *inter alia*, taken into account:

a. that under a New Contract, the Applicant would not have been guaranteed any similar rights to priority status or assistance as under his previous contract—only if the post under a New Contract were abolished would the Applicant be granted such rights, but not if the New Contract was not renewed, if the Applicant resigned or if he was dismissed; and

b. the fact that the Applicant did not succeed in finding a new position following the abolishment of his post, where he (although only in principle) possessed priority rights—out of the 20 UNICEF positions for which he applied during his notice period, he did not get one job offer.

34. With the two-year limitation on permissible compensation amounts as a result of a two-year New Contract, which it is assumed that he would have been offered, the Applicant's requests for compensation for retention of SLWFP, five-year net base salary, loss of earning capacity, and loss of pension necessarily must fail.

New Contract—compensation owing for income loss

35. For the applicable two-year period of a New Contract, the Applicant contends that he would have been entitled to net base salary (USD193,969.36), post adjustment (USD126,850.17), mobility and hardship allowances (USD10,699.92), and health and dental insurance subsidies (USD4,912.08), for a total of USD336,431.53 (Applicant's 26 October 2010 submission, para. 10). With the deduction of pension contributions of the Applicant by 7.9%, the total would be USD309,853.44.

36. The Applicant bases his claim for a two-year contract on UNDT jurisprudence (*Castelli* UNDT/2010/011 of 27 January 2010, *Bertucci* UNDT/2010/117 of 30 June 2010, and *Beaudry* UNDT/2010/146 of 18 August 2010).

37. The Respondent contends that the Applicant should only be compensated for his loss of net base salary, which he agrees to calculate in the amount of USD193,969.36. However, the Respondent does not deny that, in addition to his net

base salary, the Applicant would also have been entitled to post adjustment, as well as mobility and hardship allowances. Without further specifying the reasons, the Respondent submits that the correct amount for mobility and hardship allowances is USD8,916.60, while he does not comment on the suggested figure for post adjustment.

38. Under the head of compensation for income loss under a New Contract, the Tribunal finds that the Applicant is entitled to the sum of USD309,853.44, subject to any further modifications that may be required in this Judgment.

New Contract—health and dental insurance subsidies

39. The Applicant claims compensation for loss of health and dental insurance subsidies during the hypothetical term of a New Contract.

40. One perspective on this issue is that since the relevant premium payments would have been paid to insurance providers and not directly to the Applicant himself, such amounts covering the cost of the health and dental insurance are not an income loss, but rather a loss of a benefit that is not compensable. The Tribunal does not believe this is the most correct or fair way of assessing the matter of health (i.e., medical) insurance subsidies.

41. Employment with the United Nations, such as would be assumed under the hypothetical New Contract, may require that staff members carry medical insurance, either through the Organization or through a carrier identified by the staff member (staff rule 6.6, identical to former staff rule 106.6). If the staff member opts for the latter arrangement, the staff member must pay the cost of the medical insurance premium directly to the carrier, and this cost (and its loss under the hypothetical New Contract) would have had real monetary value to the Applicant. Similarly, the fact that the Organization pays the cost of medical insurance directly to a carrier identified by the Organization results in a real economic advantage to any staff member, where the loss of its payment would result in an economic detriment to the staff member

(i.e., the staff member would have to pay the cost). For this reason, the Tribunal has included in the category of income loss above (USD309,853.44) all sums required for health and dental insurance subsidies (USD4,912.08).

42. The former UN Administrative Tribunal seems to agree with the Tribunal on such an interpretation:

> 2. If, within 30 days of the notification of the judgment, the Secretary-General should decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in her case, the Tribunal *fixes the amount of such compensation at the sum which the Organization would have paid to subsidize the health insurance scheme*, effective 1 April 1991 and continuing until the date on which the Applicant benefits from the United Nations subsidy under this scheme. [Judgment No. 572, *Isaacs* (1991), emphasis added]

New Contract—repatriation grant, travel, shipment, and accrued annual leave

43. The Respondent allows that at the end of a hypothetical New Contract the Applicant would have been entitled to a repatriation grant (USD53,888.89), travel (USD7,265.60), shipment (USD15,000) and accrued annual leave (assume 60 days accrued for USD38,841), for a total under this miscellaneous head of USD114,995.49 (Respondent's 21 October 2010 submission, para. 10).

44. Therefore, under this head, the Tribunal finds the Applicant is entitled to the following sums:

a.	Repatriation Grant:		USD 53,888.89
b.	Travel:		USD 7,265.60
c.	Shipment:		USD 15,000
d.	Accrued annual leave:		USD 38,841
		Total:	USD114,995.49

45. It might be argued that the repatriation grant, travel, shipment and accrued annual leave sums would not have been part of a New Contract, but rather separate entitlement claims regarding the Applicant's eventual separation from UNICEF

following the expiration of a hypothetical New Contract, which claim is not before this Tribunal. However, in making its determination that the New Contract would have been a fixed-term contract of only two years in duration and that it would not necessarily have been renewed indefinitely thereafter, the Tribunal must compensate the Applicant for those amounts owing as a result of such expiration of that New Contract. The Respondent also agrees that the Applicant would have been entitled to the sums mentioned (Respondent's 21 October 2010 submission, para. 10).

46. Under the head of repatriation grant, travel, shipment and accrued annual leave, the Applicant is entitled to the sum of USD114,995.49, subject to any further modifications that may be required in this Judgment.

New Contract—termination indemnity

47. Pursuant to CF/AI/2007/007, sec. 2.18, the Applicant would have been entitled to a termination indemnity if the New Contract was abolished or at the New Contract's expiration, in acknowledgement of his years of service with UNICEF:

> Termination Indemnity. Fixed-term staff separating on:
>
> a) expiration of appointment are not entitled to termination indemnity. However, in acknowledgment of their years of service to UNICEF, staff who have completed five or more years of continuous active service with UNICEF (i.e., with no breaks(s) in service) as of the date of their separation will exceptionally be paid a separation payment equivalent to the normal termination indemnity that they would have received had their appointment been permanent. The separation payment will be calculated as per Annex B [to CF/AI/2007/007] (see paragraphs 2.21 – 2.26 and Chapter 14, Section 2 of the HR Policy and Procedure Manual); or
>
> b) termination of appointment on abolition of post will be entitled to termination indemnity.

48. Under the UNICEF rules, if the New Contract had not been renewed, the Applicant at that point would have been with UNICEF for more than 20 years, which would have entitled the Applicant to payment of the "separation payment", as

specified above. The Applicant contends that he would have been entitled to "about USD111,200 in indemnity pay" at the expiry of a New Contract with a term of *five* years (Applicant's 26 October 2010 submission, para. 14), but the Tribunal has found that the term of the contract would have been limited to two years and, as well, the amount of termination indemnity is governed by the provisions of CF/AI/2007/007, Annex B (12 months' gross salary less staff assessment).

49. Under the head of termination indemnity, the Applicant would be entitled to the sum of USD96,984.68 (the agreed amount of two years' net base salary (193,969.36) ÷ 2), subject to any modifications that may be required in this Judgment.

Loss of earning capacity

50. Under this head, the Applicant submits the following:

> The loss of earning capacity was determined as the enhanced earning capacity that the Applicant would have otherwise earned had he been separated at normal retirement age. In *Bertucci* UNDT/2010/117 of 30 June 2010, the Tribunal defined the extent to which this amount should be awarded in light of the cap in art 10.5(b) of the Tribunal's Statute as being USD200,000 for the total loss of salary and entitlements amounting to USD361,270. In the present case the proportional calculation of derived earning capacity amounts to USD706,053. This is based on the total loss of salary and entitlements of USD1,275,380. The loss of earning capacity should also include the economic loss of the Applicant's real property which amounts to USD167,464 with the total loss of earning capacity amounting to USD873,517. [Applicant 15 September 2010 submission, para. 7]

51. The Applicant has failed to substantiate the allegations on which he supports his claim for loss of earning capacity: for instance, how the early retirement influenced his employment marketability, what job opportunities he lost as a result, and how the so-called proportional calculation is warranted. In *Antaki* 2010-UNAT-095, the United Nations Appeals Tribunal stated that, "Compensation may only be awarded if it has been established that the staff member actually suffered damages".

Accordingly, the Tribunal finds no basis for awarding any compensation for loss of earning capacity.

52. The Tribunal additionally has already determined that with the limitation on permissible compensation to amounts owing as a result of the two-year New Contract (see above para. 32), the Applicant's requests for compensation for loss of earning capacity will be rejected.

Loss of pension

53. Referring to *Bertucci* UNDT/2010/117, the Applicant submits:

> 8. … [T]hat the UN Pension Fund ["UNJSPF"] will not recalculate and pay the applicant's pension as if he retired at the proper level and age. Accordingly, the loss of pension must be valued … as the difference between what would have been paid to the applicant had he retired at age 60.
> …
> 12. In the present case, for calculations of the cost of annuity, the calculated annuity of USD180,000 (for loss of salary and entitlements of USD361,270) was extrapolated from the total loss of salary and entitlements of USD1,257,380. The cost of annuity is therefore assessed as amounting to USD635,448. [Applicant 15 September 2010 submission, paras. 8 and 12]

54. Although not entirely clear from his submissions, it appears that the Applicant now claims that he has completely lost his pension rights; otherwise it would not make sense for him to claim compensation for this.

55. However, the Respondent correctly notes that the Applicant "was indeed bridged to early retirement and it was [the Applicant] who decided which benefits to retain and which ones to forfeit". The Respondent further indicates that the question of pension "is moot in so far as the Applicant was bridged to early retirement age, precisely to allow him to be eligible for a pension". The Tribunal agrees with this contention.

56. Additionally, concerning pension contributions and as made clear in the 23 July 2007 letter to the Applicant from the UNICEF Human Resources specialist, during the period of time that the Applicant was on SLWOP, the Applicant was to be responsible for the *entire* contribution to UNJSPF (the Organization's plus the staff member's share). If the Applicant has lost his pension rights through non-payment of the required pension contributions, this loss is solely attributable to the Applicant's own failure to pay the required amounts and is not the result of any error on UNICEF's part identified in Judgment UNDT/2010/147.

57. The Tribunal therefore rejects the Applicant's claim for the amount of the full contributions to UNJSPF from 1 January 2010 to the date the separation notice is sent to UNJSPF (Applicant's 15 September 2010 submission, para. 15(ii)).

58. The Tribunal has already determined that with the limitation on permissible compensation to amounts owing as a result of the two-year New Contract (see above para. 32), the Applicant's requests for compensation for loss of pension will be rejected.

Non-economic compensation

59. The Applicant submits that "non-economic compensation for breach of entitlement is assessed as USD10,000", without further substantiating this claim (Applicant's 15 September 2010 submission, para. 13).

60. The Respondent contends that "the record shows that management made every effort to minimize the negative impact on the Applicant due to the abolition of the post he encumbered" and that the Applicant therefore did not suffer any moral injury. Further, the Respondent points out that UNICEF exceptionally agreed to waive the limit of two years established in the Manual, sect. 18.3.4, in order to bridge the Applicant to early retirement; this exception was made with a view to facilitating the Applicant's retention of benefits (Respondent's 29 September 2010 submission, para. 28).

61. The Tribunal especially agrees with this observation of the Respondent. Had UNICEF not made the exceptional arrangements for the Applicant that it did, the Applicant would have had his employment with UNICEF terminated on an abolished post *without any* bridge to retirement benefits whatsoever. The benefit to the Applicant is clear and the Applicant cannot make a legitimate claim for non-economic loss (moral injury, management's oppression, massive stress or professional trauma).

62. The Applicant has not proven his claim for compensation for non-economic loss, as required by *Antaki*. Under the head of non-economic compensation, the Tribunal finds that the Applicant is not entitled to compensation.

63. The Tribunal has already determined that with the limitation on permissible compensation to amounts owing as a result of the two-year New Contract (see above para. 32), the Applicant's requests for non-economic compensation will be rejected.

Offset—for termination indemnity payments, etc. received by the Applicant on his actual (in fact, final) contract with UNICEF relating to his abolished position

64. If the Applicant had been offered a New Contract, he would not have received a termination indemnity package on his actual (and, in fact, final) contract with UNICEF that related to his abolished position. Thus, it is necessary to deduct, as an offset from compensation owing to the Applicant, any amounts received by him as a termination indemnity or for other reasons following the abolishment of his post and separation from UNICEF.

Payment for annual leave from 1 May to 25 July 2007

65. In the period following his separation on 30 April and until 25 July 2007, the Applicant was on annual leave that he had accrued while with UNICEF. The annual leave (and payment for it), thus, was not as a result of his separation, since the Applicant would have been entitled to his annual leave under all circumstances and would have been able to carry it forward under a New Contract.

66. Accordingly, the Tribunal finds that this payment for annual leave is not to be deducted from his final compensation award.

SLWPP—26 July to 25 July 2008

67. The Respondent submits that the Applicant received USD81,039.69 in partial pay during 26 July to 25 July 2008 as part of his separation package (Respondent's 21 October 2010 submission, para. 13). The Applicant has not disputed this figure.

68. The Tribunal therefore finds that the USD81,039.69 received as termination indemnity payments following abolishment of his post is to be deducted from the Applicant's compensation award as an offset in the compensation owing to the Applicant under a New Contract.

Repatriation grant, travel, shipment

69. The Respondent claims that the Applicant has already been paid a total of USD74,106.44 under this heading, but the Applicant contests the payment to him of USD7,265.60 for travel. The Tribunal finds for the Applicant and determines he has therefore only been paid the sum of USD66,840.84 (USD74,106.44 – USD7,265.60).

70. The Tribunal therefore finds that the USD66,840.84 received for repatriation grant and shipment following abolishment of his post is to be deducted from the Applicant's compensation award as an offset in the compensation owing to the Applicant under a New Contract.

Offset—overpayments made by UNICEF

71. The terms of the Applicant's termination indemnity on the, in fact, ultimate contract with UNICEF were outlined in a 23 July 2007 letter from the UNICEF Human Resources specialist to the Applicant. On 24 July 2007, the Applicant "noted" the communication and terms of the termination indemnity payment being proposed to him.

72. The Applicant has sought to contend that the terms of the termination indemnity following abolishment of his post were altered by the Respondent's subsequent statements in submissions to the Joint Appeals Board and the Dispute Tribunal. The reason that the Applicant makes this argument is that in those submissions UNICEF incorrectly summarised the termination indemnity in a manner that was more favorable to the Applicant than what he should have received under the 23 July 2007 letter from the Human Resources specialist.

73. These arguments ostensibly are also made to establish the Applicant's compensation claims herein and to refute the Applicant's purported liability to UNICEF for overpayments made to the Applicant during SLWOP.

74. In his 15 September 2010 submission, para. 15(iii), the Applicant states:

> However, it should be noted that UNICEF's Administration breached the terms of the special arrangements for the SLWPP. This is clearly stated in the Respondent's reply to the Joint Appeals Board (JAB) of 15 October 2007, paras. 34 and 35 (and in the Respondent's submission to the Tribunal of 26 August 2009 paras. 5 and 15, as well as the Respondent's submission to the Tribunal of 29 March 2010 para. 27…

75. In his 6 October 2010 submission to the Dispute Tribunal, the Applicant again argues that subsequent submissions made by the Respondent to the Dispute Tribunal in effect modified the contract between the Parties as communicated by the Human Resources specialist on 23 July 2007 and accepted by the Applicant on 24 July 2007. Similarly, the Applicant argues that "the Applicant's closing statement to the UNDT of 3 May 2010 and his submission on compensation provide all details relevant to decision made by management on the extension of the SLWPP".

76. The Applicant appears to lay blame onto UNICEF for the overpayment error and states:

> 24. The Applicant rejects the Respondent's assertion for the Applicant to be made liable for the *decisions by the management* on

> the extended payments in the course of the SLWPP, although it should be noted that under the current UNDT jurisprudence all indemnity payments are effectively deducted from the Applicant's losses. [Applicant's 6 October 2010 submission, para. 24, emphasis added]

77. The Tribunal disagrees with the Applicant's contentions. The termination indemnity agreement was formed between the Parties with the exchange of the 23 July 2007 letter from UNICEF and with the 24 July 2007 response from the Applicant.

78. The Tribunal finds as a matter of law that the Applicant's 24 July 2007 email to the Human Resources specialist constituted an acceptance of the offer made by UNICEF regarding the terms of the Applicant's termination indemnity and separation from UNICEF. Following basic notions of contract formation and modification, the Tribunal holds that subsequent submissions during litigation do not, and did not in this case, modify or alter the terms of the contract entered into by the Parties regarding the Applicant's termination indemnity and separation package.

79. However, as stated in the recitation of facts, UNICEF incorrectly implemented the terms of this termination indemnity package. By letter of 28 January 2010, the Applicant was informed that, due to an internal mistake, the SLWOP, which should have started on 26 July 2008, had not been activated in the UNICEF system and that the Applicant had continued to receive receiving partial pay up until 31 December 2009. This resulted in an overpayment of USD117,497.91 (salary), USD78,817.95 (pension contribution), and USD2,940 (life insurance), for a total of USD199,255.86 (Respondent's 29 September 2010 submission, Annex. 2).

80. The Applicant was asked to reimburse the Organization for the full amount of the overpayment as per CF/AI/2009/002, secs 1.1 and 5.1:

> 1.1 All overpayments shall be recovered by UNICEF. An overpayment creates a debt where the staff member or former staff member owes money to UNICEF which will normally be recovered in full, immediately, against the monthly payments received.
> …

> 5.1 Overpayments will normally be recovered in full. However, when the Director, DHR [assumedly the Department of Human Resources], determines that the overpayment resulted from an administrative error on the part of UNICEF and that the staff member was unaware or could not reasonably have been expected to be aware of the overpayment, recovery of the overpayment will be limited to the amounts paid during the two-year period prior to the notification by UNICEF...

81. Given the clear terms of the Applicant's termination indemnity package following abolishment of his post with UNICEF, as outlined in the 23 July 2007 letter, the Applicant could reasonably have been expected to be aware of the overpayment to him and yet the Applicant did not make any attempt to notify UNICEF of the error or to rectify the situation. Principles of equitable estoppel apply in this instance to bar the Applicant from arguing that he is not liable for the overpayments made to him by UNICEF.

82. The Tribunal notes that, with respect to the notion of estoppel, a Chamber the International Court of Justice observed that "in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity" (*Delimitation of the Maritime Boundary of the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246, para. 130).

83. In this case, the Applicant engaged in conduct (his 24 July 2007 letter) that amounted to a representation that he accepted the terms of the termination indemnity package; further, the Applicant accepted the incorrect overpayment to him made by UNICEF during the SLWOP, the Applicant should reasonably have been aware of the overpayment made to him and the Applicant did nothing to rectify the situation, all to UNICEF's detriment. Whether phrased in terms of equitable estoppel, the doctrine of unclean hands or the principles of good faith and equity, the Applicant remains liable to UNICEF for the overpayments made to him.

84. The Tribunal also finds that the overpayments did not alter, in a manner more favorable to the Applicant, the terms of the termination indemnity package agreed upon by the parties following abolishment of his post with UNICEF.

85. The Tribunal finds that the Applicant remains liable to UNICEF for the overpayment in a total amount of USD199,255.86, and that this sum is an offset to the amounts determined to be owing to the Applicant elsewhere in this Judgment.

Mitigation of damages

86. A basic principle of law is that a party is obliged to mitigate his or her losses. This means that the aggrieved party must act reasonably following a breach and may recover only for those damages that arose naturally from the breach or could have been contemplated by the parties. In determining the amount of damages, the Tribunal must assess whether the party asking for damages has acted reasonably to limit his or her losses. If he or she has not acted reasonably to limit the extent and duration of his or her losses, then the overall damages may be reduced as a result. The aggrieved party has the burden of proving his/her damages with a reasonable degree of certainty and exactness.

87. The duty to mitigate one's losses is a fundamental doctrine within both international and domestic legal systems, and the doctrine of mitigation is not a foreign one to United Nations Appeals Tribunal or UNDT jurisprudence.

88. In *Mmata* 2010-UNAT-092, the Appeals Tribunal referenced, without discussion, the doctrine of mitigation as implicit within a damage award:

> 25. .... Compensation could include compensation for loss of earnings up to the date of reinstatement, as was ordered in the case on appeal, and if not reinstated, then an amount determined by the UNDT to compensate for loss of earnings in lieu of reinstatement up to the date of judgment, as was also ordered in the case on appeal. Post-judgment compensation may include loss of future earnings *taking into account mitigation*. [Emphasis added]

89. The requirement of a staff member to mitigate his or her damages has been required under prior UNDT case law: *Kasyanov* UNDT/2010/026; *Beaudry* UNDT/2010/061; and *Bertucci* UNDT/2010/080.

90. Additionally, the former UN Administrative Tribunal also recognized a "duty" to mitigate one's loss:

> In the opinion of the Tribunal, the Applicant made an eminently sensible and proper decision in again seeking leave to take up the ICTR position on secondment, and knowing that this would be declined, in taking it notwithstanding that approval for secondment would not be forthcoming. *He did no more than fulfill his duty to mitigate his loss*. He was faced with the choice of almost immediate termination and taking up the position with ICTR in Arusha. As far as the Tribunal is concerned, he made the only appropriate and reasonable choice. [Judgment No. 1102, *Hijaz* (2003), emphasis added]

91. The Administrative Tribunal of the International Labour Organization similarly has found a duty for a staff member to mitigate loss:

> While the Tribunal cannot accept the Observatory's plea that the complainant has in effect abandoned his claim by resigning before his term was up (*it was after all his duty to mitigate his damages* and the Observatory agreed to his early departure), the burden was on him to give some evidence of material injury and he has not done so. [Administrative Tribunal of the International Labour Organization Judgment No. 2124 (2002), emphasis added]

92. Within the commercial arena, the United Nations Convention of International Sale of Goods, art. 77, states as follows:

> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

93. The 2004 Principles of International Commercial Contract of the International Institute for the Unification of Private Law (UNIDROIT) state the following regarding the principle of duty to mitigate:

> The purpose of [the principle of duty to mitigate] is to avoid the aggrieved party passively sitting back and waiting to be compensated for harm which it could have avoided or reduced. Any harm which the aggrieved party could have avoided by taking reasonable steps will not be compensated.
>
> Evidently, a party who has already suffered the consequences of non-performance of the contract cannot be required in addition to take time-consuming and costly measures. On the other hand, it would be unreasonable from the economic standpoint to permit an increase in harm which could have been reduced by the taking of reasonable steps.
>
> The steps to be taken by the aggrieved party may be directed either to limiting the extent of the harm, above all when there is a risk of it lasting for a long time if such steps are not taken (often they will consist in a replacement transaction…), or to avoiding any increase in the initial harm.

94. In the employment context of the United Nations, then, it is only reasonable and necessary that, if a staff member challenges not being selected for a position and seeks compensation for her/his loss of income, the natural demand is for the staff member to demonstrate that s/he had sought other employment to limit her/his income loss.

95. In making its assessment on compensation and whether to apply the doctrine of mitigation, the Tribunal will consider the particularities of the specific case in question. Such circumstances could influence the determination of what steps the staff member could reasonably be expected to take in terms of searching for alternative employment and thereby alleviating her/his responsibility in this regard.

96. For the Applicant, mitigation considerations would include, *inter alia*, the professional qualifications of the Applicant, his attempts to find other employment following abolishment of his post, reasons for not seeking work, his age, and other

efforts identified by him as amounting to mitigation. For example, would it be reasonable for the Applicant to send out one or two applications per month, for the number of months' compensation that he is seeking? The Tribunal considers this to be a minimal effort at mitigation, which was not taken by the Applicant in this case.

97. As demonstrated above, the Tribunal firmly disagrees with the Applicant's contentions that a duty to mitigate one's losses would have the effect of giving the Organization a "windfall" and that the doctrine is not an operative principle within UNDT jurisprudence (Applicant's 6 October 2010 submission, para. 6).

Other actual income of the Applicant during the hypothetical term of a New Contract

98. The Applicant submits he had no other employment during the period of a hypothetical New Contract, i.e. from 30 April 2007 to 30 April 2009. The Respondent does not contest this.

The Applicant's efforts to mitigate his losses

99. The Applicant primarily claims that he did not have a legal duty to actively seek other employment to mitigate his losses during the hypothetical term of a New Contract. As stated above, the Tribunal finds that such general duty to mitigate loss does exist in the realm of the employment contracts of the United Nations.

100. In the alternative, the Applicant contends that he did satisfy the duty to mitigate his losses, as he applied for 23 various UN positions outside UNICEF. The Applicant documents this by a print-out of his application history from the online United Nations jobsite (Galaxy) which lists 23 applications he submitted to Galaxy in the period from 21 September 2006 to 30 June 2009. Of these, 12 applications were submitted after his separation (the hypothetical start date of a New Contract) and until 8 October 2007. On 10 and 11 April 2008, the Applicant also submitted two applications to "the Global Fund to Fight AIDS, Tuberculosis & Malaria". The

Tribunal further notes that it follows from the case record that the Applicant sought 20 positions with UNICEF during his notice period (27 July 2006 to 30 April 2007).

101. The Respondent submits as follows:

> The duty to mitigate the loss requires that the injured party take reasonable steps to limit the losses incurred. The party in breach is not liable for loss suffered by the aggrieved party to the extent that this party could have reasonably reduced the loss. In the employment context, this duty requires the aggrieved party to diligently seek suitable alternative employment. [Respondent's 29 September 2010 submission, para. 4]

102. In the instant case, according to the information available to the Tribunal, the Applicant unsuccessfully applied for 43 United Nations positions after he was first notified of his separation on 27 July 2006 until 8 October 2008.

103. However, from 11 August to 8 October 2008, the Applicant only submitted two applications to the United Nations. After this, the only record of other applications is those two that he submitted to "the Global Fund to Fight AIDS, Tuberculosis & Malaria" in April 2008.

104. In other words, during most of the hypothetical term of a New Contract (30 April 2007 to 30 April 2009), the Applicant was very inactive or did not submit any applications at all. What is striking for the Tribunal is the seemingly glowing employment prospects painted by the Applicant in his liability submissions, versus the silence on his employment attempts in his compensation submissions. On the face of it, the Applicant therefore did not adequately fulfill his duty to mitigate.

105. Accordingly, the Tribunal finds that the Applicant's failure to mitigate his loss of income by not adequately seeking other employment shall result in a reduction of his compensation owing for income loss by 25%.

The final calculation of compensation

106. Based on the above, the calculation of the Applicant's compensation is as follows:

Compensation owing for income loss:	309,853.44
Repatriation, travel, shipment, annual leave:	+ 114,995.49
Termination indemnity on New Contract:	+ 96,984.86
(Subtotal Owing:	*521,833.79)*
Payments made for repatriation and shipment:	– 66,840.84
Termination indemnity on the, in fact, ultimate contract:	– 81,039.69
UNICEF overpayments:	– 199,255.86
25% of compensation owing for income loss reduction for failure to mitigate (309,853.44 x 25%):	– 77,463.36
(OFFSET subtotal:	*– 424.599,75)*
Final compensation award:	**USD97,324.04**

Conclusion

107. Under art. 10.5 of the Statute of the Dispute Tribunal, the Respondent shall pay the Applicant USD97,324.04 as compensation. This sum is to be paid within 60 days of the date this Judgment becomes executable during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Marilyn J. Kaman

Dated this 13th day of January 2011

Entered in the Register on this 13th day of January 2011

(*Signed*)

Santiago Villalpando, Registrar, New York