UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/067
Judgment No.: UNDT/2012/185
Date: 29 November 2012
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

SAMUEL THAMBIAH, O.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Michael Ford Shanahan

Counsel for Respondent:
Jorge Ballestero, UNICEF

Introduction

1. The Applicant, a former staff member of the United Nations Children's Fund ("UNICEF"), contests the decision to separate her from service due to the abolition of her post, the decision to separate her while she was on sick leave, and the decisions not to select her for posts for which she had applied.

2. She asks the Tribunal to rescind the decision to separate her from service, and to order that she be reinstated with retroactive effect. She also asks the Tribunal to order the Respondent to grant her a permanent appointment. Furthermore, she seeks compensation for the moral injury she suffered and reimbursement of the legal fees she incurred.

Facts

3. The Applicant, a Sri Lankan national, joined UNICEF in May 2001 as a Publicity and Promotion Officer in the Private Fundraising and Partnerships Division ("PFP"), based in Geneva. Her initial fixed-term appointment was regularly extended and her last extension was due to expire on 31 May 2012.

4. On 22 October 2010, the Director of PFP convened a meeting with staff and announced the restructuring of the PFP Cards and Gifts Section which was to be implemented by the end of April 2011.

5. By letter of 1 December 2010, the Director of PFP informed the Applicant that, "due to the necessities of service" her post was slated for abolition with effect on 31 May 2011. In line with the procedures applicable to staff on abolished posts, she was invited to apply for available posts and advised that her name would be included on lists of applicants and/or shortlists. In the event that her applications were not successful, she would be separated from service "upon expiration of an exceptional 6-month notice period" on 31 May 2011.

6. At the end of 2010 and in the first half of 2011, the Applicant applied unsuccessfully for a number of posts within and outside PFP. Also during the first

half of 2011, she enquired several times about the outcome of these selection processes, highlighting her qualifications and experience.

7. On 8 April 2011, the Applicant received a letter of separation with effect on 31 May 2011.

8. From 4 to 9 May 2011, the Applicant was placed on sick leave by her treating physician. As per a medical certificate dated 4 May 2011, she was to return to duty on 10 May and work on a half-time basis until 15 May 2011.

9. On 20 May 2011, she wrote to the Director of PFP complaining about her not being considered for posts for which she had applied and asking that the abolition of her post not be implemented on 31 May 2011.

10. The Director of PFP responded by email of 21 May 2011 explaining, *inter alia*, that recommendations to fill posts within PFP were being sent to the Division of Human Resources at the UNICEF headquarters in New York and that the process and timeline for review of post recommendations was outside the remit of PFP. She also identified specific steps which the Administration had taken in order to support staff on abolished posts. However, she stated, in the Applicant's case the date when her post would be abolished could not be deferred.

11. On Friday, 27 May 2011, the Applicant transmitted to the Administration a medical certificate dated 25 May 2011 from her treating physician, placing her on sick leave for two weeks. Upon its receipt, the Administration transmitted it to the Medical Services Section of the United Nations Office at Geneva ("UNOG") in order to determine, *inter alia*, whether or not her sick leave could be certified.

12. By email sent on Sunday, 29 May 2011, the Applicant requested management evaluation of the "[d]ecision by [the] Director [of] PFP … on 21 May 2011 that Applicant should look outside UNICEF and thereby unilaterally separating Applicant's services on 31 May 2011".

13. On 30 May 2011, she filed with the Tribunal an application for suspension of action which was rejected by Order No. 90 (GVA/2011) issued on 31 May 2011.

14. Meanwhile, by email of 30 May 2011, the Applicant was advised that the UNOG Medical Services Section required her to undergo a medical examination by an independent practitioner with a view to determining whether or not her sick leave could be certified, and she was thus requested to promptly report to the Section. By emails of 1 and 9 June 2011 respectively, the Administration reiterated this request and, on 23 June 2011, the Applicant was reminded that the certification process was still pending.

15. The Applicant eventually reported to the UNOG Medical Services Section on 14 July 2011, following which an UN Medical Officer certified her sick leave up until 31 May 2011.

16. By letter of 12 July 2011 sent by email, that the Applicant admits in her application to have been "delivered" on 14 July 2011, she was informed, in response to her request for management evaluation, that the UNICEF Deputy Executive Director had decided to uphold the contested decision. The letter referred to two annexes which were not attached to the email.

17. By email of 18 July 2011 referring to the UNICEF response to the Applicant's request for management evaluation, the Applicant was provided with the two annexes mentioned in the letter of 12 July 2011.

18. Also on 18 July 2011, newly appointed Counsel for the Applicant submitted another request for management evaluation of the decision to separate her from service, explaining that this request "supplement[ed] and incorporate[d] by reference [that] filed by the Applicant on 29 May 2011".

19. By letter of 4 August 2011, the Chief of the Policy and Administrative Law Section at UNICEF responded, explaining that the decision to separate the Applicant from service had already been considered, and that a response to the initial request for management evaluation had been issued to her on 12 July 2011

and received by her on 14 July 2011. Accordingly, Counsel for the Applicant's request of 18 July 2011 was rejected.

20. In August 2011, the Applicant submitted a claim to the Advisory Board on Compensation Claims in accordance with Appendix D to the Staff Rules and Regulations, which provides for the payment of compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations. As at the date of the hearing of 26 November 2012 (see paragraph 26 below), the Applicant had not received a decision on this claim.

21. On 17 October 2011, the Applicant filed with the Tribunal the application which forms the subject of the present Judgment. The Respondent submitted his reply on 18 November 2011 and, a few days later, he filed under seal several documents relating to the selection processes to which the Applicant had taken part.

22. By motion filed on 9 December 2011, the Applicant requested the Tribunal to order that the case be transferred to the Nairobi Registry and that the Respondent produce documentary evidence. He also sought leave to file a rejoinder. After receiving the Respondent's comments on the requested transfer, the Tribunal rejected the motion for change of venue by Order No. 146 (GVA/2012) of 10 October 2012.

23. By Order No. 147 (GVA/2012) of 11 October 2012, the parties were instructed to produce evidence confirming the date when the emailed letter of 12 July 2011 containing the response to the Applicant's request for management evaluation was received. The Respondent and the Applicant complied with this instruction on 12 and 18 October 2012, respectively.

24. In Order No. 157 (GVA/2012) of 7 November 2012, the Tribunal stated that it was of the view that disclosure of the documents requested in the motion of 9 December 2011 was not necessary at that stage.

25. By motion filed on 14 November 2012, the Applicant sought leave to call four witnesses, namely her two treating physicians, a former UNICEF Human

Resources Officer and a named individual. The motion was rejected by Order No. 163 (GVA/2012) of 19 November 2012.

26. On 26 November 2012, the Tribunal held a hearing which Counsel for the Applicant and the Applicant attended in person; Counsel for the Respondent participated by telephone from New York.

Parties' submissions

27. The Applicant's principal contentions are:

Admissibility

a. The Applicant submitted her request for management evaluation on 29 May 2011 without being assisted by counsel. The Administration's "incomplete" response to her request was sent on 14 July 2011 without the relevant annexes but she "cannot offer any affirmative evidence that she did receive [this response] prior to 18 July 2011, as no such evidence exists in her possession to show that she did not open/read it until on or about 18 July". The Respondent bears the burden of proving that she received it on 14 July 2011. On 18 July 2011, her newly appointed Counsel submitted a "supplemental" request setting out additional grounds to challenge the contested decision and the final response to her supplemental request was received on or about 4 August 2011. As the Applicant filed her application with the Tribunal within 90 days of her receipt of the Administration's final response, her application is receivable;

b. The decision to slate her post for abolition conveyed to her on 1 December 2011 is distinct from the decision to abolish her post;

c. Staff members were repeatedly assured that, in the event that selection processes were not completed by the end of April 2011, the abolition of their posts would be deferred and, at numerous staff association meetings, the Organization made promises that contracts of

those staff members who had not been reassigned would be extended. Further, the abolition of the posts of two of the Applicant's colleagues was postponed until completion of the restructuring. Her separation from service was therefore premature and unlawful;

Merits

d. The abolition of posts was not undertaken in a transparent and fair manner. UNICEF did not make sufficient efforts to secure alternative employment for the Applicant and failed to treat her with due care, though she was entitled to the rights and benefits conferred to staff on abolished posts under UNICEF administrative instruction CF/AI/2010-001 (Separation from service);

e. The selection processes to which the Applicant took part were not conducted in a fair and transparent manner and they were tainted by irregularities, discrimination and bias. She was not given due consideration. She submitted more than 30 applications for posts in the new PFP structure as well as in other units within UNICEF but was not selected for any post, whereas colleagues from developed European countries or members of the UNICEF Geneva Staff Association, who had significantly less experience than her, were. It is difficult to believe that, after 10 years of satisfactory service with UNICEF, she was unsuitable for any position. This is illustrated by the fact that she was not shortlisted for posts for which she was qualified and it is only after she complained about the lack of fairness in the selection process that she was invited for interviews and shortlisted for positions which were not fully within the scope of her experience. In addition, while her application for a P-3 post of Corporate Alliance Officer was unsuccessful, she was invited for an interview in relation to the filling of a P-4 post of Corporate Alliance Officer. Further, her requests for clarification on why she was not shortlisted for several posts were bounced from Geneva to the UNICEF headquarters in New York without anyone providing answers. Also, the reason put forward not to invite her for an interview in relation to a post of

Fundraising Specialist for which she clearly qualified is that the position needed to be filled hastily and she was on holiday, then on sick leave. Though the Administration repeatedly contacted her husband while she was on sick leave, it did not contact her when the opportunity to interview her for a job matching her competencies arose. Furthermore, in deciding not to shortlist her for any Communication posts, the Administration failed to properly assess her communication skills, and disregarded the fact that she held two degrees in communication, and that communication was mentioned in the job description for the post of Publicity and Promotion Officer which she held since 2001. Lastly, the fact that the Administration invited her to apply for posts and yet disregarded her applications violated her right to be treated with dignity. The Respondent should be ordered to disclose documents which are necessary to show that the non-selection decisions were tainted by prejudice;

f. The Applicant was wrongfully separated from service while on certified, service-incurred sick leave, whereas her medical condition was corroborated by an email from the UN Medical Officer who had seen her on 14 July 2011. Her separation while on sick leave contravened the case law of both the Dispute Tribunal and the former UN Administrative Tribunal, and it infringed section 3.9 of administrative instruction ST/AI/2005/3 (Sick leave) which provides that, when a staff member on a fixed-term appointment is incapacitated for service by reason of an illness that continues beyond the date of expiration of the appointment, he or she shall be granted an extension.

28. The Respondent's principal contentions are:

Admissibility

a. The Applicant is time-barred from contesting the lawfulness of the abolition of her post; she was notified on 1 December 2010 that her post would be abolished as of 31 May 2011 and she failed to request

management evaluation of this decision within 60 days, as required by staff rule 11.2(c);

b. The letter of 1 December 2010 was a formal notice of termination, as foreseen under sections 9.4 and 14 of UNICEF administrative instruction CF/AI/2010-001. No further decision was made regarding this matter. Therefore, the distinction drawn by the Applicant between the decision to slate her post for abolition and the decision to abolish her post is moot;

c. The way in which the Organization structures its operations, including the abolition of posts, is not subject to appeal by the Applicant as it does not affect her contractual rights;

d. In rejecting her application for suspension of action, the Tribunal considered in Order No. 90 (GVA/2011) that the email of 21 May 2011 did not contain any challengeable administrative decision;

e. The Applicant did receive the response to her initial request for management evaluation on 14 July 2011 and the 90-day time limit to file her application thus started to run as from this date. The annexes sent on 18 July 2011 did not contain information in addition to the clarification included in the letter of 12 July 2011;

Merits

f. According to section 8 of CF/AI/2010-001, a fixed-term appointment may be terminated due to the abolition of posts. The Applicant's separation from service took place in the context of the restructuring of PFP which required the abolition of 74 posts, including hers, and the creation of 36 new positions. The Administration has fully complied with its obligations under section 9 of CF/AI/2010-001 by keeping the Applicant informed in a timely manner of the restructuring, giving her six-month notice of termination, assisting her in identifying and applying for available and potentially suitable posts, and giving her

individual feedback on her interviews. There was no obligation for the Respondent to find and place her on a suitable post without her undergoing a selection process;

g. The Applicant was given full and fair consideration for the posts for which she applied. Of the 20 positions within PFP for which she was shortlisted, she withdrew her candidatures for four posts, she did not take the written tests for two of them and she did not come for the interviews for two other posts. Further, she was deemed not to meet the requirements for two Communication posts as she fell short of the required experience. Her candidature was thus considered for 10 PFP posts. She was interviewed but found not suitable for seven posts, one post was readvertised, one post had to be filled urgently and she was not invited for an interview due to her unavailability at the time. As for the remaining post, though she was invited for an interview, she did not reply to the invitation. Of the eight posts outside PFP for which she applied, one vacancy was cancelled, and she did not meet the requirements for the seven other posts, including six Communication posts and one P-4 Corporate Alliance Specialist post. The Applicant's reliance on the job description for her post of Publicity and Promotion Officer is wrong; she in fact quotes a portion of her personal history form. Additionally, when she protested that she did meet the requirements for one of the Communication posts, a Human Resources Officer offered to discuss the matter with her but the Applicant never contacted her. Further, the Applicant's contentions regarding irregularities in the selection of other staff members are unsubstantiated and immaterial to her case. Likewise, her allegations of discrimination and bias are unsupported by evidence and defamatory. On the contrary, the fact that several selection processes were delayed to accommodate the Applicant shows the Administration's good faith;

h. In spite of the Administration's requests made on 30 May, 1 and 9 June 2011, the Applicant did not report to the UNOG Medical Services

Section in order for an independent specialist to review her medical condition and determine whether or not her sick leave should be certified. Her absence from 27 to 31 May 2011 had thus to be treated as uncertified sick leave. It was not until 14 July 2011 that she reported to the Section; her sick leave was then retroactively certified from 27 to 31 May 2011 and her separation payment adjusted accordingly. As per the applicable provisions, the Applicant's separation was due to the termination of her appointment and not to the expiration of her appointment. Therefore, section 7.1 of UNICEF administrative instruction CF/AI/2009-009 (Sick leave)—which provides that, when a staff member on a fixed-term appointment is incapacitated for service by reasons of an illness that continues beyond the date of expiration of the appointment, he or she shall be granted an extension of the appointment after consultation with the Organization's medical doctor—is not applicable;

i. It has not yet been established whether or not the illness suffered by the Applicant is service-incurred. Once the Advisory Board on Compensation Claims issues its findings, the Administration will take action, as appropriate, to reconsider her case.

Consideration

Identification of the contested decisions

29. In her application, the Applicant identified the contested decision(s) as follows:

> Wrongful separation from service after irregular post abolition, and failure to assign Applicant to another post, and illegal separation while Applicant was on service-incurred sick leave, based on illegal, irregular or discriminatory/prejudicial grounds.

30. The Tribunal notes at the outset that the Applicant's written submissions fall short of identifying comprehensibly the decision(s) she seeks to contest.

31. In *Massabni* 2012-UNAT-238, the Appeals Tribunal held:

> 2. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.
>
> 3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

32. Likewise, the Dispute Tribunal has on many occasions stressed that an application must properly single out each and every administrative decision that an applicant wishes to contest in a clear and concise manner (see, *inter alia*, *O'Neill* UNDT/2010/203, *Simmons* UNDT/2011/085, *Ibrahim* UNDT/2011/115, *Lex* UNDT/2011/177), failing which the application could be deemed irreceivable (*Siaw* UNDT/2012/149).

33. In view of the above, and despite the lack of a clear and precise identification of the contested decision(s), the Tribunal considers, to do justice to the Applicant, that it has before it the following administrative decisions: the decision to separate her as a result of the abolition of her post, the decisions not to select her for posts for which she had applied, and the decision to separate her while she was on sick leave. These decisions will be examined in turn.

Decision to separate the Applicant from service as a result of the abolition of her post

34. It is not disputed that the Applicant was notified that her post was slated for abolition by letter of 1 December 2010 from the Director of PFP. In her application and at the hearing of 26 November 2012, the Applicant emphasized that she does not take issue with the 1 December 2010 decision to abolish her post. Rather, she challenges the decision conveyed on 21 May 2011 which

"uph[e]ld and carr[ied] through the abolition of her post on the initially suggested date".

35. To consider this claim, it is worth recalling the relevant legal provisions. Staff regulation 9.3(c) states:

> If the Secretary-General terminates an appointment, the staff member shall be given such notice … as may be applicable under the Staff Regulations and Staff Rules.

36. Further, staff rule 9.7(b) provides:

> A staff member whose fixed-term appointment is to be terminated shall be given not less than thirty calendar days' written notice of such termination or such written notice as may otherwise be stipulated in his or her letter of appointment.

37. Lastly, paragraphs 9.4, 9.11 and 14.2 of UNICEF administrative instruction CF/AI/2010-001 of 10 March 2010 respectively provide:

> 9.4 Notice of termination periods … will be served in writing to staff occupying posts identified for abolition.
>
> …
>
> 9.11 If the staff member has not been selected for a post, the effective date of separation is as follows:
>
> …
>
> (c) in the case of a staff member holding a fixed[-]term appointment which expires after the end of the notice period, the separation date is the date of expiration of the notice period.
>
> …
>
> 14.2 The following notice periods apply:
>
> …
>
> (b) fixed-term appointment: no less than 30 days written notice (or any other notice period stipulated in the letter of appointment)
> …

38. The letter of 1 December 2010 stated:

> I regret to inform you that due to necessities of service the post you currently encumber is among the posts slated for abolition with effect on 31 May 2011.
>
> …
>
> In accordance with [CF/AI/2010-001], during the period of notice served to you by this letter, you are expected to apply for all available posts for which you believe you have the required competencies.
>
> …
>
> Should you not be selected for a post, I regret to have to inform you that you will be separated from service, upon expiration of an exceptional 6 month[-]notice period, on 31 May 2011.

39. The language of the letter of 1 December 2010 is unambiguous. Contrary to the Applicant's claims, this letter did not express a mere "intention" to abolish her post and separate her from service with effect from 31 May 2011; it contained the notice of termination of her appointment, as foreseen by the above quoted provisions.

40. The Applicant's claim is premised on an untenable distinction between the decision "to slate her post for abolition" contained in the letter of 1 December 2010 and what she alleges to be a decision "to carry through the abolition" conveyed to her in the email of 21 May 2011. There is no basis for such distinction. On the contrary, paragraph 9.4 of CF/AI/2010-010 specifies that the notice of termination is served on incumbents of posts *identified* for abolition, as was done in the instant case by the letter of 1 December 2010. Neither the letter of separation of 8 April 2011—which explicitly referred to the letter of 1 December 2010 "informing [the Applicant] of the abolition of [her] post and providing [her] with a six-month notice period"—nor the email of 21 May 2011 contained a distinct administrative decision in this respect.

41. The Tribunal notes in passing that in a "Briefing Note" dated 18 March 2011 and addressed to the Director of PFP, the Applicant explicitly referred in the

title to the fact that her post would be abolished with effect from 31 May 2011 (see annex 13 to the application).

42. It follows from the above that the decision to abolish the Applicant's post and consequently to separate her from service was conveyed to her on 1 December 2010. It is undisputed that she failed to contest this decision within the 90-day time limit established by the Statute of the Tribunal (see paragraph 46 below) and she may not, therefore, challenge it before the Tribunal.

43. Regarding the Applicant's allegations that promises were made that the abolition of the concerned posts would be postponed, the Tribunal recalls, as it ruled in Order No. 163 (GVA/2012), that where a staff member claims that he or she had a legitimate expectation arising from a promise made by the Administration, such expectation "must not be based on mere verbal assertions, but on a firm commitment … revealed by the circumstances of the case" (*Abdalla* 2011-UNAT-138; see also *Ahmed* 2011-UNAT-153). In this respect, the Tribunal has considered in *Wilkinson* UNDT/2009/089 that "opinions expressed by some representatives of the Administration cannot be understood as express promises".

44. Even assuming that the Organization assured staff that it "would defer the abolition of posts" for those staff "whose posts were due to expire in May 2011"—as the Applicant argues in her application—or that it made promises at "numerous staff association meetings to extend contracts several months in the event employees had not been reassigned by given date"—as she alleges in her motion of 14 November 2012—, she has not claimed that a promise was made to her individually that the abolition of her post would be postponed in the event she was not selected for another position by 31 May 2011. Further, she has not adduced evidence showing that these assurances and promises were made by competent authorities and that they reflected a firm and express commitment from the Administration.

Decisions not to select her for posts for which she had applied

45. In her application, the Applicant alleges that the Administration failed to follow proper procedures and to make sufficient efforts to find her alternate employment. In this respect, she submits that UNICEF failed in its duty of care. The Tribunal notes that these claims are intrinsically linked to the selection processes to which she unsuccessfully took part and, for this reason, it shall consider them in reviewing the decisions not to select her for posts for which she had applied.

46. Article 8.1(c) and (d) of the Tribunal's Statute provides that an application shall be receivable if the applicant has previously submitted the contested administrative decision for management evaluation, and if the application is filed within 90 calendar days of the applicant's receipt of the response to his or her request.

47. At the outset, the Tribunal recalls that the scope of an application is defined by the request for management evaluation (see, in particular, *Ibekwe* UNDT/2010/159 as affirmed in *Ibekwe* 2011-UNAT-179 as well as *Neault* UNDT/2012/123).

48. It further recalls that, in *Planas* 2010-UNAT-049, the Appeals Tribunal rejected the applicant's general claim in relation to her non-selection. In so doing, it considered:

> 20. [T]he claim that she was passed over and discriminated against could only be made if the staff member, feeling that she had suffered injury after she had submitted a specific candidacy and after another person had been selected, had contested the results of the selection process, that is, the specific appointment made.
>
> 21. Therefore, the UNDT was correct in finding that, as Planas did not contest in precise terms her non-selection for any post, she did not identify any administrative decision in her application.

49. In this case, the Applicant referred, in her request for management evaluation of 29 May 2011, to the decisions not to consider her for "two positions

in the new structure" (see annex 32 to the application, p. 1), the decisions not to shortlist her for "two Communications posts", and the decision not to consider her "for the many posts outside the new structure" (see annex 32 to the application, p. 2). In identifying the remedies sought (see annex 32 to the application, p. 5), the Applicant referred to three specific P-3 posts: Interactive Marketing Specialist, Marketing Specialist and Customer Service Specialist.

50. In addition, in the document entitled "Description of the context of the decision, relevant facts, documents and other information important in the context of the request for evaluation" which she appended to her initial request for management evaluation, the Applicant referred to the decision not to select her for "two re-profiled positions in the new structure". She also referred to the decision not to shortlist her for two Communication posts.

51. As is clear from the wording of the letter of 12 July 2011 responding to the Applicant's 29 May 2011 request for management evaluation, the Administration reviewed the selection processes in relation to all 30 posts for which she had applied, both within and outside PFP.

52. In the motion filed in response to Order No. 147 (GVA/2012) and at the hearing of 26 November 2012, the Applicant explained that she did not remember when she had received the letter of 12 July 2011 and she argued that it was for the Respondent to prove that she had indeed received it on 14 July 2011.

53. On the one hand, the Tribunal understands that, more than a year after the events, the Applicant no longer remembers when she received the letter of 12 July 2011. On the other hand, the Tribunal has no doubt that the statement in her application of 17 October 2011, made only a little over three months after the receipt of the letter, accurately reflects the chronology of events. According to this statement, the letter in question was delivered on 14 July 2011. This date matches the dispatch date of the email to which the letter of 12 July 2011 was attached and a copy of which was produced by the Respondent. No further evidence is needed.

54. The Applicant also submitted that 18 July 2011 was the "effective date of receipt of the complete rejection" of her request for management evaluation and

should therefore also be considered as the date from which the 90-day time limit started to run. She stressed that, insofar as the Administration had not appended to its email of 14 July 2011 all of the documents referenced in the letter of 12 July 2011, this communication did not constitute a complete response to her request.

55. However, the Tribunal considers that the Administration's failure to append the annexes to its email of 14 July 2011 did not have any impact on the validity or completeness of the response to the Applicant's initial request for management evaluation, insofar as the latter concerned the decisions not to select her for posts for which she had applied. The 7-page letter of 12 July 2011 addressed all of the issues pertaining to the Applicant's non-selection in a clear and conclusive way. In addition, it referred to the judicial remedies available to her:

> This constitutes the final decision, as prescribed by United Nations Staff Rule 11.2(d). Should you wish to file an application against this decision with the United Nations Dispute Tribunal, you can do so within … 90 … days from the date of receipt of this letter.

56. The two annexes that were missing consisted of a document reflecting the status of the Applicant's candidatures as well as a copy of the recommendations made by the selection panel concerning the Applicant's candidature for two P-3 posts of Project Manager (Fundraising Services Unit) within PFP. The annexes are purely illustrative and add no substantive information to the letter of 12 July 2011. Besides, the Tribunal notes that the Applicant neither requested these documents after she received the letter of 12 July 2011 nor referred to them at any later stage.

57. In sum, the transmittal on 18 July 2011 of the missing annexes did not have any effect on the 90-day time limit specified in article 8.1(d) of the Tribunal's Statute, which limit started to run as from the receipt of the letter of 12 July 2011, that is 14 July 2011. It follows that the Applicant had until 12 October 2011, at the latest, to file her application challenging before the Tribunal the decisions not to select her for posts for which she had applied. As the application was filed only on 17 October 2011, it is time-barred and therefore irreceivable.

58. At this juncture, the Tribunal observes that the Applicant did not submit a motion for extension of time to file her application. It recalls in this respect what was held in *Czaran* UNDT/2012/133:

> 23. [T]he 90-day time limit for staff members to submit an application after receiving a response to a request for a management evaluation is sufficiently long to allow them to address … any technical problems with transmission of the letter [containing such response] and any difficulties that the staff member encounters in taking note of the Administration's response. Furthermore, even if the Applicant absolutely required 90 days in order to submit his application to the Tribunal, he could have applied for an extension of time, which he did not do.

59. Lastly, contrary to the Applicant's claim, the second request for management evaluation of 18 July 2011 did not affect the 90-day time limit either. Indeed, with respect to her non-selection for posts for which she had applied, this request did not identify novel administrative decisions but simply reiterated and developed the claims raised in her 29 May 2011 request for management evaluation that were dealt with in a conclusive way in the letter of 12 July 2011. It was thus redundant in that respect and does not reset the clock.

60. In view of the above findings, it is unnecessary to order disclosure of the documents relating to the selection processes to which the Applicant took part as well as the documents filed by the Respondent under seal.

Decision to separate the Applicant from service while she was on sick leave

61. Among the relief claimed in her application, the Applicant seeks "[r]eversal of the decision to separate [her] while on certified … medical leave".

62. Although this claim was not part of the request for management evaluation that the Applicant initially submitted on 29 May 2011, the letter of 12 July 2011 did address the issue. Yet, as was recalled earlier, the scope of an application is defined by the request for management evaluation. As a result, the Administration's response concerning a decision which had not been contested by the Applicant may not be taken into account for the purpose of calculating the 90-day time limit to file an application.

63. The claim was however mentioned in the request for management evaluation that the Applicant subsequently submitted on 18 July 2011. This second request was sent within the 60-day time limit specified in staff rule 11.2(c) and, consequently, the 90-day time limit to file her application started to run from the date when the Applicant received the Administration's response to this second request, that is, 4 August 2011. Given that her application was filed on 17 October 2011, the Tribunal considers the claim in relation to the decision to separate the Applicant from service while she was on "certified" sick leave to be receivable *ratione temporis.*

64. In her motion for leave to call witnesses, the Applicant explained that her two treating physicians would provide evidence on her medical condition at the time of her separation. However, it is not disputed that, as from 25 May 2011, she was placed on sick leave by her treating physicians. Nor is it disputed that her sick leave was eventually certified only until 31 May 2011. What is at stake is whether or not her sick leave should have been certified beyond that date. For this reason, her motion for leave to call her treating physicians as witnesses had to be rejected.

65. Staff rule 6.2 relevantly provides:

> **Sick leave**
>
> (a) Staff members who are unable to perform their duties by reason of illness or injury or whose attendance at work is prevented by public health requirements will be granted sick leave. All sick leave must be approved on behalf of, and under conditions established by, the Secretary-General.
>
> …
>
> **Obligations of staff members**
>
> …
>
> (g) A staff member may be required at any time to submit a medical report as to his or her condition or to undergo a medical examination by the United Nations medical services or a medical practitioner designated by the United Nations Medical Director. When, in the opinion of the United Nations Medical Director, a medical condition impairs a staff member's ability to perform his or her functions, the staff member may be directed not to attend the

> office and requested to seek treatment from a duly qualified medical practitioner. The staff member shall comply promptly with any direction or request under this rule.
>
> …
>
> **Review of decisions relating to sick leave**
>
> (j) Where further sick leave is refused or the unused portion of sick leave is withdrawn because the Secretary-General is satisfied that the staff member is able to return to duty and the staff member disputes the decision, the matter shall be referred, at the staff member's request, to an independent practitioner acceptable to both the United Nations Medical Director and the staff member or to a medical board.

66. Further, UNICEF administrative instruction CF/AI/2009-009 (Sick leave) states:

> 3.2 **Procedures for Certification of Sick Leave** …
>
> 3.4 **Staff stationed Outside New York**. The Head of Office has authority to certify sick leave up to a total of twenty working days, cumulative or consecutive, within a 12-month period if supported by medical statements.
>
> 3.5 All sick leave in excess of twenty working days within a 12-month period must be referred by the local human resources/operations specialist to the United Nations Medical Service for certification. For that purpose, the staff member shall submit to the human resources/operations specialist, in a sealed envelope, a detailed medical report from a licensed medical practitioner. This medical report will be forwarded unopened to the appropriate designated medical officer for certification, ensuring that any confidential medical content is seen only by authorised medical personnel.
>
> …
>
> 3.7 [I]f the sick leave is not certified by the Medical Director or designated officer, for administrative purposes, the absence shall be treated as unauthorized absence …
>
> 3.8 A staff member on sick leave may be required, at any time, to submit a medical certificate as to his/her condition or to undergo examination by a medical practitioner designated by the United Nations Medical Service. Further sick leave may be refused or the unused portion withdrawn if it is determined by the United Nations Medical Service that the staff member is able to return to work.

> The staff member is entitled to seek a review of the matter, in which case it is referred to another medical practitioner or to a medical board acceptable to both the United Nations Medical Service and the staff member.

67. It results from the above provision, in particular paragraph 3.4 of CF/AI/2009/009, that it is for the Administration to certify sick leaves. In so doing, it may request the staff member to undergo an examination by a medical practitioner.

68. It is clear from the documents on file that, though requested to undergo such examination, the Applicant failed to comply promptly with the Administration's request of 30 May 2011, reiterated on 1 and 9 June 2011, and that she only reported to the UNOG Medical Services Section on 14 July 2011, that is, some 45 days after the request was first made.

69. In addition, the Tribunal notes that the Applicant failed to request review of the decision relating to her sick leave as provided for in staff rule 6.2(j). Having failed to follow the prescribed procedure, she may not now challenge before the Tribunal the decision not to certify her sick leave beyond 31 May 2011.

70. In her application and subsequent pleadings, the Applicant also submitted that she could not be lawfully separated from service while she was on "service-incurred" sick leave and that the service-incurred nature of her illness was corroborated by an UN Medical Officer. In her motion of 14 November 2012, she added that her treating physicians would provide evidence on the "service connected nature" of such condition.

71. It is common ground that, in August 2011, she submitted a claim to the Advisory Board on Compensation Claims in accordance with Appendix D to the Staff Rules and Regulations. At the hearing of 26 November 2012, the parties confirmed that a decision had not yet been made on her Appendix D compensation claim.

72. Consequently, even assuming that the Administration could not lawfully separate her from service because her illness was attributable to the performance

of official duties on behalf of the United Nations—which is doubtful—, such a decision has not yet been taken by the competent body and the Applicant's claim in this respect is premature.

Conclusion

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

The application is rejected in its entirety.

(*Signed*)

Judge Thomas Laker

Dated this 29th day of November 2012

Entered in the Register on this 29th day of November 2012

(*Signed*)

René M. Vargas M., Registrar, Geneva