UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/040
Judgment No.: UNDT/2016/220
Date: 22 December 2016
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

SARROUH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Robert Nadelson, UNDP

Introduction

1. The Applicant, a former Special Advisor at the D-1 level, step 5, in the Bureau for Development Policy ("BDP") of the United Nations Development Programme ("UNDP"), contests her "formal notice of separation from service" notified to her on 29 January 2015.

2. As compensation, the Applicant requests that the impugned decision be rescinded, that she be afforded "a priority placement" and that, as compensation, she be awarded two years of salary allowing her to benefit from full pension and moral damages in the amount of two years of net base salary. Furthermore, the Applicant requests the Tribunal to award her USD100,000 for medical expenses and full reimbursement of her legal expenses of USD30,000.

3. In response, the Respondent contends that the Applicant's alleged claims regarding her post/functions in BDP not being affected by the restructuring are time-barred and therefore not receivable and that, in any event, the application is without merit.

Procedural background

4. On 30 June 2015, the Applicant filed the application. On the same date, the application was transmitted to the Respondent, instructing him to submit his reply by 31 July 2015.

5. On 28 July 2015, the Respondent filed his reply. Under the heading, "Receivability", in the reply, the Respondent objected to the admissibility of five annexes appended to the amended application, requesting that they be struck from the record on the grounds that they are not evidence in support of her position but arguments. If the Tribunal were to admit (some of) these annexes, the Respondent requested that the application be amended and that he subsequently be granted an

opportunity to amend his reply accordingly or to submit his comments on those allegations.

6. On 4 August 2015, the Tribunal (Duty Judge) issued Order No. 176 (NY/2015) instructing the Applicant to file a submission addressing the issues of receivability raised in the Respondent's reply. The Applicant's Counsel filed this submission on 1 September 2015.

7. On 1 September 2015, the case was assigned to the undersigned Judge.

8. By Order No. 285 (NY/2015) dated 10 November 2015, the Tribunal instructed the parties to file a jointly signed statement on or before 1 December 2015 in which they were to set out the agreed and disputed legal issues and facts, the necessity of additional evidence as well their views on informally resolving the case through the Office of the Ombudsman or through *inter partes* negotiations. The parties were further instructed to attend a case management discussion ("CMD") on 2 December 2015.

9. On 20 November 2015, the Respondent's Counsel filed on behalf of the Applicant's Counsel a request for extension of time and postponement of the CMD.

10. By Order No. 296 (NY/2015) dated 24 November 2015, the request was granted and the parties were instructed to file the jointly signed statement on 15 January and to attend a CMD on 20 January 2016.

11. On 15 January 2016, the parties submitted the jointly signed statement, indicating, *inter alia*, that while the parties remained "open to the possibility of settling their difference informally … there appears to be no reasonable expectation that further *inter partes* discussions or resort to mediation would be useful".

12. The CMD as per Order No. 285 (NY/2015) was held as scheduled on 20 January 2016.

13. By Order No. 21 (NY/2016) dated 28 January 2016, the Tribunal instructed the parties "to produce all documentation regarding the Applicant's sick leave until 31 January 2015". The Tribunal further ordered: (a) by 10 February 2016, the Applicant to file a list of proposed witnesses, outlining the facts which they are expected to elicit, or, alternatively, notarized affidavits; (b) by 24 February 2016, the Respondent to file a range of documentation and information listed by the Tribunal, his comments to the Applicant's 10 February 2016 submissions; a list of proposed witnesses, if any, outlining the facts which they are expected to elicit, or, alternatively, notarized affidavits, and an amendment to his reply outlining his comments to the narrative from annexes 6, 9, 29, 39 and 54 to the application; (c) by 24 February 2016, the parties to file a joint submission to set out their proposed and agreed dates for a hearing as well as all documentation regarding the Applicant's sick leave from February 2014 until 31 January 2015, and, furthermore, without stipulating a time limit, to produce all documentation regarding the Applicant's sick leave until 31 January 2015.

14. On 10 February 2016, the Applicant filed her submission pursuant to Order No. 21 (NY/2016), providing a list of proposed witnesses and the facts which they were expected to elicit. The proposed witnesses were: the Applicant; Ms. H, former UNDP Deputy Regional Director, the Regional Bureau for Arab States ("RBAS"); The OHR Director, former UNDP Director of the Regional Centre for Arab States, Cairo; Mr. A, a Security Associate in United Nations Department for Safety and Security ("UNDSS"); and Mr. E, a Security Associate in UNDSS, Dubai Office. By notarized affidavit, the Applicant filed the testimony of two other witnesses, namely Mr. RL, former UNDP official and Director of Social Development Planning for Qatar and Mr. AQ, Ambassador of Oman to the United Arab Emirates. By submission of the same date in Case No. UNDT/NY/2014/021, the Applicant requested to call exactly the same witnesses in this other case.

15. On 23 February 2016, in response to Order No. 21 (NY/2016), the Applicant filed the "pertinent" medical records and noted that, "[S]he remained on certified sick

leave through 31 July 2015, after which she was separated from service. Medical reports covering that period can also be provided".

16. By submission in response to Order No. 21 (NY/2016) of 24 February 2016, the Respondent stated that "none of the witnesses proposed in the Applicant's submission of 10 February 2016 [were] relevant to these proceedings" and provided explanations therefore. To the submission, the Respondent appended a number of documents in response to the Tribunal's instructions in Order No. 21 (NY/2016).

17. By joint submission in response to Order No. 21 (NY/2016) of 24 February 2016, the parties stated that they had agreed on the dates of 7 and 8 April 2016 for a hearing, with the possibility of extending the hearing through the following week, if needed.

18. By motion to submit additional evidence dated 26 February 2016, the Applicant requested "leave to submit the following additional documentation relative to her testimony concerning several disputed issues of fact" and listed a number of documents in this regard.

19. By response to the Applicant's 26 February 2016 motion, the Respondent objected to this motion on the grounds that none of the documents which the Applicant sought leave to submit had newly come into her possession but, should the Tribunal grant the motion, requested leave to comment on the additional evidence.

20. By Order No. 73 (NY/2016) dated 9 March 2016, the Tribunal granted the Applicant's 26 February 2015 motion to submit additional evidence and instructed the Respondent to file his comments, if any, to the additional documentation no later than 1 April 2016. The Tribunal further ordered that the hearing would take place on 7 and 8 April 2016 and that, considering the witnesses proposed by the Applicant and the similarity of the facts to which they are to testify, the oral evidence in Case No. UNDT/NY/2014/021 and the present case would be heard together but that the cases would not be joined—each case would therefore continue to have its distinct written

record and separate judgments will be issued, and that the proposed witnesses would be heard in the following order: the Applicant; Ms. H; The OHR Director; Mr. A; Mr. E; and Mr. W, the Assistant Administrator & Director of the Bureau of Management ("the Management Bureau Director").

21. The hearing started on 7 March 2016 where the Applicant gave oral evidence. At the hearing, on 8 March 2016, The OHR Director, Mr. A and Ms. H gave oral evidence. On 11 March 2016, the Management Bureau Director gave oral evidence.

22. On 12 April 2016, each of the parties filed signed confidentiality undertaking regarding access to the audio recording of the hearing. The recordings were uploaded on the eFiling portal on 15 April 2016.

23. On 20 May 2016, each of the parties filed her/his written closing submissions.

24. On 19 August 2016 the Tribunal informed the parties that transcripts are to be prepared in the present case .The transcripts were finalized on 31 August 2016.

Relevant factual background

25. The following factual chronology is based on the submissions made in the parties' jointly-signed statement of 15 January 2015 and the evidence on record.

26. On 16 September 2002, the Applicant joined the Sub-Regional Facility for Arab States in UNDP as an Institutional Reform Specialist at the L-4 level in Beirut, Lebanon.

27. On 1 January 2004, she was reassigned to the RBAS at the Headquarters of UNDP on a fixed-term contract at P-4 level, and, on 1 August 2005, she was appointed as a Deputy Resident Representative at the P-5 level in the UNDP Egypt Country Office.

28. On 1 January 2007, the Applicant was reassigned as a Policy Advisor to the Democratic Governance Group ("DGG") of BDP at the same grade. In 2007, she

successfully passed the United Nations Resident Coordinator Assessment test and was thereafter qualified for appointment for Resident Coordinator/Resident Representative/Designated Official/Humanitarian Coordinator ("RC/RR/DO/HC") positions.

29. In October 2009, the Applicant was appointed Director of the Brussels Liaison Office of the UN Development Fund for Women, a P-5 level position.

30. On 1 June 2010, the Applicant was appointed as RC/RR for the United Arab Emirates ("the UAE") at the D-1 level.

31. On 27 April 2012, the Applicant was instructed by the then Assistant Administrator and Regional Director for RBAS, Ms. AS ("RBAS Regional Director"), to undertake a mission to New York in order to conduct consultations with relevant parts of Headquarters, including with the Management Consultancy Team to reach a sustainable solution to some alleged management issues in Country Office in the UAE.

32. During her stay at the Headquarters in May 2012, it was agreed that the Applicant was to leave the UAE and be moved to UNDP's Headquarters, New York, to work as a Special Advisor at D-1 level.

33. On 4 June 2012, as results from an email with the subject-matter "Note for the Record" sent by Ms. FW (unknown title) to the Applicant and the then Deputy Regional Director of RBAS, ("the Deputy Regional Director"), that during a meeting of the same date, it was agreed that:

a. The Applicant's contract would be extended for two years effective 1 June 2012;

b. Terms of Reference would be developed during the following week for a post at the D-1 level in the "BDP Governance Unit",

c. A letter "re-assigning" the Applicant" from the "UAE to BDP", effective 1 August 2012 would be issued during the following two weeks;

d. The BDP assignment would be "for 22 months, being the balance of the two year extension [and] during this assignment [the Applicant] could apply for other HQ posts, without being bound by the usual 'time post limitation'";

e. The Applicant would leave UAE on 31 July 2012, proceeding on home leave, and report for duty in BDP on 4 September 2012;

34. On 8 June 2012, the Applicant confirmed by email that Ms. FW's June 2012 email reflected "what we discussed", making only one revision (not relevant here).

35. Later the same date, Ms. FW responded the Applicant, informing her that the "tour of duty" rule would only apply for posts in New York and that, as the post in BDP would cease to be funded on 1 July 2014, she would be able to apply for any post at any location.

36. On 12 June 2012, Ms. FW forwarded the Terms of Reference to the Applicant. In these Terms of Reference, the Applicant's alleged post was labelled, "Policy Advisor on Public Service", its level was stated as D-1, and it was located in New York. Under the heading "Duties and Responsibilities", it was indicated that the Applicant would work under "the overall direction of the Democratic Governance Practice ["DGG"] Director and the direct supervision of the Senior Public Administration Advisor/Responsive Institutions Cluster Team Leader". However, nothing was stated about how the alleged post was funded.

37. On 18 June 2012, the Applicant forwarded her comments to the Terms of reference to the Practice Director of the DGG /BDP, stating, amongst others, that "many areas still need work".

38. By email of 23 June 2012 a UNDP colleague, copying, amongst others, Ms. FW and the then Deputy Regional Director, noted that it had been agreed, during the Applicant's mission to Headquarters, that she would be "reassigned" from the UAE to Headquarters with effect from the end of July 2012. The UNDP colleague also noted that she understood that the Applicant were "in discussions with BDP regarding [the Applicant's] eventual assignment with BDP" and that the "reassignment" would proceed "[r]egardless of the outcome of these discussions".

39. By email of the same date, the Applicant responded that, "There is and was no agreement on reassignment without my prior approval and agreement on the [Terms of Reference] of the assignment proposed by BDP". The Applicant further expressed that she was "quite alarmed" with the statement that the "reassignment" would proceed "[r]egardless of the outcome of these discussions because this constituted "a clear breach of what we discussed".

40. In a separate email of the same date to the Deputy Assistant Administrator and Deputy Director of BDP, Ms. MS, the Applicant stated that she could not accept the Terms of Reference as they did not represent the agreement with the RBAS. The Applicant appended to this email exchange as an annex to his application, an undated version of the Terms of Reference; albeit now rather formed as an employment contract—the starting date is stated a 4 September 2012 and duration is indicted as "Initial Contract [of] 2 years". The name of alleged post was changed to, "Senior Adviser on Governance and Sustainable Development" and the Applicant was to report to the DGG Director (no mention was made to the Senior Public Administration Advisor/Responsive Institutions Cluster Team Leader). Nothing was stated regarding the source of funding for the alleged post.

41. By a letter titled, "Reassignment", dated 28 June 2012 from Benefits and Entitlement Services, UNDP, Copenhagen, to the Applicant, which was jointly-signed by two UNDP Human Resources Associates, the Applicant was informed that she was "reassigned" to become a as "Advisor to UNDP New York".

42. On 9 April 2013, the Terms of Reference, were signed by the DGG Practice Director, Ms. F. The alleged post was named, "Special Advisor, Strategic Initiatives, [DGG]" and the Applicant was to report to the DGG Practice Director. The document further indicated:

a. "Starting Date: January 1st, 2013-December 31, 2014 (staff member hold a two years [sic] contract with expiry date June 30, 2014); and

b. "Duration of Initial Contract: 2 years".

However, no mention was made as to how this alleged post was to be funded, including from which budget the expense for the Applicant's salary would be charged.

43. On 1 October 2013, in an email to the Officer-in-Charge of BDP/DGG, copying also the Director of the Office of Human Resources, The OHR Director, ("the OHR Director") and the Deputy Assistant Administrator and Deputy Director of BDP, Ms. MS, the Applicant indicated, amongst others, that she had expecting a "constructive dialogue with BDP management" and that she felt that BDP/DGG had not made any effort to "integrate" her into DGG. She further stated that, "As you know, I do not have a position in DGG. It is a fragile arrangement with RBAS, where I am sitting in DGG with RBAS paying my salary.

44. Between April and November 2013, the Applicant applied for a range of different RC, BDP and other UNDP positions, but UNDP (by the Executive Group, "EG"), as the nominating agency, did not nominate the Applicant for any of these positions. The Tribunal determined in Judgment No. *Sarrouh* UNDT/2016/219 in Case No. UNDT/NY/2014/021 that the EG's decisions on 5 September and 12 November 2013 not to nominate the Applicant for any of the relevant RC position for which she had applicant in August and November 2013 were unlawful.

45. On 20 November 2013, the Chief Resource Management Division, Bureau for Crisis Prevention and Recovery, UNDP, emailed a broad range of UNDP staff in

different units, including all staff in BDP sharing with them a "link for conducting the functional mapping".

46. On 7 February 2014, upon her request, the Applicant met with the OHR Director to discuss possible short-term and long-terms assignments for her, including in Syria and Jordan. In a contemporaneous, "Note for the Record", prepared by the Applicant dated 11 February 2014, the Applicant stated that, during this meeting, she was informed that, in case her contract would expire, there would be no separation or termination of her contract but that she would be assigned to the Business Solution Center for a maximum period of one year during which time period she could apply for other posts.

47. On 11 February 2014, the Applicant applied and reapplied for a total of five RC positions, but never received any information and/or responses to her applications.

48. On 26 February 2014, the Applicant was placed on certified sick leave, which was subsequently extended to the end of May 2014.

49. On 21 May 2014, the Management Bureau Director sent an email with the subject line, "Structural Change: Notification to affected staff", apparently to all UNDP staff at Headquarters in New York, about the "Structural Review" in October 2013. In this email, the Management Bureau Director stated that

> …
>
> Given the scope of the restructuring, all staff who are currently employed in Headquarters or regional level unit are in principle affected by this change.
>
> This does not mean that your job necessarily changes. It simply signals that your current position is within the scope of the change exercise and therefore you are in principle affected. The precise implications for your post will be communicated to you in due course. Organograms and Terms of Reference detailing the new configurations and responsibilities of bureau and units within them have now been published and from these you will be able to see

> changes which may affect your position. Your managers will also be holding meetings to discuss the impact on your unit.

50. On 23 May 2014, the Applicant filed an application for suspension of action during management evaluation with the Dispute Tribunal of the decision not to renew her fixed-term appointment beyond 31 May 2014. In its ensuing order, *Sarrouh* Order No. 127 (NY/2014) dated 29 May 2014, as part of the background, the Tribunal noted as follows:

> 12. The Applicant states that, on 13 May 2014, she inquired with the Office of Human Resources, Bureau of Management, UNDP, about the status of her G-4 visa, which expires at the end of May 2014 and about her United Nations Laissez Passer, which had already expired. She was advised that the Office of Human Resources had received no requests for further contract extension, without which her G-4 visa would not be extended. She was told to contact the Bureau of Management in New York, which she did, but received no reply.
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> 13. On 22 May 2014, the Applicant requested management evaluation of the decision "not to renew [her] fixed-term appointment which expires on May 31, 2014". The following day, on 23 May 2014, she filed the present application with the Tribunal.
>
> 14. On 27 May 2014, the Office of Human Resources, Bureau of Management, UNDP, sent an email to the Applicant, stating that, "upon its current expiration, and as of 1 June 2014, [her] contract will be extended for three months, i.e. until 31 August 2014". The email was received by the Applicant at 4:51 p.m. on 27 May 2014.

51. On 28 May 2014, the Applicant's contract was extended for three months until 31 August 2014.

52. On 29 May 2014, by *Sarrouh* Order No. 127 (NY/2014), the Tribunal rejected the application for suspension of action pending because there was no pending administrative decision to separate her on 31 May 2014.

53. On 2 June 2014, the Applicant requested to amend her 22 May 2014 request for management evaluation of and now requested that the decision to leave her status as unassigned, as resulted from the 27 May 2014 contract extension, be also reviewed.

54. On 1 July 2014, the Applicant received the response to her request for management evaluation from the Management Bureau Director. In the considerations, it was indicated that:

> a. No administrative decision was taken not to renew her contract beyond 31 May 2014 and no such decision had consequently been communicated to her;
>
> b. Her contract had been extended until 31 August 2014;
>
> c. UNDP was in the process of realigning its human resources structure, *inter alia*, at the UNDP headquarters. New organograms and a related realignment strategy have been developed. Given the scope of the restructuring, all staff members who were assigned to Headquarters were in principle affected by the related changes. A decision had been taken to only renew expiring contracts of most Headquarter staff for a limited period of time, i.e., until the expected completion of the realignment process;
>
> d. Since the Applicant's post was affected by the realignment exercise, her appointment was not again renewed for two years, but only for a period of three months;
>
> e. The Applicant's status was not changed on 27 May 2014 to "unassigned";
>
> f. The Applicant was still assigned as Special Advisor at the D-1 level with BDG/DGG and her assignment was affected by the realignment process.

55. By letter dated 10 July 2014, the Applicant responded the Management Bureau Director regarding his 1 July 2014 management evaluation. She stated, amongst others, that:

> … The statement, "your post is affected by the realignment exercise" is patently wrong. As you are well aware, I do not have a post, nor

> have I been redeployed against any [Headquarters] position … More importantly, upon announcing the realignment process, I was bluntly told by my supervisor, [name redacted, "Mr. K"], that my assignment with BDP was a two year arrangement with RBAS management after which I [was] expected to go back to RBAS or anywhere else as I [did] not have or [held] any position within the BDP structure.
>
> … I have not been notified by RBAS management, my parent Bureau, that my position as RR/RC [was] affected by the restructuring …
>
> RC/RR position are not affected by the restructuring … I look forward to hearing from RBAS Regional Director, and discuss options for my next assignment with RBAS, my parent Bureau.
>
> …

56. On 30 August 2014, the Applicant's contract was extended from 1 September to 30 November 2014. Subsequently, together with her contract, the Applicant's certified sick leave was extended until 31 December 2014.

57. In his 28 July 2015 reply, the Respondent submits that:

> As noted, the Applicant had remained on sick leave all this while. While her position had ended on 1 July 2014, due to her sick leave UNDP did not send her a letter informing her that she was to be separated, and as a result, her post was not formally abolished. However, pursuant to consultations with the Medical Services Division, which advised UNDP that it would be beneficial to the Applicant's recovery to be advised of her exact job status, on 29 January 2015 [Ms. H, name redacted] Officer-in-Charge (OiC), OHR, informed the Applicant that her assignment with BPPS (formerly BDP) had since ended, and that her post in BPPS would be formally abolished effective 31 January 2015. The Applicant was now also informed that given that she had not been successful in securing either a temporary or regular assignment, and taking into account her ongoing sick leave status, once she was to "no longer be on certified sick leave, [her] notice period in accordance with UN Staff Rule 9.6 (c) (i), and UN Staff Rule 9.7 (b), [would] automatically begin". The Applicant was further informed that she could apply for an agreed separation, if she so wished. With the abolition of her post on 31 January 2015, it was only on 1 February 2015 that the Applicant was placed on unassigned status.

58. By letter dated 2 March 2015, the Applicant filed a request for management evaluation of the decision notified to her on 29 January 2015 that her position with

the Bureau for Policy and Programme Support ("BPPS", the former BDP) has ended and the position she was encumbering was abolished as of 31 January 2015.

59. By letter dated 1 April 2015, the Management Bureau Director responded to the Applicant's 2 March 2015 request for management evaluation, stating, amongst others, that:

a. The Applicant's claim regarding her not being affected was time barred as she was informed about this in his email of 21 May 2014;

b. Given her continued sick-leave states, while her assignment with BPPS had long ceased, the Organization decided to formally abolish it effective 31 January 2015; and

c. Accordingly, on 1 February 2015, she was placed on "unassigned" status.

60. The Applicant remained on sick leave from February 2014 until 31 July 2015 after which she was separated from service.

Applicant's submissions

61. The Applicant's principal contentions may be summarized as follows:

a. UNDP's human resources policies stipulate that unassigned or displaced staff members are given priority in consideration for posts to which they fully qualify. In addition, UNDP's policies on gender equality should ensure that qualified female candidates are supported and placed through affording them proper consideration and priority of placement. In the absence of any explanation of the reasons why the Applicant was excluded from benefiting from these policies, this practice cannot but be viewed as institutional discrimination leading directly to the decision to separate the Applicant from service because she had no post;

b. The Appeals Tribunal in *Obdeijn* 2012-UNAT-201 affirmed that "the Administration cannot legally refuse to state the reasons for a decision that creates adverse effects on a staff member, such as the decision not to renew a [fixed-term appointment]". Furthermore, when the Administration provides a reason, it must be supported by the facts (*Islam* 2011-UNAT-115). In the present case, no coherent reason has been provided for the decision on non-renewal and the arguments put forward in justification are not supported by the facts;

c. The Dispute Tribunal recognized in *Kasmani* UNDT/2009/017 that "discretion cannot be considered to be an unfettered one in the sense that it would always dispense the decision maker with the need to carefully weigh in the balance the consequences of the decisions. The myth of unfettered discretion is inimical to the rule of law principles". The Appeals Tribunal applied this principle to the issue of contract renewal in *Ahmed* 2011-UNAT-153 and held that "an administrative decision not to renew a fixed-term appointment can be challenged as there is a duty and requirement on the Organization to act fairly, justly, and transparently in its dealings with the staff members … where a decision of non-renewal does not follow the fair procedure or is based on improper grounds, the Tribunal may intervene";

d. The Applicant was promised that her contractual status would not be adversely affected by her move, and she had legitimate grounds to expect that her contract would be renewed as has been the practice for the last 12 years. At the same time, a decision not to renew an appointment cannot be motivated by bias, prejudice or improper motives, since the Administration has the duty to act fairly, justly and transparently (*Pirnea* 20 13-UNAT-311). The non-renewal, using restructuring changes as a pretext for separation, has been guided by bias, prejudice and discrimination and a predetermined intent to use reorganization as an excuse to separate the Applicant. Based on her with solid performance track record as a long serving staff member—in her last

performance appraisal of 2013, her supervisor as assessed her performance as "outstanding"—and the fact that she was two years away from retirement at age 62 at the time of her separation, the Administration's practices and policies constituted express promise for creating an expectancy for renewal;

e. In the management evaluation, it was argued that the claims made by the Applicant that she was not affected by the restructuring were not receivable as they are time-barred. It is claimed that the Applicant received the email from Mr. W on May 21, 2014 and "it was incumbent upon her to file a request for management evaluation of that decision within the statutory sixty days". The Applicant explained her rejection of the applicability of the email message to all staff and was not contradicted;

f. The alleged abolition of the Applicant's assignment in January 2015 contradicts the Respondent's assertion that funding of her assignment was to end on 1 July 2014. The Respondent did not initiate any communication with the Applicant upon expiry of her contract or "funding" of her post as per human resources applicable policies. Management apparently believed it was appropriate to communicate to her options of separation and serve her a termination notice, but not to discuss career options while on sick leave. None of the applicable procedures for the Applicant's placement were followed and her own efforts to place her were sabotaged;

g. The Applicant's supernumerary status was entirely the result of the Respondent's action and, contrary to the provided assurances given that were received in good faith by the Applicant, she was never properly reassigned to a post. The Applicant's last official title, notably Resident Representative/Resident Coordinator ("RR/RC"), was never been replaced and she remains in the pool of candidates for RR/RC positions. The fact that she has been denied fair consideration for any RR/RC posts to which she

applied and has been de facto blacklisted is the subject of a separate application but is equally applicable to the issue of her termination;

h. What is clear is that the Applicant's displacement is the result of the Respondent's failure to implement, in good faith, the agreement to return to Headquarters. The Applicant requested and was granted exemption from the "tour of duty" of serving full term (four years) in her reassignment on the grounds that the post in BDP would cease to be funded on 1 July 2014, which rendered her free to apply for any post so that her career was not put in jeopardy and to ensure employment continuity. This constituted a formal promise that her contractual status would not be adversely affected by the move. As a long serving staff of 12 years of service, with solid performance track record and highly recognized achievements and only two years away from retirement, the Applicant had every right to expect contract renewal;

i. The Applicant's post as a Special Advisor could not be abolished because there was never any post created against this title or terms of reference. The Respondent persists in his claim that the Applicant was not "unassigned" but continued to hold the position of Special Advisor. This title and position do not appear in any official documents or BDP structure;

j. The two Bureaus agreed on an "arrangement", which she was advised about. There was never a post or formal position created in the hosting bureau, BDP, contrary to what she had agreed to. The reference to abolishing her position pursuant to staff rule 9.6(c) is legally incorrect since only posts are abolished, not positions. The Applicant was not placed against a post or a position;

k. The Respondent dismissed the Applicant's claim that her displaced status predates the restructuring process as "not receivable". This argument confuses the decision with the facts leading up to it. The decision to terminate her employment was made on 29 January 2015. The generic email that was

sent to all UNDP staff at headquarters could not be the subject of a legal challenge since it did not apply to her and it contained information irrelevant to her situation. In light of the numerous factual inaccuracies in his analysis and the failure to deny the Applicant's record of what took place, it is incumbent on the Respondent to provide clearly articulated reasons for not placing the Applicant in an appropriate post commensurate with her abilities for over two years. It is not entirely truthful that there is no priority consideration afforded in the context of the RC/RR recruitment process. There is an incentive to place those in the RC pool who are not currently serving. The UNDP Guidelines provide that candidates must be sponsored by a UN entity and are supposed to be nominated for a post at least once a year. UNDP never sponsored her. There was a corporate decision not to do so;

l. UNDP policy claims to support gender equality and aims to improve the representation of women in managerial positions. Yet, when presented with a female candidate in a region short on female and Arabic speakers, there appears to be no place in the Organization for her. It is this inertia that the Applicant has labelled institutional discrimination, which emanates from the senior management of the Organization;

m. All allegations made against the Applicant in the RBAS Regional Director’s letter of 27 April 2012 are refuted with compelling evidence. No investigation or “fact finding" missions” were carried out to validate the allegations and gossip communicated to senior management. No due process was followed based on which the decision for premature removal was made. The Respondent had an obligation to enact all informal recourse mechanisms and resort to all investigation frameworks to make a legal, informed and transparent decision. If found implicated with wrong doing, the Respondent had an obligation to hold the Applicant accountable and enforce disciplinary measures against her in accordance with the internal justice system and UNDP accountability framework. If not, the Respondent had a legal

obligation to undo the harm and injustice in accordance with the internal justice system towards the Applicant. The Respondent failed to do so. The Applicant never received any communication, in writing or verbal, as to why she has been subjected to this systemic pattern of harassment, isolation and unjustified unfair treatment;

n. The Applicant has suffered unwarranted professional dislocation and harsh treatment causing her severe stress over her uncertain future and career. The pattern of institutional harassment and discrimination targeting her for arbitrary dismissal, caused her work environmental stress and social anxiety since her arrival in New York in September 2012. Her once promising career and professional reputation was irreparably harmed. Since 26 February 2014, the Applicant has been on certified sick leave under the care of a medical team treating her for Post-Traumatic Stress Disorder;

o. The Tribunal should rescind the decision to separate her from service on the basis that she failed to be placed in the Organization's Headquarters realignment process. The Applicant was denied the fair treatment to which she is entitled as well as all her rights as a long serving staff member. As a proper remedy to make her whole, she should be afforded priority placement;

p. Due to her separation, the Applicant is asking for compensation for two years at full pay allowing her to benefit from her full pension; and award her moral damages in the amount of two years' net base pay. In addition, the Applicant is asking the Tribunal to award her an amount of USD100,000 in compensation for medical expenses and suffering depression and illness as a result of harassment, mistreatment and discrimination. The Applicant is also seeking full reimbursement of all legal expenses she has incurred since 2012 in pursuing her rights in the amount of USD30,000;

q. In her closing submissions, the Applicant indicates that it would be highly impractical to envisage her going back to UNDP given its present

leadership and its refusal to address her concerns, resulting in lack of trust by the Applicant. Should an order of reinstatement be envisaged, the appropriate remedy would be therefore Special Leave with Full Pay from the date of her separation (31 July 31 2015) until her retirement (28 August 2017), thereby ensuring her entitlements and wages for this period would be recovered and her pension contributions be reinstated. In terms of alternative compensation in lieu of reinstatement, the Applicant is entitled to restoration of her full remuneration from her date of separation to the date of her mandatory separation from service. In addition to seeking alternative compensation commensurate with her legitimate expectations, she requests additional compensation for moral damages in the amount of USD100,000 for the negative effects on her professional reputation, her future capacity for employment and future pension entitlements, as well as for the adverse effects on her health and well-being caused by the actions of senior management at UNDP, and USD30,000 in legal costs caused by the Respondent's abuse of process presenting false and misleading testimony to the Tribunal.

Respondent's submissions

62. The Respondent's principal contentions may be summarized as follows:

a. The Applicant accepted in writing, following consultations, on 1 July 2012 to assume the post of Special Adviser at the D-1 level in BDP. In this regard, the Applicant agreed to be reassigned, the Administrator has the discretion to reassign her staff and, as per staff rule 11.2(c), insofar as the Applicant wished to challenge her reassignment, it was incumbent on her to do so by 7 August 2012, notably 60 days after she accepted the offer, at the latest. Given that the Applicant did not challenge the decision to assign her to the post of Special Adviser in a timely manner, her complaints about this post are time-barred;

b. Furthermore, the Applicant's claim that she was not affected by the restructuring is time-barred as, by email of 21 May 2014, entitled “Structural Change: Notification to affected staff”, the Applicant was informed that she was affected by the Structural Review, The email stated that “[g]iven the scope of the restructuring, all staff who are currently employed in headquarters or regional level units are in principle affected by this change”, and that “[the Applicant’s] current position is within the scope of the change exercise and therefore [she was] in principle affected”. This message constituted an administrative decision that the Applicant was affected by the Structural Review. Pursuant to staff rule 11.2(c), if the Applicant wished to challenge the decision that she was affected by the structural review, it was incumbent upon her to file a request for management evaluation of that decision within the statutory sixty-day limit, i.e., by 20 July 2014, but she failed to do so. The Applicant’s explanation does not constitute a formal request for management evaluation on the basis of which she could further appeal;

c. In the alternative, and to the extent that the Tribunal should accept that Applicant’s claim that notwithstanding the email of 21 May 2014, she was not affected by the Structural Review, in the 1 July 2014 response to the management evaluation request of 2 June 2014, the Assistant Administrator and Director of the Bureau of Management again expressly stated that the Applicant’s post had been affected by the structural review at UNDP headquarters. As per the letter of 1 July 2014, “[s]ince [the Applicant’s] post [was] affected by the realignment exercise, [her] appointment was not again renewed for two years, but only for a period of three months”. Consequently, even if the Tribunal were to accept the Applicant’s claim that the notification of 21 May 2014 did not apply to her, there can be no doubt that, by 1 July 2014, the Applicant had clearly been personally informed that she was affected by the Structural Review. It follows from staff rule 11.2(c) that it was incumbent upon her to challenge this decision by 30 August 2014, but she

failed to do so and the Applicant's claim that she was not affected by the structural review is time-barred and not receivable;

d. The Applicant's claim that her reassignment to the position of Special Adviser, BDP was as "unassigned" is also time barred. As stated, the Applicant requested management evaluation of the purported decision to designate her as unassigned on 2 June 2014. UNDP reviewed this claim in its management evaluation of 1 July 2014. To the extent that the Applicant wished to challenge this management evaluation, as per staff rule 11.2(c), it was incumbent on her to submit her appeal to this Tribunal by 29 September 2014, but the Applicant did not do so;

e. The Applicant's claim that her status as Special Adviser, BDP was "unassigned" is incorrect. The Applicant's post was located in BDP for a limited term at the Applicant's level, in her area of expertise in democratic governance and with consultation and input from the Applicant. It is not disputed that as per the agreement of 4 June 2012 between the Applicant and UNDP, the Applicant was reassigned to BDP as a Special Adviser, until 1 July 2014. It is also not in dispute that the Applicant was paid during this period, nor is it in dispute that she was performing functions. In substance, the Applicant does not dispute that she was reassigned as Special Adviser, BDP; a fact borne out by the Applicant's internal resume indicating her reassignment to these functions. As provided in section II (Scope) of the Structural Review Policy, "[t]he People Realignment Policy and Processes covers HQ and regional level functions where there will be a structural change". Given that the Applicant was assigned to BDP, she could not but be subject to the structural review hat turned BDP into the Bureau for Policy and Programme Support ("BPPS");

f. It is not clear on what basis the Applicant maintains that she was unassigned and not affected by the structural review, nor the relevance of this

point given that, even had the Applicant been unassigned, she would still have been affected by the structural review, as provided in section V of the Structural Review Policy, which provides that unassigned staff, i.e., staff in the Business Solutions Exchange, are affected. As also provided in the Structural Review Policy, "Staff members who remain without a position as a result of the realignment process will be separated in accordance with the UN Staff Regulations and Rules". Consequently, even had the Applicant been unassigned while performing the functions of the post of Special Adviser, BDP, to which she had agreed, she would still have been affected by the structural review;

g. At no time was the Applicant provided with an express promise that her appointment would be renewed after 1 July 2014. To the contrary, she was scrupulously kept informed of the length of her assignment in BDP as well as of the structural review. When the then Officer-in-Charge of BDP/DGG met with the Applicant on 25 October 2013, he reiterated to her that her assignment with BDP/DGG was time bound, and that no assurance could be given to her, or to any other staff member in BDP/DGG, that following the restructuring she would definitely still have a position;

h. The Applicant's time-bound assignment had concluded over six months prior to the date of the impugned notice of separation on 29 January 2015. As she had been unsuccessful in her applications for a new post and encumbered a post she had accepted with the knowledge that it was time-bound, the Applicant could have had no reasonable expectation that her appointment would be renewed, save to allow her to benefit from the full benefit of her sick leave entitlement;

i. The Applicant has not been discriminated against or harassed. Regarding the Applicant's claim in this context that her communication with UNDP has so upset her that her doctors have recommended that all

communications from UNDP go through her counsel, the Applicant felt sufficiently calm and competent to engage in friendly and detailed discussions with the Administration on the matter of her U.S. visa. The status of her G-4 visa was not part of a series of retaliatory actions linked to the alleged discrimination. Between 2012 and 2015 UNDP repeatedly asked her to provide copies of her G-4 visa so that UNDP could report her legal presence to the U.S. authorities as required, but the Applicant failed to provide these copies. On 5 January 2015, she entered the U.S. on a B-1 visa, breaching the UN's requirements, of which she was aware, according to which she was to enter the USA only on a G-4 visa. Having entered in this manner, the Applicant approached UNDP on 23 February 2015 regarding assistance in extending a G-4 visa, having failed to inform UNDP that she had in fact entered the USA on a B-1 visa; a visa that was due to expire the next day, i.e., 24 February 2015. The Administration's efforts to assist the Applicant and regularize her status in a situation that she had created was not the result of some improper motive. Any actions by UNDP, such as requesting her to leave the U.S. to apply for a new G-4 visa were the consequence of the Applicant's own conduct and omissions;

j. UNDP had prepared the Applicant's Terms of Reference in June 2012, but declined to accept these Terms of Reference, as she insisted on reporting directly to the Director of BDP. The Applicant was subsequently permitted to develop her own Terms of Reference after her arrival in BDP in September 2012. Indeed, in her report on "DGG Areas of Work - An Overview for the period of September 2012 - July 2013", the Applicant states that in the period under review she spent considerable time developing the Terms of Reference for her work with DGG, and that this constituted one of her two key results during that period;

k. While the Applicant claims "institutional discrimination" on the basis that she was not assigned high profile tasks nor invited to represent UNDP

and that her performance was solid and even outstanding, the Applicant's performance in the UAE was rated sub-par, i.e., "4 – partially met expectations". Nonetheless, the Applicant was reassigned to a senior position at the D-l level, intended to leverage her experience in Public Administration. As per Order No. 251 (NBI/2013), para. 26, the Dispute Tribunal did not find that the Applicant suffered any harm to her professional reputation as a result of her reassignment to this new position.

Consideration

Applicable law

63. Staff regulation 9.3(a) provides that:

> **Regulation 9.3**
>
> (a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:
>
> (i) If the necessities of service require abolition of the post or reduction of the staff;
>
> (ii) If the services of the staff member prove unsatisfactory;
>
> (iii) If the staff member is, for reasons of health, incapacitated for further service;
>
> (iv) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;
>
> (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;
>
> (vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned;

(b) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a change or termination of a mandate, and in accordance with the standards of the Charter;

(c) If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations;

(d) The Secretary-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member whose appointment has been terminated, provided that the termination is not contested, a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

64. Staff rules 9.6 and 9.7 state, in relevant parts, regarding termination:

Rule 9.6

Termination

Definitions

(a) A termination within the meaning of the Staff Regulations and Staff Rules is a separation from service initiated by the Secretary-General.

…

Reasons for termination

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

(i) Abolition of posts or reduction of staff;

…

Termination for abolition of posts and reduction of staff

(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.

…

(f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty stations.

Rule 9.7

Notice of termination

(b) A staff member whose fixed-term appointment is to be terminated shall be given not less than 30 calendar days' written notice of such termination or such written notice as may otherwise be stipulated in his or her letter of appointment.

65. Staff rule 6.2 states, in relevant parts, concerning sick leave that:

Rule 6.2

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.

Maximum entitlement

(b) A staff member's maximum entitlement to sick leave shall be determined by the nature and duration of his or her appointment in accordance with the following provisions:

> (i) A staff member who holds a temporary appointment shall be granted sick leave at the rate of two working days per month;
>
> (ii) A staff member who holds a fixed-term appointment and who has completed less than three years of continuous service shall be granted sick leave of up to 3 months on full salary and 3 months on half salary in any period of 12 consecutive months;
>
> (iii) A staff member who holds a continuing appointment, or who holds a fixed-term appointment for three years or who has completed three years or more of continuous service shall be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years.

66. From the UNDP Recruitment and Selection Framework, issued and effective on 1 July 2009 (most recently reviewed on 22 March 2012) follows, in relevant parts:

> …
>
> 102. In accordance with Staff Regulation 1.2 (C)II, management may decide in the interest of the Organization to assign a UNOP staff member to another post in the same field of work with similar functions at the same level without competitive process. The decision for a lateral move is at the discretion of management and only after consultation with the concerned staff member. While a staff member may express his/her interest in moving laterally to another position in the same business unit, a lateral move is not an entitlement. The management decision to fill a post through competitive process instead of lateral move is discretionary.
>
> 103. Lateral moves without a competitive process may only apply to similar posts in the same field of work with similar functions as documented in the job descriptions of both posts (the post encumbered by the staff member and the post considered for lateral move), at the same level requiring the same or a similar set of competencies and in the same business unit.
>
> …
>
> 106. The manager must discuss the proposed re-assignment or exchange with the staff members concerned in order to seek their views. While the staff members are subject to their management's authority to reassignment to any of the similar posts with similar functions at the same level in the office, they must be consulted prior to the lateral moves and, as far as possible, their consent for the lateral

moves should be secured. However, the consent of the staff members concerned must be secured in writing when the lateral move, although taking place in the same business unit, entails a change in duty station [Footnote: This would be the case for instance, for two similar posts like Policy Advisors within the same Headquarters Bureau, e.g. BCPR or BDP but in two different duty stations or two similar posts within the same Headquarters Office, e.g. two Audit posts with OAI, or two similar posts with the Security Team, but in different duty stations].

…

109. The process leading to lateral moves must be fully documented. The job descriptions must be provided to support that the two posts have similar functions and are at the same level. Prior consultation with the staff members concerned and their written consent in the event that the lateral moves entails the change of duty stations, must be evidenced. A copy of the signed approval with the relevant documentation and clearance must be provided for implementation of the necessary action:

(i) to OHR/BoM for P and D, as well as HQ GS staff members;

(ii) to the HR focal point in the relevant business unit for other GS and NO staff members.

…

119. As far as possible, the post to be filled on an urgent basis should be given to a UNDP staff member meeting the requirements for the post and already at the level of the post. However:

a) in the event that the post is exceptionally filled by an outsider and since the selection will not be submitted to the relevant Compliance Review body prior because of the urgency, the letter of appointment will specify that his/her appointment is limited to the specific post in question and he/she will not be considered as an internal candidate for the purpose of UNDP vacancies; normally, the individual will be separated from UNDP upon expiry of his/her appointment limited to the post in question, unless he/she secures a UNDP through competitive process as an external candidate;

…

126. Decisions on Lateral moves have been delegated as outlined below:

a) Administrator

(i) D-2/P7 staff members

b) Bureau Directors and Directors of Independent Offices
(i) Locally recruited FTA G1-G7 at Headquarters (with clearance of Director, ORR)

(ii) P1-P-5 Staff Members (with clearance of Director, OHR)

(iii) D-l/P-6 Staff members (with clearance of AA and Director, OHR)

c) Regional Directors/Resident Representatives/Head of Liaison Office

(i) GS and NO staff members within their Office (with clearance of HR Unit)

127. A Bureau Director may, on a very exceptional basis, propose the lateral moves of current incumbents of Deputy Resident Representative, Country Director, Deputy Country Director, Operations Manager positions from a country to another within the same region, outside the normal reassignment process through the candidate pools mechanism. The proposed lateral move will be submitted by the Regional Bureau Director, through the Director, OHR/BoM, to the Associate Administrator for clearance, with the relevant documentation supporting the exceptional circumstances justifying the lateral move, demonstrating the consent of the staff member to the resulting change in duty station and providing the cost analysis of the relocation.

…

128. Since the selections and reassignments of Resident Coordinators/Resident Representatives are subject to inter-agency consultations, the present lateral moves policy does not apply to Resident Coordinators/Resident Representatives. Decisions on Strategic Placements.

129. Decisions on strategic placements remain within the authority of the Administrator and Associate Administrator as follows:

a) Administrator

(i) D-2/P7 staff members

b) Associate Administrator

(i) All other posts

…

67. The UNDP specific rules on, "Termination of Appointment for Reasons of Health", with effective date on 29 May 2005, provides, in relevant parts, that:

> …
>
> 4. For a staff member's appointment to be terminated for reasons of health under UN Staff Regulation 9.3 (a) (iii) the staff member's incapacity must be established by conclusive medical evidence that results in the award of a disability benefit under UNJSPF [United Nations Joint Staff Pension Fund] Regulations.
>
> …
>
> 5. The provisions of this policy apply to all UNDP staff members governed by the UN Staff Regulations and Staff Rules.
>
> …
>
> 6. When a staff member has taken an extensive period of continuous or cumulative sick leave (SL), a request must be sent to the UN Medical Director for determination of whether the staff member's illness or injury is currently or potentially a case of incapacity for further service. This should be done as early as possible and not later than six months before the staff member exhausts his/her paid leave entitlement, both SL and annual leave (AL).
>
> 7. The request must be submitted for:
>
> a) Internationally-recruited staff members, by the OHR Business Partner serving the duty station or organizational unit;
>
> …
>
> …
>
> 13. If a delay occurs in the determination by the UN Medical Director of the staff member's incapacity and the staff member concerned has exhausted all his/her SL entitlement (at both full pay and half pay) under UN Staff Rule 6.2, and AL entitlement, the staff member will be placed on special leave with half pay pending the medical determination.
>
> 14. If the medical determination is that an impairment does exist, a request must be submitted as soon as possible to the United Nations Staff Pension Committee ("the Committee") for the award of a disability benefit to the staff member.
>
> 15. The request must be submitted for:

a) Internationally recruited staff members, by the OHR Business Partner serving the duty station or organizational unit

…

21. When the UNJSPF Committee has decided to award a disability benefit, a recommendation for the termination of the staff member's appointment for reasons of health under UN Staff Regulation 9.3 (a) (iii) as appropriate, must be submitted as expeditiously as possible to the OHR Director for approval on behalf of the Administrator, for:

a) Internationally recruited staff members, by the OHR Business Partner serving the duty station or organizational unit

…

22. Following the approval by the OHR Director of the termination of the staff member's appointment, the appropriate notice of termination, as indicated in the next paragraph, will be issued to the staff members as follows:

a) For internationally recruited staff members**,** by the OHR Business Partner serving the duty station or organizational unit

…

25. Separation from service will take effect as of the date established in the notice of termination. In establishing such date, the following conditions will be observed:

…

c) If, on the date of notice, the staff member has already exhausted all his/her SL entitlement and has been placed on special leave with half pay under paragraph 13 and/or 19, the separation will be effective on the date the notice is given, but the notice will specify that compensation will be paid for the full period of notice

…

35. 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/she shall be granted an extension of the appointment, after consultation with the UN Medical Director, for a continuous period of certified illness up to the

maximum entitlement to SL at full pay and half pay under UN Staff Rules 6.2.

…

68. The UNDP specific rules on, "Sick Leave", with effective date on 22 February 2016, provides, in relevant parts, that:

…

5. Staff members are entitled to sick leave, inclusive of certified and uncertified sick leave as described below and in accordance with UN Staff Rule 6.2:

…

c) A staff member holding a permanent or continuing appointment or who has completed three or more years of continuous service on a fixed-term appointment shall be granted sick leave up to 195 working days on full salary and 195 working days on half salary in any period of 48 consecutive months. Nine months are equivalent to 195 working days.

…

18. When a staff member has exhausted all of his/her entitlement to sick leave on full pay, further sick leave will be charged to the sick leave on half-pay entitlement as per paragraphs 5 (b) and (c) until the entitlement to sick leave on full pay arises again after the four-year period for the initial entitlement.

…

21. When a staff member on a fixed-term or temporary appointment is incapacitated for service by reason of an illness that continues beyond the date of expiration of the appointment, he/she shall be granted an extension of his/her appointment, after consultation with the United Nations Medical Director or designated medical officer, for the continuous period of certified illness up to the maximum entitlement to sick leave at full pay, and in the case of fixed-term appointments at half pay as per paragraphs 5 (b) and (c).

…

24. In cases where a staff member is approaching exhaustion of his/her entitlement to sick leave with full pay, the designated HR focal point must bring the situation to the attention of OHR, which will contact the United Nations Medical Director in order to determine

> whether that staff member should be considered for a disability benefit under article 33 (a) of the Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund (UNJSPF) while the staff member is on sick leave with half pay. The UN Medical Services, via OHR, shall periodically contact offices with instructions for the submission of cases for consideration for disability benefit. (Refer to Termination of Appointment for Reasons of Health)

69. From the Convention on Termination of Employment, 1982 (No. 158) follows in relevant parts:

> ***Article 2***
>
> 1. This Convention applies to all branches of economic activity and to all employed persons.
>
> 2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:
>
> (a) workers engaged under a contract of employment for a specified period of time or a specified task;
>
> (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
>
> (c) workers engaged on a casual basis for a short period.
>
> 3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.
>
> 4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.
>
> 5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of

the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms ***termination*** and ***termination of employment*** mean termination of employment at the initiative of the employer.

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service

…

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

…

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

> (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.
>
> 2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.
>
> 3. For the purposes of this Article the term the workers' representatives concerned means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.
>
> …

Receivability

70. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073, *O'Neill* 2011-UNAT-182, *Gehr* 2013-UNAT-313, and *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute of the Dispute Tribunal prevents it from considering cases that are not receivable.

71. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

> a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations

Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

72. It results that in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability *ratione materiae*

73. The Tribunal notes that it is uncontested that the decision to abolish the Applicant's post was notified to her on 29 January 2015 and that she filed a management evaluation request on 2 March 2015, within 60 days from the date of notification of the contested administrative decision. Therefore the application is receivable *ratione materiae.*

Receivability *ratione personae*

74. The Tribunal notes that the Applicant is a former staff member and the application is receivable *ratione personae*.

Receivability *ratione temporis*

75. Pursuant to the mandatory provision of art. 8.1(d)(i)(a) of the Dispute Tribunal's Statute, for an application to be receivable, it must be filed within "90 days of the applicant's receipt of the management evaluation of his or her submission" in cases like the present one, where a management evaluation of the contested decision is required under staff rule 11.2(a).

76. The Tribunal notes that the management evaluation response was communicated to the Applicant on 1 April 2015 and that the present amended application was filed on 30 June 2015, within 90 days from the date of notification. Therefore the application is receivable *ratione temporis*.

77. The Tribunal underlines that the decision to abolish a post is the result of a complex process, which has to follow specific procedural steps resulting in preliminary/interlocutory decisions like, for example, the decision to determine the posts and/or staff member affected by the structural review process, as well as temporary contract extension(s) for a limited period of time. Such preliminary decision(s) cannot be appealed separately and they are reflected in the final decision to abolish the post. Therefore the legal review in the present case is related only to the final contested decision to abolish the Applicant's post issued on 29 January 2015 which is receivable *ratione temporis* as presented above.

The impugned decision and the process of abolition

78. The Tribunal notes that the decision contested in the present case is the decision to abolish the Applicant's post "Policy Advisor D1 in UNDP, BCCP (former BDP)". The Tribunal considers that the process of abolition was initiated on 21 May 2014 when the staff members received the general announcement and, in the Applicant's case, was finalized on 29 January 2015 when the decision to abolish the post was notified to her. The termination was effectuated on 31 July 2015.

Reasons for separation from service

79. Under the staff regulations and rules, the Secretary-General may separate a staff member from service in accordance with her terms of his/her appointment or for any of the reasons specified in the staff regulations 9.1 to 9.3 and staff rules 9.1 to 9.6.

80. The reasons for separation from service can be organized into five categories:

I) Separation *ope legis*

81. There are certain types of separation from service that do not involve unilateral action from one of party (Organization or staff member) or the parties' consensus. These include:

a. expiration of the contract in accordance with the terms of appointment (staff rule 9.1(iii) and 9.4);

b. death of the staff member (staff rule 9.1(vi));

c. retirement (staff regulation 9.2 and staff rules 9.1(iv) and 9.5).

II) Separation by parties' agreement prior to the expiration of the contract (staff regulation 9.3(a)(vi) and staff rule 9.6(c)(vi))

82. According with the general principle of legal symmetry—*mutuus consensus, mutuus disensus*—the labor contract, which is a consensual contract, can be terminated by agreement between the parties.

83. All types of appointments (temporary, fixed-term or continuing) can be terminated in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that this action is not contested by the staff member.

84. A termination based on this reason can only take place if the action is not contested by the staff member. In other words such an action can only be legally

implemented by the Secretary-General if the staff member agrees with it. The staff member's agreement is a conditional requirement for the application of this rule and the Secretary-General's initiative to terminate the contract is in this case an offer to the staff member. If the staff member accepts freely and unequivocally the offer then is an agreed termination and the parties can come to an agreement orally or in writing.

85. In *Jemiai* UNDT/2010/149, the Tribunal held that an agreed termination on terms negotiated free from any duress or misrepresentation is an essential feature of good employment relations and should be given effect and honored by the contracting parties.

III) Separation initiated by the staff member

86. There are two types of separation which may be initiated by a staff member:

a. Resignation (staff regulation 9.1 and staff rule 9.2); and

b. Abandonment of the post (staff rule 9.3).

IV) Separation initiated by the Secretary-General

87. There are five sub-categories in the types of separation which may be initiated by the Secretary-General:

a. Termination for reasons (grounds) not related to the staff member: abolition of posts or reduction of staff (regulation 9.3(a)(i) and staff rule 9.6(c)(i) and 9.6(e)).

b. Termination for reasons (grounds) related to the staff member:

i. If the staff member is, for reasons of health, incapacitated for further service (staff regulation 9.3(a)(iii) and staff rule 9.6(c)(iii));

ii. If the services of the staff member prove unsatisfactory (staff regulation 9.3(a)(ii) and staff rule 9.6(c)(ii));

iii. If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light and, if they had been known at the time of his/her appointment, should under the standards established in the Charter of United Nations have precluded his or her appointment (staff regulation 9.3(a)(v) and staff rule 9.6(c)(v));

iv. If the conduct of the staff member does not meet the highest standards of integrity required by art. 101, para. 3, of the Charter of the United Nations (staff regulation 9.3(a)(iv));

v. Disciplinary reasons in accordance with staff rule 10.2(a)(viii)–(ix) (rule 9.6(c)(iv). Rule 10.2(a) states that disciplinary measures can take only one or more of the following forms:

(i) Written censure;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

c. Termination in the interest of good administration of the Organization (staff regulation 9.3(b) and staff rule 9.6(d)):

i. In addition to the reasons given in the letter of appointment and from staff regulation 9.3(a) "in the case of a staff member holding a continuing appointment, the Secretary General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary General, such action would be in the interest of the good administration of the Organization to be interpreted principally as a change or termination of a mandate and in accordance with the standards of the Charter".

ii. This additional reason for termination is distinct from the ones presented above and can be understood as being:

(a) Applicable only to a staff member who holds a continuing appointment;

(b) A termination without the consent of the staff member;

(c) A direct result of the Secretary-General's unilateral opinion that the termination is in the interest of the good administration of the Organization; the Secretary-General's authority to determine the interest of good administration of the Organization and his discretionary power to terminate a staff member's contract are provided for by the Staff Regulations and Staff Rules.

d. This termination is to be interpreted principally as a change or termination of a mandate.

e. The written notice is three months.

88. Staff regulation 9.3(b) and staff rule 9.6(d) are applicable when the Secretary-General's action is taken without the consent of the staff member in cases other than the ones mentioned expressly in staff regulation 9.3(a) and staff rule 9.6(c) respectively when the General Assembly decides not to extend the mandate of a mission or there are no funds available. According to the text, this reason itself can be interpreted in two ways change of the mandate or termination of the mandate. No ambiguity about this reason for termination is possible since the plain reading of the rule is clear in this sense and this reason cannot be assimilated or compared with any other because it is related directly to the extension of the UN mandate and/or the availability of funds.

The termination of the Applicant's fixed-term appointment

89. The Tribunal notes that, in the present case, the Applicant's fixed-term contract was terminated for the reasons stated in letter to the Applicant dated 29 January 2015 signed by the Officer-in-Charge of the Office of Human Resources, Bureau of Management (emphasis added):

> This is with regard to your assignment with the Governance Unit, former BDP (now BPPS), in UNDP New York. Further to the communication at the beginning of your assignment, (e-mail from [Ms. FW, name redacted] and [the Deputy Regional Director], dated 4 June 2012 and acknowledged by you on 8 June 2012), this is to confirm that *the assignment has ended and the position you were encumbering with BPPS will subsequently be abolished effective 31 January 2015. Regrettably, you have not been successful in securing any temporary or regular reassignment*. We would thus like to inform you of your current status in light of the end of the assignment with BPPS.
>
> We take note of your certified sick leave for the period I May 2014 through 31 December 2014. We also take note that you and your physician have expressed intention to submit requests for extended certified sick leave beyond this period. We confirm that UNDP will proceed in accordance with UN Staff Regulation and Rule 6.2 and the

> relevant administrative issuances and that your appointment will be extended in line with the UN Staff Regulations and Rules.
>
> We will be tracking the sick leave entitlements and keep you informed of the timelines. Should you exhaust the entitlement of sick leave and as per the recommendations of your physician and UNMSD, UNDP will support the submission of any requests for disability benefit with the UNJSPF. Please be aware that at the moment you will no longer be on certified sick leave, your notice period in accordance with the UN Staff Rule 9.6 (c) (i), and UN Staff Rule 9.7 (b), will automatically begin.
>
> …

90. The Tribunal considers that, according to the first paragraph of the 29 January 2015 letter, the Applicant's contract was terminated because "[her] assignment with the Governance Unit, former BDP (now BPPS) has ended and the position [she] was encumbering with BPPS will subsequently be abolished effective 31 January 2015".

91. The Tribunal considers that there are two different reasons invoked by the UNDP:

a. The end of the Applicant's assignment in former BDP on 31 January 2015, and

b. The abolishment of her post effective 31 January 2015.

92. The Tribunal notes that none these reasons, notably the end of the assignment and the abolishment of post, are reasons for termination related to the staff member. The Tribunal will further analyze each of these reasons to determine if the termination decision was issued in accordance with the legal provisions.

Did the Applicant's assignment with the former BDP end on 31 January 2015?

Facts relevant to the Applicant's end of assignment on 31 January 2015

93. The Tribunal notes the following relevant facts:

a. The Applicant's contract as RC in UAE was extended for two years effective from 1 June 2012 until 31 May 2014;

b. On 4 June 2012, she was officially informed that, as agreed with the UNDP management in May 2012, she was to be "reassigned" to a D-1 level post in BDP/DGG at UNDP Headquarters in New York, starting on 1 August 2012 and that she would have to report to her new office on 4 September 2012. This assignment would be "for 22 months, being the balance of the two year extension [and] during this assignment [the Applicant] could apply for other HQ posts, without being bound by the usual 'time post limitation'";

c. On 4 June 2012, she was also informed that the Terms of Reference for her new position would be developed during the following week for a post at the D-1 level in the "BDP Governance Unit";

d. On 12 June 2012, Ms. FW forwarded the Terms of Reference to the Applicant. In these Terms of Reference, the Applicant's post title was titled, "Policy Advisor on Public Service", its level was stated as D-1, and it was located in New York. Under the heading, "Duties and Responsibilities", it was indicated that the Applicant would work under "the overall direction of [the DGG Director] and the direct supervision of the Senior Public Administration Advisor/Responsive Institutions Cluster Team Leader";

e. The Applicant left UAE on 31 July 2012, proceeding on home leave, and reported for duty in BDP on 4 September 2012;

f. The official Terms of Reference for Applicant's post were finalized and signed by her supervisor on 9 April 2013. The document sets out two important elements: an extension of the Applicant's initial mandate with BDP until 13 December 2013 and the description of her duties and responsibilities for 2013 and for the future period 2014 to 2017 as follows:

> ...
>
> The Special Advisor *will play a leading role* in disseminating the messages and findings of the first Flagship Democratic Governance Report and *support the Practice Director* in building momentum and consensus on the key messages and reform recommendations of the Report amongst traditional and emerging donors, the G77 Group, UN agencies, OECD and other multilateral and bilateral donors. To that effect, the Special Advisor will represent UNDP/DGG, along with the DG Report team, in this dialogue with traditional and emerging donors seeking new partnerships and renewed commitment to democratic governance as key pillar to achieving MDGs/SDGs, Post 2015 Agenda development, women empowerment and social protection. The Special Advisor will explore developing a DG Strategy for pilot regions based on the DG Report recommendations.
>
> ...
>
> **... Lead the development of UNDP Strategy on Political Economy of Transitions and build consensus and new partnerships In support of Implementing the new UNDP Strategy.**
>
> ...
>
> Building on the outcome of the recent OGC Political Economy of Transitions Conference and following up on ideas and proposals of the OGC-NOREF Initiative, as well as current UNDP work on transitions, the Special Advisor, under the guidance and supervision of the DG Practice Director, will work closely with the Director of OGC and BCPR to develop UNDP Strategy on Political Economy of Transitions - dedicating 50% of her time on delivering this key result. The UNDP Oslo Governance Centre (OGC) and the Norwegian Peacebuilding Resource Centre (NOREF) organized a conference on the political economy of democratic transitions, with a focus on understanding models, policies and processes underpinning economic transformation and the renegotiation of

the social contract and have produced a number of working discussion papers in this area. OGC has also created a new stream of work in its 2013 workplan specifically dedicated to support UNDP's analytical work, dialogue and knowledge sharing of the governance elements In political transitions and has articulated some concrete ideas for follow up to support UNDP to play a stronger leadership role in this area.

...

The Special Advisor will lead on developing a new strategy for UNDP Intervention and leadership on democratic governance in countries undergoing political transitions, including the Post 2015 Agenda and support countries in defining and articulating a new governance model and social contract which will form the basis for the Post 2015 Agenda. In carrying out this work, the Special Advisor will be supported by a small team of researchers to ensure quality products and timely delivery of results.

...

... **Contribution to UNDP Strategic Plan 2014-2018**

...

Within the current context of the new Areas of Work as identified in the new UNDP Strategic Plan 2014-2017, and DGG commitment to an integrated approach to deliver the outcomes and results of Work Area 2 of the SP- with high policy impact at national levels, DGG will pursue widening inclusion, expanding choice and opportunity, and advancing effectiveness, inclusiveness and responsiveness of governance across all new Areas of development work. DGG support to the new UNDP Strategic Plan Includes, among other key results, assistance for governance transitions, advocating governance innovation and reform, supporting equitable access to services, developing comprehensive approaches to state building in postconflict settings and providing assistance to state-building to improve capability, accountability, responsiveness and legitimacy.

...

The Special Advisor will also provide strategic advice and insights into the DG Strategy and Post 2015 dialogue for the Arab region, as requested by the DG Practice Director. In close collaboration with the Governance Team Leader in the RCC, she will explore and elaborate a concept note and analytical framework for a regional Democratic Governance Report for

> the Arab Region, building on the findings and recommendations of the Global DGR anticipated to be launched in Summer 2013.

The actual status of the Applicant's assignment

94. The Tribunal concludes that the Applicant's initial assignment as a Policy Advisor at the D-1 level, which was supposed to be for 22 months and expire on 31 May 2014, was extended until 31 December 2014. The Tribunal further notes that, while the duties included in the Applicant's initial Terms of Reference of June 2012 were related to the UNDP Strategic Plan 2008–13, the final Terms of Reference of April 2013 expanded her duties and responsibilities, indicating that the Applicant's assignment was expected to last until 2017 in order to implement the major governance processes as detailed the 2014–17 Strategic Plan, as adopted by the UNDP, the United Nations Population Fund and the United Nations Office for Project Services on 2 August 2013. The Tribunal concludes that, on the preponderance of evidence, the Applicant's assignment as a Policy Advisor at the D-1 level in BDP did not end in December 2014 but was expected to continue until 2017, at least until 28 August 2017 (the retirement date of the Applicant). Furthermore, the Tribunal notes that UNDP did not take into account the extension of the Applicant's contract from 1 June 2014 to 31 December 2014, which had otherwise been approved by the then Practice Director of DGG on 9 April 2014 and accepted by the Applicant, as the Applicant's contract was instead extended twice for three–month periods, notably from June to August 2014 and from September to December 2014. As results from the 1 July 2014 response to the Applicant's management evaluation request of the decision not to renew her contract beyond 31 May 2014, the end of her assignment mandate was not stated as the reason but rather that:

> Since [her] post [was] affected by the realignment exercise, [her] appointment was not again renewed two years, but only for a period of three months. As indicated, this [was] in line with a decision to limit duration of contract extensions pending the realignment process, which applies to most staff members at UNDP headquarters.

The Applicant's right to be maintained in the Pool of the Business Solution Exchange Mechanism

95. The "Business Solution Exchange Mechanism (BSE)" (submitted by the Respondent on 24 February 2016) states as follows, in relevant parts:

> **I. Objectives**
>
> UNDP is a dynamic and universally present organization. In order to stay relevant, it has to provide a high quality, timely and efficient response to emerging and often rapidly changing development challenges both globally and at the country level. A critical element of its effectiveness and requisite agility is the ability of UNDP to strategically utilize talent and productively match the knowledge, skills and competencies of its personnel to particular business requirements.
>
> In line with this objective the Business Solutions Exchange (BSE) mechanism supports Bureaus, Global and Regional Centers and Country Offices of UNDP in engaging additional temporary capacity matching their business needs and demands. It constitutes an integral part of the emerging corporate service delivery model, which aims to enhance organizational and development effectiveness.
>
> **II. Sources of talent to be engaged through the BSE mechanism**
>
> During the initial phase (2 years) the Business Solutions Exchange mechanism will draw on staff between assignments as the main source of temporary capacity. In addition to providing UNDP offices with an important opportunity to address their short-term capacity needs, the BSE mechanism will allow such staff to get productively engaged and continue contributing to UNDP results, in case there is demand for their services.
>
> The BSE talent pool will be composed of long-serving [footnote omitted] international professional (IP) staff with permanent and fixed-term appointments in the following categories otherwise called "between assignments":
>
> a. whose post has been abolished;
>
> b. whose regular tour of duty has ended and the next assignment is not yet identified;
>
> c. who return from an inter-agency move;
>
> d. who wish to return from a special leave without pay;

e. who were selected for a post but were not cleared through an inter-agency process or by

the host Government;

f. who cannot continue in the post due to unforeseen circumstances;

g. who are close to retirement (58 years or older for retirement at the age of 60, and 60 years or older for retirement at the age of 62 [footnote omitted])and are not able to fulfill a complete tour of duty, especially in field positions, before mandatory retirement [footnote omitted].

…

IV. Terms of engagement

…

c. Duration

Being in the BSE pool, including being engaged in a formal temporary assignment through the BSE mechanism, does not change the "between assignments" status of the staff member. (S)he must continue actively searching for a regular assignment, with the support of the HR Business Advisors and the Career Transition Unit (CTU) in OHR/BoM.

The cumulative time during which a staff member can be in the BSE pool is 6 months. If the staff member in the BSE pool gets engaged in a formal temporary assignment, the time in the BSE pool will come to a halt and will resume (not restart) upon the completion of the temporary assignment. The duration of the temporary assignment itself can be flexible and will be agreed with the receiving unit.

These provisions will not fully apply to staff in category g. above, who can remain in the BSE pool for up to 2 years.

d. Funding

Generally, for a staff member in the BSE pool engaged in a formal temporary assignment through the BSE mechanism all costs will be covered by the receiving office.

BoM will cover all relevant costs for staff in the BSE pool for 3 months following the end of the previous regular assignment, which is expected to cover the first 3 months in the BSE pool. BoM will also cover such costs (with the exception of direct costs related to the assignment, e.g. the cost of travel and DSA) for the first 2 months of a formal temporary assignment or several assignments cumulatively since the staff member joins the BSE pool.

> Funding for staff close to retirement and any other situations where the provision above does not apply, will be reviewed on a case by case basis. Based on this note, more detailed procedural guidance will be developed by OHR/BoM and available through POPP.

96. The Tribunal notes that, in any event, even if her assignment had expired, after 29 January 2015, being over 58 years old and a staff member between assignments, she had the right to be maintained in the UNDP's BSE Pool for two years as a staff member close to retirement, based on the review of the funding related to her case. These provisions were not observed in the Applicant's case.

Was the Applicant's alleged post in former BDP abolished?

> The Administration's different reasons for abolishing the Applicant's alleged post in the former BDP

97. The Tribunal notes that, in the 1 July 2014 management evaluation response and his the 24 February 2016 reply, the Respondent presents two different and opposite reasons as for abolishing the Applicant's post.

98. The first reason, as stated in the 1 July 2014 management evaluation response, was that the Applicant's status had not been changed to "unassigned" and that the Personal Action Report ("PAR") sent to her on 28 May 2014 was no different from other PAR sent to her after her "reassignment" to BDP from September 2012, and that, "she [was] still assigned as a Special Advisor at the D1 grade with BDP/DGG. Since [her] assignment [was] affected by the realignment process, this situation [could] change, as in the case of most other staff members who [were] currently assigned to the headquarters".

99. The Tribunal notes that there is no evidence on the record of any organograms from before or after the Applicant's reassignment to BDP in New York reflecting the entity's structure. The Tribunal therefore concludes that, before 1 August 2012, when the Applicant was officially "reassigned" to New York, no vacant or occupied Policy Adviser post at the D-1 level existed in BDP/DGG. As results from the

correspondence received by the Applicant in June 2012, this post was created for her starting from 1 August 2012. In his submission dated 24 February 2016 to the Tribunal, the Respondent presented the following information:

> 2. The following is the list of D-1 posts in BDP, and later in BPPS, between June 2012 and the present:
>
> 3. In August 2012, BDP included one Director, one Policy Adviser, one Technical Adviser, one Adviser, two Deputy Directors and one Cluster Manager at the D-1 level (a total of seven).
>
> 4. In May 2013, BDP included two Directors, two Deputy Directors, one Policy Adviser, one Adviser, and one Team Leader at the D-1 level (a total of seven).
>
> 5. In May 2014, prior to the Structural Change, BDP included two Directors, two Deputy Directors, one Policy Adviser, one Adviser, and one Team Leader at the D-1 level (a total of seven).
>
> 6. As stated, following the Structural Change on 1 October 2014, BPPS was formed. In October 2014, BPPS included four Directors, six Chiefs, two Regional Cluster Managers, two Managers, one Executive Coordinator, two Regional Cluster Leaders, one Senior Adviser and one Senior Policy Adviser at the D-I level. (A total of nineteen, with two positions slated to be abolished by June 2015.)
>
> 7. In January 2015, BPPS included four Directors, six Chiefs, two Regional Cluster Managers, two Managers, one Executive Coordinator, two Regional Cluster Leaders, one Senior Adviser and one Senior Policy Adviser at the D-1 level. (A total of nineteen.)
>
> 8. In January 2016, BPPS included four Directors, six Chiefs, two Regional Cluster Managers, two Managers, one Executive Coordinator, one Regional Cluster Leader, and one Senior Policy Adviser at the D-I level. (A total of seventeen.)

100. Comparing this information to that which follows from the management evaluation response, it results that from August 2012 until 1 October 2014, there was only one "Policy Adviser" post in BDP at the D-1 level, which therefore, if anything, must have been the one encumbered by the Applicant.

101. From 1 October 2014, following the structural change of UNDP, BPPS was formed as a new Bureau that integrated a number of units from the old structure, notably: BDP, Bureau for Crisis and Recovery, part of the Bureau of External

Relations and Advocacy, and part of the Executive Office. It appears that the entire BDP office was therefore integrated in BPPS and no evidence indicate that any post from BPPS was subsequently abolished. From 1 October 2014 until January 2016, BPPS had one "Senior Policy Adviser" at the D-1 level and one "Senior Adviser". The two positions mentioned in paras. 7 and 8 in the Respondent's submission dated 24 February 2016 that were abolished in June 2015 were the posts of "Regional Cluster Leader" and "Senior Adviser", but the post of "Senior Policy Adviser" at the D-1 level remained.

102. As supporting evidence, the Respondent presented no organograms of the units, including BDP, which were absorbed into BPPS, to prove: (a) the number of identical D-1 level posts that exited in each of the units; (b) that the Applicant's post was the one that had actually been abolished; and (c) and that the remaining "Special Advisor" post at the D-1 level was not the one encumbered by the Applicant before to 1 October 2014.

103. The Tribunal concludes that it results that the abolishment of the Applicant's post was not genuine and that her post still appears to exist in the organigram of her office and that it is therefore also still funded.

104. The other reason related to the abolition of post was stated in the Respondent's 24 February 2016 submission as follows:

> … temporary positions, which are created to support temporary initiatives and special demands, are often not reflected in the Organizational organograms, which reflect the Organization's long term mandate. The Applicant's temporary assignment in BDP, similarly does not appear in the Bureau's organogram or staffing list.

105. This statement is contradicting what was stated in the 1 July 2014 management evaluation response and, in fact, confirms the allegations made by the Applicant in the management evaluation request that, in reality, she was not assigned to a post in BDP. Moreover, since all the Applicant's PARs were identical with the

one of 28 May 2014, it further results that starting from 1 August 2012 she was not officially assigned to any post in BDP.

Was the Applicant actually placed against a post as a "Policy Advisor at the D1 level in BPPS (former BDP) UNDP"?

106. The Tribunal considers that the Respondent appears to have presented two contradicting versions of the Applicant's contractual status in BDP:

a. That she was "reassigned" (laterally moved) to a D-1 level post in BDP based on an agreement between the releasing entity, RBAS, and the receiving entity, BDP. Such arrangement would require that a vacant D-1 level post already existed in BDP; or

a. As presented in the Respondent's reply, that the Applicant's assignment in BDP was a special arrangement that necessitated the creation of a new D-1 level position in BDP with similar responsibilities and duties to the ones of an RC (the Applicant's former position).

107. In either of these situations, it is clear that a post must have existed in the receiving agency, BDP (now BPPS), otherwise the Applicant could not have been considered a UNDP staff member, being still a RBAS staff member entitled to be laterally moved by the RBAS to another available RC post.

108. The Tribunal also observes that, in June 2012, the Applicant was informed that her D-1 level post in BDP had funding until May 2014. As concluded above, this post is actually still funded, being part of the BPPS and there is no evidence that its budget was reduced or is to be reduced in future.

109. The Tribunal considers that only an existing, unlike a non-existing, post can be abolished. The Respondent admits that the Applicant's post was not officially included in the organogram or in the staffing list, and the Tribunal therefore

concludes that it could not have been abolished. In conclusion, the decision to abolish the Applicant's non-existent post is absurd and unlawful.

Was the staff rule 9.6(e)(ii) respected in the Applicant's case ?

110. The Tribunal further notes that: (a) the Applicant was recruited as a RC at the D-1 level) through competitive recruitment process to serve on a two-year international fixed-term appointment, (b) she was to have identical responsibilities at a similar level in a new position, and (c) this type of contract continued in existence after her assignment with BDP.

111. Had the alleged Applicant's post in former BDP exited and subsequently been abolished, pursuant to the staff rule 9.6(e)(ii), subject to availability of suitable posts and after having considered any possible staff members on continuing appointments affected by the abolition, the Applicant had the right ("shall") to be retained in service and UNDP had the correlative obligation to retain her in service if her services could be effectively utilized, with due regard to her competence, integrity and length in service.

112. The Tribunal notes the following relevant Dispute Tribunal jurisprudence concerning abolition of a post of a staff member holding a continuing/permanent contract under staff rule 9.6(e)(i):

> *Hassanin* UNDT/2016/181
>
> … As noted by the United Nations Appeals Tribunal in *Masri* 2016-UNAT-626 (para. 30), "it is within the remit of management to organize its processes to lend to a more efficient and effective operation of its departments." However, there is a long line of authorities regarding the Respondent's duties towards staff members on abolished posts. In one of the earliest Dispute Tribunal cases on the subject matter—*Dumornay* UNDT/2010/004 (case concerning the United Nations Children's Fund ("UNICEF"), affirmed on appeal)—the Tribunal examined in paras. 30–34 whether there were reasonable efforts by the Administration to find alternative employment for the applicant who was a permanent staff member on an abolished post.

The Tribunal found that the applicant failed to show that UNICEF did not fulfil its obligations.

… In *Dumornay* 2010-UNAT-097, the Appeals Tribunal affirmed *Dumornay* UNDT/2010/004, referring in para. 21 to "reasonable efforts … to try to find [the Applicant] a suitable post":

> … Dumornay [permanent staff member] was given a three-month temporary appointment after her post was abolished and reasonable efforts were made by the Administration to try to find her [the Applicant—a permanent staff member] a suitable post …

… In *Bye* UNDT/2009/083 (case concerning the United Nations Office of the High Commissioner for Human Rights; no appeal), the Tribunal observed that it was unclear whether the requirement of good faith efforts to find alternative employment applied to staff on non-permanent appointments other than permanent staff on abolished posts. However, the Tribunal noted that the former United Nations Administrative Tribunal ("UNAdT") held the view that the requirement of good faith in the search for alternative employment extended to other, non-permanent categories of staff. The Tribunal therefore considered and found that the Administration made *bona fide* efforts to find alternative employment for the applicant, the holder of a fixed term appointment, although those efforts were unsuccessful.

… In *Shashaa* UNDT/2009/034 (case concerning the United Nations Development Programme ("UNDP"); no appeal), paras. 25–27 and 39, the Dispute Tribunal referred to some of UNAdT pronouncements on good faith efforts in finding alternative employment for displaced permanent staff, noting that "the employer can expect reasonable cooperation" from the affected staff member.

… In *Mistral Al-Kidwa* UNDT/2011/199 (case concerning UNICEF; no appeal), paras. 50–74, the Tribunal addressed UNICEF's rules for staff on abolished posts, including additional obligations of the Administration with respect to search for alternative employment.

… In *Tolstopiatov* UNDT/2010/147 (case concerning UNICEF; no appeal), the Tribunal addressed UNICEF's rules for staff on abolished posts, including additional obligations of the Administration with respect to search for alternative employment. In para. 45, the Tribunal stated in essence that the obligation of "good faith effort" is implicitly part of staff rule 9.6(e) in respect of the preference given to staff members in cases of abolishment of posts. The Tribunal found that the burden of proving that the Organization made a diligent search rests with the Organization.

… In *Abdalla* UNDT/2010/140 (case concerning the UN Secretariat, affirmed in *Abdalla* 2011-UNAT-138), the applicant was a temporary staff member outside the scope of preference stated in staff rule 9.6(e). The Tribunal stated in paras. 27–28:

> … The Tribunal also noted the jurisprudence of the former United Nations Administrative Tribunal applicable to cases of abolishment of post to assess whether the Organization was obliged to find alternative employment for the applicant, as a staff member of a downsizing Organization before his reassignment to UNAMI, and after that, as a staff member of UNAMI on temporary assignment whose post had been abolished.
>
> 28. The former United Nations Administrative Tribunal has consistently held that "a good faith effort must be made by the Organization to find alternative posts for permanent staff members whose post are abolished" (see UNAT Judgement No. 910, *Soares* (1998), citing Judgement No. 447, *Abbas* (1989); Judgement No. 85, *Carson* (1962); Judgement No. 1128, *Banerjee* (2003)). The Tribunal has stated that such a duty is strictly speaking limited to staff members with permanent appointments and that to apply the same duty to staff members with fixed-term appointments appeared to fall out of the scope of application of the former staff rule 109.1 (see Judgment No. UNDT/2009/083, *Bye*). Even if the jurisprudence refers to former staff rule 109.1, the current staff rule 9.6 (e) cited above, embodies a similar rule in respect of the preference given to staff members in cases of abolishment of posts.

… In *Abdalla* 2011-UNAT-138 (para. 25), the Appeals Tribunal found that there were "no provisions in the Staff Regulations and Rules that require the Organization to create or find a suitable post for a staff member on a *temporary* assignment in cases of abolition of post" (emphasis added).

… In *Pacheco* UNDT/2012/008 (case concerning the Office for the Coordination of Humanitarian Affairs ("OCHA"); affirmed on appeal), the Tribunal dismissed the applicant's claim that OCHA was obliged to make a good faith effort to find an alternative suitable post. The Tribunal found that the applicant's fixed-term contract expired and hence staff rule 9.6(e) did not apply (see paras. 71–77 of *Pacheco*).

… In *Rosenberg* UNDT/2011/045 (case concerning UNDP; no appeal), the Tribunal found that reorganization was a valid exercise of the Respondent's discretion and the decision not to retain the staff member further was not unlawful.

… The most recent pronouncement of the Dispute Tribunal is *El-Kholy* UNDT/2016/102 (presently under appeal). Although that judgment concerned UNDP, which has a number of internal issuances concerning abolishment of posts and related matters, the Tribunal provided a detailed examination of the relevant case law and made a number of significant legal pronouncements of general application. The Tribunal stated:

> 52. It is clear from staff rule 9.6(a), (c) and (e) that a termination as a result of the abolition of a post is lawful provided that the provisions of the Staff Rules are complied with in a proper manner. It is also abundantly clear from this rule, read together with staff rule 13.1(d), that there is an obligation on the Administration to give proper and priority consideration to permanent staff members whose posts have been abolished. As such, a decision to abolish a post triggers the mechanism and procedures intended to protect the rights of a staff member under the Staff Rules to proper, reasonable and good faith efforts to find an alternative post for the staff member who will otherwise be without a job. Failure to accord to the displaced staff members the rights conferred under the Staff Rules will constitute a material irregularity.
>
> …
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> 55. Staff rules 9.6(e) and 13.1(d) clearly set out the duty and obligation on the Administration with an unequivocal commitment to give priority consideration to retaining the services of staff members holding a permanent appointment subject to the following conditions or requirements: relative competence, integrity, length of service and the availability of a suitable post in which the staff members services can be effectively utilized.
>
> …
>
> 67. The fact that the Staff Rules provide that in assessing the suitability of staff members for available positions, due consideration has to be given to the relative competence, integrity and length of service,

does not imply that the Organization can make such assessment only if and when a staff member has applied for a particular vacancy. Nothing in staff rules 9.6(e) and 13.1(d) indicates that the suitability for available posts of a staff member affected by the abolition can only be assessed if that staff member had applied for the post.

68. On the contrary, in case of abolition of post or reduction of staff, the Organization may be expected to review all possibly suitable available posts which are vacant or likely to be vacant in the near future. Such posts can be filled by way of lateral move/assignment, under the Secretary-General's prerogative to assign staff members unilaterally to a position commensurate with their qualifications, under staff regulation 1.2(c). It then has to assess if staff members affected by the restructuring exercise can be retained against such posts, taking into account relative competence, integrity, length of service, and the contractual status of the staff member affected. It is clear from the formulation of staff rules 9.6(e) and 13.1(d) that priority consideration must be accorded to staff members holding permanent appointments. Preferential treatment has to be given to the rights of staff members who are at risk of being separated by reason of a structural reorganisation. If no displaced or potentially displaced staff member is deemed suitable the Organisation may then widen the pool of candidates and consider others including external candidates, but at all material times priority must be given to displaced staff on permanent appointments. The onus is on the Administration to carry out this sequential exercise prior to opening the vacancy to others whether by an advertisement or otherwise. Accordingly, an assertion that the Applicant's suitability could not be considered for any vacant positions if she had not applied for them is an unjustifiable gloss on the plain words of staff rules 9.6(e) and 13.1(d) and imposes a requirement that a displaced staff member has to apply for a particular post in order to be considered. If that was the intention, the staff rule would have made that an explicit requirement. But most importantly, such a line of argument overlooks the underlying policy, in relation to structural reorganisation, of according preferential consideration to existing staff who are at risk of

> separation prior to considering others and giving priority to those holding permanent contracts.
>
> …
>
> 86. By simply stating that he could not consider the Applicant for any position for which she had not applied and that she could not be considered for placement or lateral move, the Respondent admits that no consideration whatsoever for any such available posts was given to the Applicant. The Administration did not even look for available posts for which the suitability of the Applicant, by way of placement or lateral move, could have been considered before the termination of her appointment took effect.
>
> …
>
> 89. … [T]he Administration failed to fulfil its obligations under staff rules 9.6(e) and 13.1(d). It also failed in this duty when it did not at least make an assessment of her suitability for other available posts. It follows that the decision to terminate the employment of the Applicant by reason of an organisational restructuring was not in compliance with the duty on the Respondent under staff rule 9.6(e) read together with staff rule 13.1(d). The termination in these circumstances was unlawful.
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> …

… In Judgment No. 1409, *Hussain* (2008) (concerning a former staff member of UNDP), the UNAdT held that the obligation of the Administration under former staff rule 109.1(c) meant that "once a *bona fide* decision to abolish a post has been made and communicated to a staff member, the Administration is bound—again, in good faith and in a non-discriminatory, transparent manner—to demonstrate that all reasonable efforts had been made to consider the staff member concerned for available and suitable posts".

… In Judgment No. 910, *Soares* (1998) (concerning a former staff member of UNDP), the UNAdT reiterated that a good faith effort must be made by the Organization to find alternative posts for permanent appointment staff members whose posts are abolished. The Respondent must show that the staff member was considered for available posts and was not found suitable for any of them prior to termination. The Tribunal has held in the past that where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was

given (see also Judgment No. 447, *Abbas* (1989); Judgment No. 1128, *Banerjee* (2003)).

… Although the rulings of the UNAdT referred to above relate to cases involving UNICEF and UNDP, the UNAdT found that a duty to deploy good faith efforts to find alternative employment for the displaced staff member existed for any permanent staff member whose terms of employment were governed by the Staff Regulations and Rules. See, e.g., para. VIII of Judgment No. 1163, *Seaforth* (2003), stating that "where there is an abolition of a 100 series post, the Respondent has an obligation to make a bona fide effort to find staff members another suitable post, assuming that such a post can be found, and with due regard to the relative competence, integrity and length of service of that staff member". See also para. VII of Judgment No. 1254 (2005).

Administrative Tribunal of the International Labour Organization

… In *El-Kholy* UNDT/2016/102, the Dispute Tribunal included a number of relevant pronouncements of the Administrative Tribunal of the International Labour Organization ("ILOAT").

… In Judgment No. 1782 (1998), at para. 11, the ILOAT stated:

> What [staff rule 110.02(a) of the United Nations Industrial Development Organization] entitles staff members with permanent appointments to is preference to "suitable posts in which their services can be effectively utilized", and that means posts not just at the same grade but even at a lower one. In a case in which a similar provision was material (Judgment 346: *in re* Savioli) the Tribunal held that if a staff member was willing to accept a post at a lower grade the organisation must look for posts at that grade as well.

… In Judgment No. 3238 (2013), the ILOAT decided that the advertising of a post inviting reassigned staff members to apply would not be sufficient to comply with the duty to give them priority consideration. The ILOAT stated at para. 12:

> At all events, in law the publication of an invitation for applications does not equate with a formal proposal to assign the complainants to a new position, issued specifically in order to comply with the duty to give priority to reassigning staff members holding a contract for an indefinite period of time.

… In Judgment No. 3437 (2015), at para. 6, the ILOAT stated:

The Tribunal's case law has consistently upheld the principle that an international organization may not terminate the appointment of a staff member whose post has been abolished, at least if he or she holds an appointment of indeterminate duration, without first taking suitable steps to find him or her alternative employment (see, for example, Judgments 269, under 2, 1745, under 7, 2207, under 9, or 3238, under 10). As a result, when an organisation has to abolish a post held by a staff member who, like the complainant in the instant case, holds a contract for an indefinite period of time, it has a duty to do all that it can to reassign that person as a matter of priority to another post matching his or her abilities and grade. Furthermore, if the attempt to find such a post proves fruitless, it is up to the organisation, if the staff member concerned agrees, to try to place him or her in duties at a lower grade and to widen its search accordingly (see Judgments 1782, under 11, or 2830, under 9).

Nakhlawi UNDT/2016/204

… The Applicant argues that the mandate of her post was terminated, but that her post was not abolished. Given staff rule 13.1(c), the termination of her permanent appointment was illegal. The Respondent holds that staff regulation 9.3(b) and staff rule 9.6(d) only cover the change or termination of a mandate of an entity, a mission or a department, in this case UNICRI, but not that of a single post. In his view, this case is one of abolition of post, and not of termination of a mandate pursuant to the above-referenced rules.

… While the term "abolition of post" is not defined by the Staff Regulations and Rules, staff regulation 9.3(b) and staff rule 9.6(d) define termination "in the interests of the good administration of the Organization" as "a change or termination of a mandate". The plain wording of these provisions does not indicate whether it meant the change or termination of the mandate of a department/mission, or simply the mandate of a particular post.

… The Tribunal finds that the distinction between staff regulation 9.3(b) and staff rule 9.6(d) refers to a change or termination of a mission/department, as opposed to a change or termination of the mandate of a particular post, and may be relevant in the case of termination of a continuing appointment. It is, however, irrelevant in case of termination of a permanent appointment. Indeed, a permanent appointment cannot be terminated on the grounds of termination of mandate, either of a mission, or of a particular post, unless it is accompanied by a decision to abolish the relevant post. Therefore, the relevant question for the Tribunal to consider is whether the mandate of the Applicant's post was terminated, and, if in the affirmative,

whether such termination of the post's mandate was accompanied by the abolition of said post? Stated differently, the Tribunal has to determine whether there can be situations in which the mandate for a post changed or terminated, without a decision to abolish such post being taken, and whether this is what occurred in this case?

… The Tribunal finds that there may be situations where the mandate of a Unit or of a given post is terminated, and a separate decision is taken to abolish (a) post(s). In such a scenario, staff rule 13.1(d), rather than staff rule 13.1(c) would apply to permanent appointees.

…

… The vacancy announcement for the post encumbered by the Applicant reflects exactly that reality, when it indicates, as a standard phrase for VAs for UNICRI's projects, that "extension of appointment is subject to the finite mandate of one year or more for carrying out the activities related to the design and implementation of the grant scheme and the availability of project funds". This formulation shows that it was clear from the beginning that in light of the finite character of the very specific and limited mandate of the post of Expert (Grant Management) to carry out activities relating to the design and implementation of the grant scheme, the post encumbered by the Applicant would naturally come to an end once the post holder had accomplished all the functions falling in his/her portfolio. It was, however, not predictable with precision when that would occur.

…

… Having concluded that the present case is one of termination of the (finite) mandate of the Applicant's post, rather than one of its abolition, the Tribunal finds that the legality of the termination of the Applicant's permanent appointment has to be assessed under staff rule 13.1(c), rather than under staff rule 13.1(d). Since pursuant to staff rule 13.1(c), staff rule 9.6(d)—which allows termination on grounds of change or termination of mandate—does not apply to permanent appointments, and in the absence of the abolition of her post, the decision by the Administration to terminate the Applicant's permanent appointment was illegal and should be rescinded.

…

… The Respondent did not contest that in case of termination of permanent appointment under staff rule 13.1(d), the Administration has to make good faith efforts to place the concerned staff member in a suitable post. However, the Administration argues that the extent of that obligation is limited to the department in which the Applicant was employed at the time of separation. The Respondent notes that the

Applicant had been transferred, between departments, from DFS to UNICRI, in 2012, and that any obligation to make efforts to place her were limited to the "parent department", which he notes was UNICRI. It is the Respondent's view that since UNICRI made genuine efforts, and since the Applicant's candidature to a few positions in the Secretariat were given due consideration, the Administration complied with its duty under the relevant rule.

…

… In determining whether the Administration complied with its duty under staff rule 13.1(d), the Tribunal finds it necessary to take into account the rationale behind the creation of a career service at the United Nations. It notes that from its inception, the United Nations gave particular importance to the consideration of granting staff members the status of permanency. The rationale for the establishment of career appointments at the United Nations is first reflected in the report of the Preparatory Commission of the United Nations (Report of the Preparatory Commission of the United Nations (UN Document PC/20, December 23, 1945), p. 92.), in 1945, which underlined the need for a career service, and its special character:

> Unless members of the staff can be offered some assurance of being able to make their careers in the Secretariat, many of the best candidates from all countries will inevitably be kept away. Nor can members of the staff be expected fully to subordinate the special interests of their countries to the international interest if they are merely detached temporarily from national administrations and remain dependent upon them for their future. Finally, it is important that the advantages of experience should be secured and sound administrative traditions established within the Secretariat.

…

… With this in mind, the Tribunal recalls what it held in *El-Kholy* (followed in *Hassanin* UNDT/2016/181) with respect to the obligations of the Administration pursuant to staff rule 9.6(e) and 13.1(d) when considering the termination of the appointment of a permanent staff member:

…

… In light of all of the foregoing, the Tribunal stresses that it is clear that in contrast to Applicant El-Kholy, the permanent appointment of the Applicant in this case was one with the United Nations Secretariat. The duty of the Administration under staff rule

> 13.1(d) was not limited to a particular office or department. No such limitation can be drawn from staff rule 13.1(e), which only applies to staff members on the General Service category. In light of the above provisions of the Staff Rules, the Respondent's argument that the duty of the Administration to make good faith efforts to place the Applicant against a suitable post extended only to her "parent department", which he defined as being UNICRI, cannot stand. As an international professional staff member, with a permanent appointment with the United Nations Secretariat, the limitations under staff rule 13.1(e) and (f) did not apply to the Applicant.
>
> … The Administration's duty, arising from staff rule 13.1(d), finds its reflection in the terms of sec. 11.1(b) (Placement authority outside the normal process) of ST/AI/2010/3 (Staff selection system). Under that provision, upon the abolition of the Applicant's post, on the assumption that one were to follow the Respondent's argument that her post had been abolished, the Assistant-Secretary-General for Human Resources Management had the authority to place the Applicant in a suitable position. In light of the staff rules as referred to above, that authority turned to a positive duty and extends to any available suitable post anywhere within the United Nations Secretariat.

113. The Tribunal considers that the Administration's obligation established in *Hassanin* and *Nakhlawi* for staff members on continuing appointment, as indicated in staff rule 9.6(e), exists and is applicable to all staff members affected by the abolition of posts in the mandatory order of preference set out in secs. (i), (ii) and (iii) of staff rule 9.6(e), including the Applicant's two-year fixed-term appointment.

114. In the present case, there is no evidence that any BPPS staff members holding continuing appointments at the D-1 level were affected by the restructuring process and therefore were to be considered for available posts before the Applicant.

115. Furthermore, the Tribunal notes that no evidence shows that a detailed list of available posts in UNDP (BPPS and/or in other entities) had been prepared as required ("will") by UNDP's "People Realignment Policy and Processes". The list should have identified those positions where processes of lateral move, position matching and relocation could have been conducted in the Applicant's case, and then been presented to her to allow her to assess the options and express her acceptance of any such positions.

116. The Tribunal observes that, as results from Judgment No. *Sarrouh* UNDT/2016/219 in Case No. UNDT/NY/2014/021, as per March 2016, there were at least two vacant RC posts for which the Applicant had actually applied in February 2014 (Nigeria and South Arabia) and to which the Applicant could have been laterally moved.

117. The Tribunal considers that the Applicant had no obligation to secure a temporary or regular assignment with BPPS and the justification included in the contested decision that she was not successful in securing any temporary or regular assignment with BPPS has no legal standing.

118. Consequently, even if the Applicant's post had actually been abolished, the Tribunal concludes that the Applicant's rights pursuant to staff rule 9.6(e)(ii) were not respected.

Was the termination decision in reality based on another reason than end of appointment and abolition of post?

119. The Tribunal notes that, in his reply, the Respondent submitted that "the Applicant had remained on sick leave all this while. While her position had ended on 1 July 2014, due to her sick leave UNDP did not send her a letter informing her that she was to be separated, and as a result, her post was not formally abolished". However, following consultations with the Medical Services Division, which advised UNDP that it would beneficial to the Applicant's recovery to be advised of her exact job status on 29 January 2015, OHR informed the Applicant that her assignment with BPPS (formerly BDP) had ended and that her post in BPPS would be formally abolished effective 31 January 2015:

> …
>
> We take note of your certified sick leave for the period 1 May 2014 through 31 December 2015. We also take note that you and your physician have expressed intention to submit requests from extended certified sick leave beyond this period. We confirm that UNDP will

> proceed in accordance with UN Staff Regulations and Rule 6.2 and the relevant administrative issuances and that your appointment will be extended […]
>
> We will be tracking the sick leave entitlements and keep you informed of the timelines. Should you exhaust the entitlement of sick leave and as per the recommendation of your physician and UNMSD, UNDP will support the submission of any requests for disability benefit with the UNJSPF. Please be aware that at the moment you will no longer be on certified sick leave, your notice period in accordance with the UN Staff rule 9(c)(i) and UN Staff Rule 9.7 (b) will automatically begin .
>
> …

120. The Tribunal notes that the Applicant was placed on sick leave on 26 February 2014 and, until that moment, she had completed more than three years of continuous service under a fixed-term appointment. According to the UNDP specific rules on "Termination of appointment for Reasons of Health" and "Sick Leave", she had the right ("shall") to be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years. As results from the above, the contested decision was issued on 29 January 2015 when the Applicant had already exhausted her nine months of full pay salary on 26 November 2014, but not the remaining nine months of sick leave with half pay.

121. According to the mandatory provisions of the UNDP specific rules on "Termination of appointment for Reasons of Health", UNDP had the obligation ("shall") starting from 26 November 2014, when the Applicant had used all her entitlement for sick leave with full pay, while she was on sick leave with half pay, to start the procedure for terminating her appointment for health reasons by bringing her situation into the attention of the Medical Director in order to determine if she should be considered for a disability benefit under art. 33(a) of the United Nations Joint Staff Pension Fund Regulations.

122. The Tribunal considers that, in fact, the notice period indicated in the termination decision is related to staff rule 9.6(c)(iii) on termination for health reasons and not to staff rule 9.6(c)(i) on abolition of posts or reduction of staff

because it explicitly mentioned "as per the recommendation of your physician and UNMSD, UNDP will support the submission of any requests for disability benefit with the UNJSP". The latter is a specific procedure only to a termination for health reasons and, instead of following the mandatory procedure for such a termination, UNDP invoked two non-existing reasons that involved a more simple termination procedure, Therefore, it appears that the real reason for the termination was the Applicant's extended sick leave, which is a reason for termination related to the staff member as opposed to a termination for reasons not related to the staff member such as abolishment of post, as invoked by the Respondent. The Tribunal observes that no information was provided by the parties if the procedure for disability benefit was initiated in the Applicant's case before or after her separation or if a decision was taken in this regards by the Medical Services Division. Moreover, the Tribunal considers that the Applicant was entitled to continue her sick leave on half pay until 26 August 2015, but she was separated before then in breach of the provisions entailed in the Convention on Termination of Employment, 1982 (No. 158) and the UNDP specific rules on "Termination of Appointment for Reasons of Health" and "Sick Leave".

Relief

The Applicant's requests for relief

123. In the application, regarding relief, the Application submitted that:

> … For all these reasons, the Applicant requests the Tribunal to order the decision to proceed with her separation from service on the basis that she failed to be placed in the Organization's Headquarters realignment process be rescinded. The Applicant has been denied the fair treatment to which she is entitled as well as all her rights as a long serving staff member. As a proper remedy to make her whole, she should be afforded priority placement.
>
> … As she is now facing eminent separation and has been served the notice of termination (only 2 years before retirement at age 62), the Applicant is asking for compensation for two years at full pay

> allowing her to benefit from her full pension; and award her moral damages in the amount of two years' net base pay. In addition, the Applicant is asking the court to award her an amount of $100,000.00 in compensation for medical expenses and suffering depression and illness as a result of harassment, mistreatment and discrimination. The Applicant is also seeking full reimbursement of all legal expenses she has incurred since 2012 in pursuing her rights in the amount of $30,000.

124. In her closing submissions, the Applicant amended this plea to:

> … While the Applicant has asked as matter of principle that the contested decision to separate her from service be rescinded, it is highly impractical to envisage going back to UNDP given the present leadership in UNDP and its refusal to address her concerns, resulting in lack of trust by the Applicant towards the current UNDP leadership. Should an order of reinstatement be envisaged, the appropriate remedy is Special Leave with Full Pay from the date of her separation (July 31, 2015) until her retirement (August 28, 2017), thereby ensuring her entitlements and wages tell' this period are recovered and her pension contributions are reinstated
>
> … In terms of alternative compensation in lieu of reinstatement, the Applicant is entitled to restoration of her full remuneration from her date of separation to the date of her mandatory separation from service. In addition to seeking alternative compensation commensurate with her legitimate expectations, she requests additional compensation for moral damages in the amount of $100,000 for the negative effects on her professional reputation, her future capacity for employment and future pension entitlements, as well as for the adverse effects on her health and well-being caused by the actions of senior management at UNDI', and $30,000 in legal costs caused by the Respondent’s abuse of process presenting false and misleading testimony to the Tribunal.

Rescission of the impugned separation decision and pecuniary compensation

125. As results for the above considerations, the contested decision is unlawful and is to be rescinded. The Tribunal considers that the rescission of an unlawful termination decision has the *ope legis* effect of the parties being retroactively placed in the same contractual relationship existent before the issuance of the rescinded decision. In line herewith, as the basis of any form of compensation, the Appeals Tribunal stated in *Warren* 2010-UNAT-059 (para. 10) that “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".

126. It results that, in case a termination decision is rescinded, the separated staff member is, in principle, to be retroactively reinstated in her/his former position and s/he is to receive his/her salary and other entitlements from the date when s/he was separated until her/his likely date of separation, as determined by the Dispute Tribunal. However, when the a party or both parties expressly indicate that due to the particular circumstances of a case the effective reinstatement no longer constitutes a possible option, the remedy can consist solely of compensation.

127. Taking into account the particular circumstances of the Applicant's health status, which, in her view, justify a further extension of the sick leave and prevent her from effectively undertaking functions similar to those of her previous position, the Tribunal considers it appropriate not to order the reinstatement and, in lieu of rescission of the termination decision, to order the Respondent to pay adequate pecuniary compensation.

128. The Tribunal notes that from the 1 July 2014 management evaluation response, it results that if the post had not been abolished, the Applicant contract would have been extended for another two years. Taking into consideration also the extension from April 2013 to December 2013, the Applicant's contract would therefore likely have been extended from 1 January 2014 to 31 December 2016. Furthermore, the Tribunal considers that, as results from the above considerations, her assignment with BDP/DGG was expected to continue in 2017, at least until 28 August 2017, the final year of implementation of the 2014–2017 Strategic Plan adopted in August 2013, at least until 28 August 2017, at the time of the Applicant's retirement.

129. Therefore, in lieu of rescission, the Tribunal will grant the Applicant's request for pecuniary compensation consisting in net-base salary from 31 July 2015 to 28 August 2017. In addition, the Applicant shall receive compensation in the amount

equal to the contributions (staff member's and the Organization's) that would have been paid to the United Nations Joint Staff Pension Fund for the entire period (31 July 2015 to 28 August 2017).

Moral damages

130. The Tribunal notes that art. 10.5(b) of the Dispute Tribunal's Statute was amended by the General Assembly in December 2014 and that the text introduced, as a mandatory new requirement, that the Dispute Tribunal may only award compensation "for harm, supported by evidence". This requirement is both substantive, because the compensation can only be awarded for harm, and procedural, because the harm must be supported by evidence.

131. In *Black's Law Dictionary*, 6th Ed. (1990), "harm" is defined as "[a] loss or detriment in fact of any kind to a person resulting from any cause" (p. 718).

132. It results that, since art. 10.5(b) of the Dispute Tribunal's Statute makes no distinction between physical, material or moral harm, the provision is applicable to any types of harm and that the harm must be supported in all cases by evidence.

133. The Appeals Tribunal stated in *Gueben et al*. 2016-UNAT-692 that the amended text of art. 10.5(b) of the Statute is of immediate application because an award of damages takes place at the time the award is made and not at the time the application is made. According to the Appeals Tribunal, "applying the amended statutory provision is not the retroactive application of law. Rather, it is applying existing law".

134. The Tribunal notes that, in *Asariotis* 2013-UNAT-309, the Appeal Tribunal stated that (emphasis in the original as well as added and footnotes omitted):

> 36. To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What

> can be stated, by way of general principle, is that damages for a moral injury may arise:
>
> > (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may of *itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
> >
> > (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.
>
> 37. We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

135. In accordance with the requirement of art. 10.5(b) of the Dispute Tribunal's Statute and para. 36(i) of *Asariotis*, this Tribunal is of the view that a breach of a fundamental nature can give rise to an award of moral damages only if the harm to the staff member is supported by evidence.

136. The Tribunal notes that, as results from the evidence, the Applicant was under continuous stress and depression caused by the circumstances of the present case for the following reasons:

a. Her contract was twice extended for three months even though it was valid until December 2014;

b. To be updated and informed of her contractual status, she had to file management evaluation requests to the UNDP Administrator and a suspension of action application to the Dispute Tribunal ;

c. After she was placed on sick leave in February 2014 and her contract was extended from 31 May 2014 until 31 August 2014, BDP/DGG did not take all the necessary measures to ensure the extension of her G-4 visa for this period. During her medical visit to New York in June 2014, she was exposed to humiliating procedures regarding her legal status in USA, while she was preparing for a major medical intervention. Despite the fact that her contract was further extended, her G-4 visa was not reissued and there is no evidence that she was contacted by the Respondent to resolve her visa issue before then;

d. The termination decision procedure was only initiated after her Medical Doctor, following extensions of her sick leave, recommended that her health would benefit from her receiving pertinent and concrete information regarding her contractual status. When provided, the information regarding the abolition of her post aggravated her health issues and she needed additional sick leave;

e. The events related to the termination decision, which was found to be unlawful, induced in the Applicant, a dedicated long serving staff member, a strong filing of rejection and a deep lack of trust in the Organization’s capability to recognize her contribution.

137. The Tribunal considers that the present judgment together with an amount of USD3,000 represents a reasonable compensation, and the request for moral damages is therefore to be granted in part.

Costs

138. The Tribunal notes that there is no evidence on the record produced by the Applicant regarding the amount of medical costs and/or the legal fees related to the present case. The Applicant's request for costs is to be rejected.

139. Furthermore, the Tribunal considers that no evidence was produced that show that the Respondent presented false and/or misleading testimony to the Tribunal. The request for USD30,000 is also to be rejected.

Conclusion

140. In the light of the foregoing, the Tribunal DECIDES:

a. The Application is granted in part;

b. The contested termination decision is rescinded;

c. As pecuniary damages in lieu of rescission, the Tribunal will grant the Applicant's request for pecuniary compensation consisting in net-base salary from 31 July 2015 to 28 August 2017. In addition, the Applicant shall receive compensation in the amount equal to the contributions (staff member's and the Organization's) that would have been paid to the United Nations Joint Staff Pension Fund for two years and 28 days;

d. The Respondent is further ordered to pay the Applicant a compensation of USD3,000 as moral damages;

e. The Applicant's request for medical costs, legal fees and legal costs is rejected.

141. The awards of compensation shall bear interest at the U.S. Prime Rate with effect from the date this judgment is executable until payment of said awards. An

additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this judgment becomes executable.

(*Signed*)

Judge Alessandra Greceanu

Dated this 22nd day of December 2016

Entered in the Register on this 22nd day of December 2016

(*Signed*)

Hafida Lahiouel, Registrar, New York