Before: Judge Thomas Laker

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

PACHECO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Amal Oummih, OSLA

Counsel for Respondent:
Myriam Foucher, UNOG

Introduction

1. On 9 April 2010, the Applicant, a staff member of the Office for the Coordination of Humanitarian Affairs ("OCHA"), filed with the Dispute Tribunal an application against the decision to abolish her post and to separate her with effect from 30 April 2010.

2. In her closing statement filed on 14 December 2011, the Applicant requested:

> a. Rescission of the contested decision or compensation representing "one-year base salary, with post adjustment and a monetary equivalent for the loss of any corresponding entitlements and benefits [the] Applicant would have received, including health insurance, home leave, pension fund contribution";
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> b. Compensation for moral injury, loss of professional reputation and career prospects in the amount of USD100,000;
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> c. Additional award of damages in the amount of USD55,000 representing what the Applicant would have received had she been extended for a two-week period to allow her to exercise her maternity leave rights, and payment of all medical bills incurred as a result of being cut off from health insurance;
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> d. Two months' net pay for failure to complete a performance appraisal report for the Applicant and retroactive completion of the Applicant's performance appraisal report for the 2009-2010 cycle;
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> e. To be placed in an alternative suitable post at her P-5 rostered level.

Facts

3. On 8 April 2003, the Applicant entered the service of OCHA as a Humanitarian Affairs Officer (Advocacy) at level L-4, in Jerusalem, on a one-year project personnel appointment (200 series of the former Staff Rules). Her

200-series appointment was subsequently extended on a yearly basis, on the same position and at the same level, the last one covering the period from 1 January 2009 to 31 December 2009.

4. In May 2008, a new Head of the OCHA office for the Occupied Palestinian Territory ("OCHA-OPT") took his functions, thus becoming the Applicant's supervisor.

5. In July 2008, OCHA-OPT held an office retreat to discuss the office's "role and objectives with regard to coordination and clusters, protection of civilians and access, advocacy and information management" in the Occupied Territory and "the necessary adjustments to fulfill the newly agreed priorities". The "Concluding Points" of the retreat stressed, *inter alia*, that "OCHA's priority must focus on strengthening coordination and supporting the humanitarian country team with regard to protection and access issues". Regarding "advocacy and information management", the "Concluding Points" noted that "[OCHA] partners generally praise [OCHA-OPT] for [its] information/advocacy role in the [Occupied Territory]"; however, while "OCHA advocacy efforts [had until then] focus[ed] on feeding the awareness of humanitarian 'sympathizers'", there was a need to shift the focus on "influencing the decisions of key stakeholders" through "quiet and bi-lateral diplomacy" in order to "achieve tangible results on access and protection"; this would require "a review [of the] existing advocacy products and objectives". The "Concluding Points" further stated that "[i]n order to translate the conclusions of the retreat into actions, the structure of the office [would] be reviewed", with three pillars, a new coordination pillar, the merger of advocacy and information into a second pillar, and a third pillar to ensure adequate support and administrative services to the office.

2009 cost plan

6. In an email dated 30 September 2008 addressed to the Americas & the Caribbean, Europe, Central Asia and Middle East Section ("ACAEME"), Coordination Response Division, OCHA-New York, regarding the 2009 cost plan for OCHA-OPT, the Head of Office agreed to make additional cost cuts, noting however that during the revision of the cost plan in July 2009, it had been agreed

that "[o]ther core activities of the office, including advocacy and information management[,] would continue at the same level".

2010 cost plan

7. By email dated 4 September 2009 regarding the preparation of the 2010 cost plans, OCHA-New York reminded all OCHA field offices of the decision to maintain a zero-growth policy for 2010.

8. By email dated 1 October 2009, the Chief, ACAEME, Coordination Response Division, OCHA-New York, provided to the Head of OCHA-OPT the management's feedback on OCHA-OPT proposed cost plan for 2010, as follows:

> There is a feeling here that the cost plan could be reduced further, particularly staff costs. In particular, it was suggested that the allocation of resources should focus better on achieving OCHA priorities. As per the OCHA strategic framework and [OPT] work plan 2010, these would be the reinforcement of coordination with operational partners and donors with the goals to create a more enabling humanitarian environment and improve the coordination system. In line with what precedes, it was also suggested to mainstream some of the advocacy functions, so as to integrate them better within the coordination/protection and research/reporting units. We need to move quickly on this ...

9. According to the Respondent, the Head of OCHA-OPT came to the conclusion that the only way to further reduce costs while mainstreaming the advocacy functions was to abolish the post of Humanitarian Affairs Officer/Chief of Advocacy that the Applicant occupied at the time. This suggestion was endorsed by the Director of the Coordination Response Division, OCHA-New York, as is reflected in his memorandum of 13 October 2009 to the Under-Secretary-General for Humanitarian Affairs, entitled "Request for Cost Plan 2010 approval for the OCHA office in the Occupied Palestinian Territory", the relevant parts of which reads:

> The Cost Plan 2010 amounts to USD6,481,177, which is significantly less (… -6.12%) than the cost plan approved in February 2009. The cost plan 2010 builds up on the work and cost plans of the two previous years, which put the emphasis on: the strengthening of OCHA's coordination capacity, particularly with regard to protection and access; the reinforcement of the sub-office in Gaza; and the empowerment of National Staff. The cost plan

> 2010 also aims at giving [OCHA-OPT] the capacity to fulfil OCHA's corporate objectives, as defined in the strategic framework 2010-2013 and reflected in the OPT work plan 2010. Thus particular attention was given to ensuring that resources were allocated in priority to the creation of a more enabling humanitarian environment and the establishment of a more effective humanitarian coordination system in the OPT. In line with what precedes, the cost plan 2010 also foresees to progressively mainstream some of the advocacy functions, so as to integrate them better within the coordination and analysis tasks of OCHA in the OPT.
>
> …
>
> To reflect the increasing role of OCHA with regard to coordination and protection, the office will be slightly reorganized in 2010. The following realignments are proposed for 2010:
>
> …
>
> 3. Budget the (P-4) position of Senior Advocacy Officer for 4 months only, as these functions will be progressively integrated in coordination and analysis units;

A list of positions removed or created followed, which indicated under item 3: "Budget the (P4) position of Senior Advocacy Officer for 4 months only, as these functions will be progressively integrated in coordination and analysis units."

10. Eventually, the 2010 cost plan for OCHA-OPT as approved by the Under-Secretary-General for Humanitarian Affairs on 3 November 2009 showed that the Applicant's "temporary post" (Chief of Advocacy, P-4) had been approved for four months only, until 30 April 2010.

Contested decision

11. On 12 November 2009, the Head of OCHA-OPT called the Applicant in for a meeting to discuss the 2010 cost plan for her unit. In the presence of the Finance Officer, he informed her that her post would be abolished in 2010.

12. By memorandum dated 13 November 2009, the Officer-in-Charge, Human Resources Unit ("OiC/HRU"), OCHA-Geneva, confirmed to the Applicant that further to the revised 2010 cost plan for OCHA-OPT, "the post of Humanitarian Affairs Officer, against which [she had been] recruited, [was] being abolished as of 30 April 2010".

13. By email dated 16 November 2009, the Applicant reacted to the above-mentioned memorandum by requesting, "in order to start planning", "all the relevant information regarding [her] entitlements, including termination indemnity…".

14. By email dated 17 November 2009, the OiC/HRU, OCHA-Geneva, responded to the Applicant that she was not entitled to a termination indemnity because "this is not a [t]ermination of [c]ontract, but rather an expiration of contract on 31 May [sic] 2010" in accordance with provisional staff rule 9.6, which provides that: "Separation as a result of … expiration of appointment … shall not be regarded as a termination within the meaning of the Staff Rules."

15. In another email dated 17 November 2009, the OiC/HRU, OCHA-Geneva, further assured the Applicant that her candidatures to other posts within OCHA would be taken into consideration.

16. Further to the contractual reform involving the abolition of the 200-series appointments, the Applicant's project personnel contract expiring on 31 December 2009 was converted, with effect from 1 January 2010, to a fixed-term appointment and extended to cover the remainder of the period until the abolition of her post. The new letter of appointment, which was issued on 24 December 2009, stipulated (emphasis in original):

> This appointment is for a fixed-term of **one year** from the effective date of appointment [1 January 2010]. It therefore expires without prior notice on **30 April 2010.**

The Applicant signed it on 4 January 2010 and added a handwritten note stating: "I sign this understanding that my post has been abolished effective 30 April 2010."

Appeal

17. On 12 January 2010, the Applicant wrote to the Secretary-General to request a management evaluation of:

a. The decision, communicated orally to her on 12 November 2009 by the Head of OCHA-OPT and in writing on 13 November 2009 by the OiC/HRU, OCHA-Geneva, to abolish her post as of 30 April 2009;

b. The decision communicated to her on 17 November 2009 by the OiC/HRU, OCHA-Geneva, "which changes arbitrarily the category of [her] termination from 'abolition of post' to 'expiration of contract', and thus not entitling [her] to a termination indemnity".

18. By letter dated 26 February 2010, the Under-Secretary-General for Management informed the Applicant that upon reviewing her request for management evaluation, the Secretary-General had decided to uphold the contested decision on the grounds that it was consistent with the Staff Rules and with her terms of appointment.

19. Under cover of a memorandum dated 24 March 2010, entitled "Your forthcoming separation" and emailed to the Applicant on 26 March 2010, the Human Resources Unit, OCHA-Geneva, transmitted to the Applicant the various administrative forms to be completed "to facilitate her separation … effective 30 April 2010". The email specified that should the Applicant be selected for another post before the end of her appointment, her separation would not take place.

20. On 9 April 2010, the Applicant filed two applications with the Tribunal, the first one to appeal the decision to abolish her post and separate her effective 30 April 2010, and the second one to request the Tribunal to suspend the contested decisions as an interim measure.

21. By Order No. 49 (GVA/2010) of 20 April 2010, the Tribunal rejected the application for suspension of action as an interim measure.

22. On 30 April 2010, the Applicant was separated from service.

23. On 12 May 2010, the Respondent filed his reply to the application on the merits and on 1 July 2010, the Applicant submitted observations thereon.

24. By Order No. 81 (GVA/2010) of 22 October 2010, the Tribunal directed the Respondent to file additional information on the circumstances surrounding

the decision to abolish the Applicant's post effective 30 April 2010, as well as on the advertisement in June 2010 of a P-4 post of Humanitarian Affairs Officer in OCHA-OPT.

25. The Respondent responded to the above-mentioned Order on 5 November 2010 and on 29 November 2010, the Applicant submitted comments.

26. The Tribunal held a substantive oral hearing on 5 April 2011. In light of Counsel for the Applicant's submissions at the hearing, by Order No. 39 (GVA/2011) the Tribunal directed the Respondent to provide additional information on the procedures for abolition of posts in OCHA and how these procedures were implemented in the Applicant's case. The Respondent filed and served his submission on 14 April 2011.

27. On 11 May 2011, the Tribunal held a second oral hearing during which the author of the contested decision, who was at the time the Head of OCHA-OPT, was heard and cross-examined by the Applicant. At the end of the hearing, the Tribunal ordered Counsel for the Applicant to submit in writing, within a week time, a list of additional questions she wished to ask to the witness.

28. By email dated 13 July 2011 addressed to the Registry and copied to Counsel for the Respondent only, the author of the contested decision provided the following clarification:

> I did receive the questions of [the Applicant] as well as the tribunal order through [Counsel for the Respondent] and did not receive them from the tribunal. Consequently at the time I did receive the questions and did answer I was not aware of the accompanying annexes.
>
> I received the attachments after June 3, after I submitted my responses to the tribunal.
>
> I now better understand question 4 which is referring to the budget line 304. The 30000 US $ was budgeted to allow the office to hire a film maker for a period up to 4 months in case it decided to produce a film to support the launch of the Consolidated Appeal in 2011 as per previous years. Such a person would have been recruited locally at an equivalent P4 level. Per comparison, a P4 internationally recruited costs an average of more than 16000 US $ per month.

> The office finally did not use this budget line and transferred 20000 US $ to the budget travel line at the time of the cost plan mid term review.

29. On 14 July 2011, the Registry forwarded the above-mentioned email to Counsel for the Applicant.

30. From 13 September to 17 October 2011, the parties unsuccessfully attempted to settle the matter informally.

31. On 29 November 2011, the Tribunal held a third hearing during which the author of the contested decision was heard and cross-examined by the Applicant for the second time. At the end of the hearing, the Judge ordered the parties to file written closing statements by 13 December 2011.

32. On 13 December 2011, Counsel for the Respondent filed her closing statement, whereas Counsel for the Applicant filed, without leave from the Tribunal, a "Reply to email of 1[3] July 2011 concerning the consultancy budgeted in the 2011 cost plan". In this submission, Counsel for the Applicant stated that "Applicant … was not aware of this email at the time of the 29 November 2011 hearing", although it had been forwarded to her on 14 July, and raised issues and allegations in this respect not previously made, including at the hearing.

33. On 14 December 2011, Counsel for the Applicant filed her closing statement. On the same day, she also filed, without leave from the Tribunal, "additional evidence not previously available to Applicant" in connection with the above-mentioned email of 13 July 2011.

Parties' submissions

34. The Applicant's principal contentions are:

a. The decision to abolish her post was not motivated by a legitimate organizational interest, but was in fact made in bad faith;

b. The Respondent's contention that the abolition of her post was due to a "revised strategic office plan" is not supported by the facts. All

indicators in 2008 and until 12 November 2009—including the February 2008 note from the then Under-Secretary-General for Humanitarian Affairs, the conclusions of the office retreat held in July 2008, and the email dated 30 September 2008 from the Head of OCHA-OPT—pointed to continued functioning of the advocacy unit with no staff reduction;

c. A cost plan is a mere financial planning tool, not a strategic office planning mechanism. Accordingly, the 2010 cost plan could not be used as a legitimate process to abolish the Applicant's post. A no-growth policy generally means no new posts, not abolition of posts. OCHA-OPT was not in any financial difficulties requiring the abolition of posts;

d. Even assuming that a cost plan could be a substitute for a strategic plan on advocacy in OCHA-OPT, then the question is raised why the Applicant, as chief of the unit, was totally excluded from the preparation of the 2010 cost plan. Shrouding the decision to restructure the Applicant's unit in secrecy until the announcement made to her of the abolition of her post shows bad faith and unfair dealings by the Administration;

e. The decision to abolish the Applicant's post was in breach of the express promise made by the Head of Office in September 2008 when discussing the 2009 cost plan that the advocacy unit "would continue at the same level";

f. The advertisement by OCHA of a P-4 Humanitarian Affairs Officer in June 2010, just over a month after the Applicant's departure, demonstrates that the decision to abolish her L-4 Humanitarian Affairs Officer post, supposedly due to funding constraints, was made in bad faith;

g. The advertisement towards the end of 2010 of a six-month consultancy for an Advocacy/Communication Officer in OCHA-OPT further shows that there was no genuine objective to mainstream the advocacy functions or that doing so necessitated abolishing the Applicant's post;

h. In the context of the strained relationship between the Applicant and the Head of Office, it can be fairly implied that the decision to abolish the Applicant's post was in fact motivated by extraneous factors;

i. The decision to separate the Applicant is further tainted by the Respondent's failure to make a good faith effort, as he was legally obliged pursuant to former staff rule 109.1(c), to find the Applicant a suitable alternative post, at a time when she was pregnant and in need of maternity leave, health insurance and income. In its Judgment No. 1389, the former United Nations Administrative Tribunal took note of "the Administration's total disregard of its obligations under [former] staff rule 109.1(c)(i), which stipulates that, when a post is abolished, the Administration must make efforts to place the staff member concerned on a new post …";

j. The Organization's failure to make any attempt to find the Applicant an alternative suitable post is due to discriminatory reasons, including her personal situation and other unlawful extraneous factors;

k. Even if the Administration was not obliged to make a good faith effort to find the Applicant an alternative post, such an obligation was created by the statement of the Under-Secretary-General for Management in the management evaluation that: "OCHA has made a good faith effort to fulfil its obligations under the Staff Rules … and has stated its intention to continue its efforts to assist you in finding another suitable position";

l. The Applicant's letter of appointment indicates a one-year contract effective 1 January 2010 and that the Applicant would be entitled to a termination indemnity should her appointment be terminated for any reason. The Respondent should honour its written commitments and express promises to the Applicant as indicated in the letter of appointment. The Respondent cannot claim that the Applicant's contract is being terminated due to the abolition of her post and at the same time claim that her contract is not being extended;

m. In its Judgment No. 1389, the former Administrative Tribunal noted that: "[M]aking the date of abolition of the post, which confers entitlement to an indemnity if it interrupts a contract, coincide with the expiration of the applicant's fixed-term appointment, which does not confer entitlement to an indemnity, in the present case, creates at least the appearance of a lack of good faith …". It further held that, in this case, the Administration's action was a violation of the staff member's right to fair and equitable treatment;

n. The Respondent failed to comply with his obligation to consider the Applicant for conversion to permanent appointment, although she was eligible pursuant to ST/SGB/2009/10.

35. The Respondent's principal contentions are:

a. It was by error that the Applicant's letter of appointment issued on 24 December 2009 stipulated: "This appointment is for a fixed-term of one year from the effective date of appointment [1 January 2010]. It therefore expires without prior notice on 30 April 2010." As confirmed by the Tribunal in its Order on the request for suspension of action, the Applicant's separation did not have to be effected by terminating her appointment rather than by allowing it to expire;

b. The decision to abolish the Applicant's post was lawful. Staff regulation 9.3(a)(i) gives the Secretary-General discretionary authority to abolish posts. The Applicant did not provide evidence that the decision to abolish her post was based on improper motives;

c. The OCHA field office structure is reflected in a yearly cost plan establishing the resources required to execute the Office's strategic work plan from extra-budgetary resources. It is true that a cost plan is not a strategic planning mechanism but it translates the strategic framework into action. OCHA field offices are located in conflict, post-conflict or crisis areas where the situation changes rapidly; therefore, office structure must be flexible and adjusted as needs arise. In the present case, the

Under-Secretary-General for Humanitarian Affairs decided in 2008 that OCHA-OPT should reorient its activities and focus on emergency coordination, access and protection activities;

d. Furthermore, in late 2009, OCHA management indicated that the OCHA-OPT cost plan should be further reduced, especially in terms of staffing costs, and suggested that the allocation of resources focus better on achieving OCHA priorities, i.e., the improvement of the coordination system. It also stressed the need for OCHA-OPT to quickly mainstream some advocacy functions so as to integrate them better within coordination/protection and research/reporting units. Consequently, the position of Chief of Advocacy became redundant;

e. The position of Humanitarian Affairs Officer at the P-4 level that was advertised in June 2010 in the OCHA compendium is a generic "roster Humanitarian Affairs Officer position" focusing on coordination, protection issues and fundraising. It is not an advocacy position which would have been advertised in the Public Information Officer compendium. Furthermore, that position is an upgrade of a former P-3 position.

36. The Respondent deemed it unnecessary to respond to the other arguments of the Applicant, on the ground that these had already been addressed in the Tribunal's Order No. 49 (GVA/2010) rejecting the Applicant's request for suspension of action.

Considerations

37. The case at hand raises the following issues:

1) Whether the decision to abolish the Applicant's post was motivated by extraneous factors or by genuine operational needs and strategic choices within the remit of the Organization;

2) Whether the Applicant's appointment was terminated or whether it expired;

3) Whether OCHA was obliged to make a good faith effort to find an alternative suitable post for the Applicant;

4) Whether the Applicant was eligible for consideration for conversion to a permanent appointment and if so, whether the Respondent failed to comply with his obligation to consider her.

38. As regards the first issue, the Applicant's main contention is that, in the context of the strained relationship between her and the Head of OCHA-OPT, the abolition of her post was motivated by extraneous factors and aimed at getting rid of her, rather than based on the genuine needs of the Organization.

39. In *Rosenberg* UNDT/2011/045, the Tribunal held that:

> 14. There is a principle that is widely followed by labour courts and tribunals internationally. An employer is entitled to re-organise the work or business to meet the needs and objectives set by the employer at a particular time. It is not for the labour court or tribunal to dictate to an employer how the employer should run the business or undertaking. The court will not interfere with a genuine organisational restructuring even though it may have resulted in the loss of employment for the complainant. However, the court would be vigilant to guard against restructuring and reorganisation decisions which are made for the ulterior purpose of disadvantaging the individual applicant in a case before it. Reorganising and restructuring of the workplace should not be used as a mechanism for getting rid of an employee whom management may regard as being troublesome or whose continued presence was no longer deemed desirable …

40. Similarly, ILOAT Judgment No. 2933 (2006), as quoted in *Rosenberg*, indicates:

> According to firm precedent, decisions concerning the restructuring of an international organisation's services, such as a decision to abolish a post, may be taken at the discretion of its executive head and are consequently subject to only limited review. For this reason, while it is incumbent upon the Tribunal to ascertain whether such a decision has been taken in accordance with the rules on competence, form or procedure, whether it rests on a mistake of fact or of law, or whether it constituted abuse of authority, it may not rule on its appropriateness, since it may not supplant an organisation's view with its own …

41. In the case at hand, the Tribunal can only reiterate that the Secretary-General has wide discretion in the organization of work. It is not for the Tribunal to substitute its own views to that of the Secretary-General on how to organize work and meet operational needs. Decisions in this sphere may be set aside only on limited grounds, for example if the competent authorities breached procedural rules, or if discretion was exercised in an arbitrary, capricious or illegal manner.

42. As the Appeals Tribunal held in *Asaad* 2010-UNAT-021,

> [T]he Administration's discretionary authority is not unfettered. The jurisprudence of the former [Administrative] Tribunal provides that the Administration must act in good faith and respect procedural rules. Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration … We would add that its decisions must not be based on erroneous, fallacious or improper motivation.

43. The Appeals Tribunal further held in *Asaad*, and also in *Hepworth* 2011-UNAT-178, that the burden of proving improper motivation lies with the staff member contesting the decision.

44. The Tribunal notes that in the 2010 work plan initially submitted by OCHA-OPT in September 2009, the Applicant's post was maintained. However, on 1 October 2009, the Head of OCHA-OPT received feedback from OCHA senior management stating that (emphasis added):

> *There is a feeling here that the cost plan could be reduced further, particularly staff costs*. In particular, it was suggested that the allocation of resources should focus better on achieving OCHA priorities. As per the OCHA strategic framework and [OPT] work plan 2010, these would be the reinforcement of coordination with operational partners and donors with the goals to create a more enabling humanitarian environment and improve the coordination system. *In line with what precedes, it was also suggested to mainstream some of the advocacy functions, so as to integrate them better within the coordination/protection and research/reporting units. We need to move quickly on this* …

45. It was further to these instructions that the Head of OCHA-OPT took the decision to abolish the Applicant's post. This decision was endorsed by the Director of the Coordination Response Division, OCHA-New York, as is reflected in his memorandum of 13 October 2009 to the Under-Secretary-General for Humanitarian Affairs, entitled "Request for Cost Plan 2010 approval for the

OCHA office in the Occupied Palestinian Territory", the relevant parts of which reads (emphasis added):

> The Cost Plan 2010 amounts to USD6,481,177, which is significantly less (… -6.12%) than the cost plan approved in February 2009. The cost plan 2010 builds up on the work and cost plans of the two previous years, which put the emphasis on: the *strengthening of OCHA's coordination capacity, particularly with regard to protection and access; the reinforcement of the sub-office in Gaza; and the empowerment of National Staff*. The cost plan 2010 also aims at giving [OCHA-OPT] the capacity to fulfil OCHA's corporate objectives, as defined in the strategic framework 2010-2013 and reflected in the OPT work plan 2010. Thus particular attention was given to ensuring that resources were allocated in priority to the creation of a more enabling humanitarian environment and the establishment of a more effective humanitarian coordination system in the OPT. *In line with what precedes, the cost plan 2010 also foresees to progressively mainstream some of the advocacy functions, so as to integrate them better within the coordination and analysis tasks of OCHA in the OPT*.
>
> …
>
> *To reflect the increasing role of OCHA with regard to coordination and protection, the office will be slightly reorganized in 2010*. The following realignments are proposed for 2010:
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> …
>
> *3. Budget the (P-4) position of Senior Advocacy Officer for 4 months only, as these functions will be progressively integrated in coordination and analysis units*;

46. The Head of OCHA-OPT testified on two occasions before the Tribunal and also provided written answers to the Applicant's questions. He maintained that the decision to abolish the Applicant's post was motivated by strategic choices, in particular the mainstreaming—or integration—of advocacy activities into the other activities of OCHA-OPT aimed at giving more emphasis to quiet, humanitarian diplomacy with authorities and key interlocutors, as opposed to promoting public awareness and public information for "sympathizers" which had been the focus of the Applicant's activities. He stated that when he was appointed Head of OCHA-OPT in June 2008, he was tasked with reinforcing the coordination activities of the office, and that it was in this context that the integration of advocacy into the functions of staff who usually led discussions with key interlocutors, i.e., staff dealing with coordination, protection, and access issues, took place.

47. In response to the Applicant's claim that she was never presented with a plan for mainstreaming advocacy in the office and was not aware of the so-called mainstreaming, the former Head of OCHA-OPT explained that this was an ongoing process and that mainstreaming meant integrating advocacy into other OCHA core functions, particularly coordination.

48. In her oral pleadings and cross-examination of the former Head of OCHA-OPT, the Applicant focused on defending that the so-called mainstreaming of advocacy activities in fact never occurred. However, she did not call any witnesses to support her allegation. The Tribunal finds that it was not presented with specific and convincing evidence to doubt the Respondent's assertions in this respect.

49. To contest the abolition of her post, the Applicant puts forward other arguments.

50. She claims that all indicators in 2008 and until 12 November 2009—including the February 2008 note from the then Under-Secretary-General for Humanitarian Affairs, the conclusions of the office retreat held in July 2008, and the email dated 30 September 2008 from the Head of OCHA-OPT—pointed to continued functioning of the advocacy unit with no staff reduction. The Tribunal notes from the sequence of events that the situation changed between 2008 and 2009 and the Applicant erroneously relies on facts and events which were relevant for the 2009 cost plan but have no bearing on the 2010 cost plan.

51. The Applicant further claims that the decision to abolish her post was in breach of the express promise made by the Head of Office in September 2008 when discussing the 2009 cost plan that the advocacy unit "would continue at the same level". Even assuming that a promise was indeed contained in the email in question, the Tribunal notes that it pertains to the 2009 cost plan and is therefore irrelevant as far as the 2010 cost plan is concerned.

52. The Applicant questions why, as chief of unit, she was totally excluded from the preparation of the 2010 cost plan and claims that shrouding the decision to restructure her unit in secrecy until the announcement made to her of the abolition of her post shows bad faith and unfair dealings by the Administration. In this respect, the Tribunal recalls first that in the initial 2010 work plan submitted

in September 2009, there was no plan to abolish the Applicant's post. It was further to the feedback received from OCHA senior management on 1 October 2009 that the decision to abolish the Applicant's post was taken. The Tribunal notes that there was only one month between the submission of the revised 2010 cost plan for approval on 13 October 2011 and the notification of the contested decision to the Applicant on 12 November. Such sequence of events does not reveal any bad faith or reprehensible conduct by the Administration, which on the contrary appears to have taken swift action to notify the Applicant of the contested decision.

53. In support of her claim that the decision to abolish her post was motivated by extraneous factors, the Applicant further refers to three positions created or funded in OCHA-OPT after her separation on 30 April 2010.

54. First, she contends that the advertisement by OCHA of a P-4 Humanitarian Affairs Officer in June 2010, just over a month after her departure, demonstrates that the decision to abolish her L-4 Humanitarian Affairs Officer (Advocacy) post, supposedly due to funding constraints, was made in bad faith. The Tribunal notes however that funding constraints were not the main reason for abolishing the Applicant's post, which was motivated by shifting priorities in the objectives of OCHA-OPT. Having reviewed the functions of the post thus advertised, the Tribunal finds that the advertisement of this post has no relevance to the Applicant's case.

55. Second, the Applicant raised subsequently that the advertisement towards the end of 2010 of a six-month consultancy for an Advocacy/Communication Officer in OCHA-OPT further shows that there was no genuine objective to mainstream the advocacy functions or that doing so necessitated abolishing her post. In this respect, the Tribunal notes that one year had passed between the decision to abolish the Applicant's post and that to advertise this six-month consultancy. Even if the advertisement of this consultancy would show *post facto* that the abolition of the Applicant's post was not a wise operational choice, it certainly does not establish that the contested decision, taken a year before, was made in bad faith.

56. Finally, in May 2011, in written questions to the former Head of OCHA-OPT, the Applicant raised the issue of budget line 304 in the 2010 revised cost plan, which reads, in the budget narrative: "Consultants (304) - Consultant for Advocacy at P4 level for 4 months duration".

57. Under "Overview", the budget line reads:

> **304 Consultants**
> Consultants – Institutional Fees and Charges 30,000

58. The Applicant questions why this line was included in the budget if, as testified by the former Head of OCHA-OPT, "mainstreaming the advocacy activities was 'concluded' by October 2009".

59. The Tribunal notes that in the October 2010 request for cost plan approval, that is, at a time when it had already been decided to abolish the Applicant's post, a different explanation was provided for budget line 304, namely, "[a] total increase of USD 30,000 corresponding to the recruitment of a CAP [Consolidated Appeal Process] Consultant for a period of 4 months at the P-4 level". This in turn corresponded to what had been indicated in the 2010 work plan dated 19 September 2010, that is, before it was decided to abolish the Applicant's post was taken. This sequence of events might be enough to conclude that the existence of this provision in the cost plan is unrelated to the contested decision and in no way proof that it was made in bad faith.

60. Additionally, in an email dated 13 July 2011 addressed to the Registry, the Head of OCHA-OPT provided the following explanation:

> The 30000 US $ was budgeted to allow the office to hire a film maker for a period up to 4 months in case it decided to produce a film to support the launch of the Consolidated Appeal in 2011 as per previous years. Such a person would have been recruited locally at an equivalent P4 level. Per comparison, a P4 internationally recruited costs an average of more than 16000 US $ per month.
>
> The office finally did not use this budget line and transferred 20000 US $ to the budget travel line at the time of the cost plan mid term review.

61. Although this email was forwarded by the Registry to the Applicant's Counsel on 14 July 2011, she only reacted to it on 13 December 2011, by filing without leave from the Tribunal a "Reply to email of 1[3] July 2011 concerning

the consultancy budgeted in the 2010 cost plan". This was five months after the email had been shared with her, two weeks after the last hearing, and shortly after the Respondent had already filed his closing statement. In this submission, the Applicant claimed with little regard for the truth that she "was not aware of this email at the time of the 29 November 2011 hearing". Then on 14 December 2011, the Applicant filed yet another submission in this respect, again without leave from the Tribunal, claiming that on that day, she had "discovered new evidence directly relevant to this issue", i.e., Guidelines for the preparation of cost plans for 2010: Field Offices". She did not explain how she had become aware of this new evidence.

62. The above-described circumstances would be sufficient to dismiss the Applicant's evidence of 13 and 14 December 2011 as inadmissible because its admission would damage the integrity of the proceedings.

63. This being said, the Tribunal also considers that this evidence lacks probative value since it provides no proof, nor does the Applicant allege, that someone was hired to replace her with the budgeted funds.

64. In conclusion, and keeping in mind the Applicant's burden of proof, the Tribunal was not presented with evidence that persuaded it that the abolition of the Applicant's post was manifestly unreasonable, motivated by ill-will or a calculated scheme to remove her from the office and that warranted the Tribunal's interference with the Respondent's discretion. The abolition of the Applicant's post appears to be the result of an acceptable exercise of discretionary power in light of the Organization's strategic choices and the instructions received by the Head of OCHA-OPT on 1 October 2009.

65. It is understandable that the Applicant, a staff member with an unblemished record, should feel aggrieved at a shift in focus whereby she lost the opportunity of continued employment after seven years of service. However, the Respondent was entitled to reorganize advocacy activities as he deemed fit to deliver the programme. In the absence of evidence that the decision to abolish the Applicant's post was aimed at achieving the ulterior purpose of excluding the Applicant from continued employment, this claim must fail.

66. The second issue the Tribunal needs to decide is whether the Applicant's appointment was terminated or whether it expired.

67. The Applicant avers that her contract was terminated since her letter of appointment stated that it was "for a fixed-term of **one year** from the effective date of appointment [1 January 2010]" (emphasis in original), to wit, until 31 December 2010, whereas she was separated on 30 April 2010.

68. However, the Tribunal notes that the same letter of appointment also stated in the next sentence (emphasis in original): "It therefore expires without prior notice on **30 April 2010**."

69. The clear contradiction between these two sentences can only be the result of a clerical mistake and the facts of the case, as previously described, show unequivocally that the error was in the first sentence.

70. In the present case, the Tribunal sees no reason to depart from the finding contained in Order No. 49 (GVA/2010) on the Applicant's application for suspension of action:

> 25. In her observations on the Respondent's reply, Counsel for Applicant argues at length that the Applicant's case is not one of expiration or non-renewal of contract, but one of termination. While it is undisputed that the Applicant's separation is due to the abolition of her post, this is not to say that her separation had to be effected necessarily by terminating her appointment, as the Applicant implies. Given that the Applicant's fixed-term appointment was due to expire on 31 December 2009 when it was decided to abolish her post, it was well within the Administration's discretion to either allow it to expire then or to extend it, as it did, until 30 April 2010.
>
> 26. The Applicant relies on the contradiction in her letter of appointment, which provides that such appointment is "for a fixed-term of one year from [1 January 2010]" and "therefore expires without prior notice on 30 April 2010", to claim that, in fact, her appointment went beyond 30 April 2010 and that, by separating her on 30 April 2010, the Administration is terminating her appointment. In the circumstances, however, there is no doubt that the Applicant's appointment was due to expire on 30 April 2010, despite the oversight in her letter of appointment. When she signed the said letter of appointment, the Applicant was well aware of the decision to abolish her post effective 30 April 2010, as communicated to her on 12 and 13 November 2009. She was also well aware of the fact that the Administration had decided to let

> her appointment expire, as communicated to her on 17 November 2009 ...

71. The third issue before the Tribunal is whether OCHA was obliged to make a good faith effort to find an alternative suitable post for the Applicant. The Applicant claims that such an obligation existed pursuant to former staff rule 109.1(c).

72. However, rule 109.1(c) was part of the 100 series of the Staff Rules which were in force until 30 June 2009 and which never applied to the Applicant who, at the time, held a 200-series appointment.

73. At the material time, the 100 series and 200 series of the Staff Rules had been abolished and the Applicant held a fixed-term appointment governed by the provisional Staff Rules promulgated in ST/SGB/2009/7. Provisional staff rule 9.6, which was applicable at the time and reproduced most of former staff rule 109.1(c), stipulates:

> (e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:
>
> (i) Staff members holding continuing appointments;
>
> (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
>
> (iii) Staff members holding fixed-term appointments.

74. It is clear from a plain reading of the above-quoted rule that only staff members whose appointments are terminated may be entitled to invoke this provision. This is not the case of the Applicant, whose fixed-term appointment was allowed to expire. Pursuant to provisional staff rule 9.4 then applicable, "[a] temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment".

75. The Applicant further avers that even if the applicable rules did not oblige the Administration to make a good faith effort to find her an alternative post, such an obligation was created by the statement of the Under-Secretary-General for

Management in the management evaluation that: "OCHA has made a good faith effort to fulfil its obligations under the Staff Rules … and has stated its intention to continue its efforts to assist you in finding another suitable position."

76. The Tribunal, however, does not see in this statement, especially when read in context, any promise likely to have created a right for the Applicant which the applicable rules did not confer on her.

77. In view of the foregoing, the Tribunal must dismiss the Applicant's claim that OCHA was obliged to make a good faith effort to find an alternative suitable post for her.

78. As regards the fourth issue raised by this case, the Applicant claims that the contested decision breached her terms of appointment because the Administration failed to comply with its obligation to consider her for conversion to a permanent appointment. However, pursuant to provisional staff rule 13.4(b) which was applicable at the material time, only staff members who held 100-series fixed-term appointments on or before 30 June 2009 could be eligible for consideration for a permanent appointment. As previously mentioned, the Applicant only held 200-series appointments before 30 June 2009 and accordingly she was not eligible.

79. In her closing statement filed on 14 December 2011, the Applicant made new claims.

80. First, she requested an award of damages in the amount of USD55,000 representing what the Applicant would have received had she been extended for a two-week period to allow her to exercise her maternity leave, and payment of all medical bills incurred as a result of being cut off from health insurance. While it may be unfortunate that the Respondent did not see fit to extend (at its own initiative, since the Applicant did not request it) the Applicant's contract to allow her to exercise her maternity leave, the Tribunal must note that there was no obligation on the Respondent to do so. The Tribunal further notes that at the time the contested decision was taken and notified of the contested decision, OCHA was not aware of the Applicant's pregnancy.

81. Second, the Applicant requested two months' net pay for failure to complete a performance appraisal report and retroactive completion of her performance appraisal report for the 2009-2010 cycle. This is the first time the Applicant raises the issue of her performance appraisal report. This issue was neither raised in her request for management evaluation, nor at any stage of the proceedings before the Tribunal. It is therefore not receivable.

Conclusion

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

The application is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 13th day of January 2012

Entered in the Register on this 13th day of January 2012

(*Signed*)

Anne Coutin, Officer-in-Charge, Geneva Registry