Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

TEO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Michael Brazao, OSLA

Counsel for Respondent:
Jérôme Blanchard, HRLU/UNOG

Introduction

1. The Applicant, a Human Rights Officer at the P-3 level, step 8, with the Office of the United Nations High Commissioner for Human Rights ("OHCHR") in New York, filed an application in which she describes the impugned decision as follows (emphasis omitted):

> As the present Application will make clear, the contested decision consists of two inextricably intertwined components.
>
> Component "A": The Applicant's assignment by her employer, OHCHR, to a General Temporary Assistance ["GTA"] … post contrary to the express terms of a post-matching exercise whereby she was informed in writing that she would be laterally transferred from her former post in the Asia-Pacific Section … at the Geneva duty station of OHCHR to a regular-budgeted ["RB"] post in the Sustainable Development Goals ["SDG"] Section … at the New York duty station of OHCHR.
>
> Component "B": Failure of the Applicant's employer to assign her appropriate functions commensurate with the SDG position she accepted in good faith pursuant to the above-referenced post-matching exercise.

2. In response, the Respondent contends that the application is not receivable *ratione materiae* and, in any event, without merit.

3. By Judgment No. UNDT/2018/044 dated 23 March 2018, the Tribunal held that the application is indeed receivable as the impugned administrative decision is one that is appealable under art. 2.1(a) of the Statute of the Dispute Tribunal (see this Judgment for the reasoning). The present Judgment therefore concerns the merits of the application.

Factual background

4. From 4 April 2008 until 31 October 2011, the Applicant worked in the Asia-Pacific Section ("APS") within the Field Operations and Technical Cooperation Division of OHCHR on various P-3 level posts.

5. On 3 December 2011, the Applicant was granted a fixed-term appointment against a RB-post at the P-3 level in APS.

6. On 10 September 2015, the Applicant received a memorandum, "Lateral move of posts to new Regional Hubs", by the then-High Commissioner for Human Rights, the then-Deputy High Commissioner for Human Rights, and the Assistant Secretary-General for Human Rights. The Applicant was informed that "an internal working-level Staff Movement Group (SMG) was established in June to develop a framework to better and more efficiently carry out OHCHR's mandate … The framework seeks to accomplish changes that are necessary for this Office to operate more effectively while also trying to accommodate staff members' needs and preferences". It was further stated that:

> […]
>
> … As the incumbent of an identified post, you would be expected to move with your post. However, if you do not wish to keep your post and move with it, you will be offered the opportunity to take part in a lateral staff movement exercise along with other staff across the entire Office. This would give you the opportunity to express preferences for available posts/duty stations, including the posts of staff in other locations who opt in to the process that will be coordinated by the SMG … The Steering Group will review the recommendations and the High Commissioner will take decisions on lateral reassignments by the end of November, although the implementation/moves will not occur until the first half of 2016, in consultation with the staff involved.
>
> […]

7. The Applicant elected to opt-in to this process, which was titled a "post-matching exercise".

8. On 9 December 2015, the Applicant received a memorandum, "Lateral movements under OHCHR Change Initiative", from the Chief of the Programme Support and Management Services ("PSMS") of OHCHR in which was stated:

> … I am writing with reference to the internal post matching process conducted in the context of the Change Initiative, in which you agreed to participate by declining a proposed move with your post to the field[.]
>
> … This is to confirm the High Commissioner's decision, pending receipt of the necessary budgetary approvals from the General Assembly, to laterally transfer you to the post you indicated as your second preference, Human Rights Officer in the Millennium Development Goals Section of RRDD [an unknown abbreviation, but the Applicant submits that the "Millennium Development Goals Section of RRDD" referred to was later renamed the "Sustainable Goals Division" ("SDG")] in New York.
>
> … Formal confirmation of the implementation of this decision, which will not take place before 2016, will be given following the final budget approval by the General Assembly at the end of this year. At that stage, PSMS/HRMS [presumably, Human Resources Management Service (unknown abbreviation)] will liaise with you regarding the dates for the transfer to take place.
>
> […]

9. On 15 January 2016, the Applicant received another memorandum, "Proposed lateral movements under OHCHR Change Initiative", from the PSMS Chief in which was stated:

> […]
>
> … As you are by now aware, the General Assembly has decided to delay action on the approval of OHCHR's proposals in the context of the Change Initiative, pending consideration of a final report to be presented to the seventy-first session of the General Assembly later

> this year. Given this outcome, it will not be possible to proceed with the implementation of those decisions.
>
> […]
>
> … In the meantime, further consideration is now being given to options for proceeding with those aspects of the Change Initiative within the authority of the High Commissioner, which we hope will provide opportunities for some movements of posts/staff. This will require a fresh look at the staffing implications, for which the successfully managed matching process will be used as a point of reference. This will, of course, be subject to full consultation with the concerned staff.
>
> […]

10. On 8 June 2016, by email to the PSMS Chief, copying in the HRMS Chief, the Applicant accepted the offer of the SDG-post in New York.

11. On 28 June 2016, the Applicant received an email from HRMS indicating that her move to New York had been officially approved effective 1 September 2016 and that she would be contacted by United Nations Office at Geneva's ("UNOG") Human Resources partners on the details of the move.

12. On 22 July 2016, the PSMS Chief forwarded to the Applicant a memorandum, "Your lateral move under the OHCHR Change Initiative", informing the Applicant that:

> … As discussed, the Controller has approved the move of posts in the OHCHR Sustainable Development Goals (SDG) [as stated above, formerly named the Millennium Development Goals] Section to New York from 1 September 2016, allowing for the implementation of the High Commissioner's lateral move decisions. Thus, I am pleased to confirm your transfer to the P-3 SDG post (#30501032) in New York, on the agreed date of 23 September 2016.
>
> … Details regarding the arrangements for your move will be communicated to you separately from UNOG in the coming days.

13. On 14 September 2016, only nine days before the Applicant was expected to relocate to New York, she learned that the incumbent of the SDG-post had filed an application for suspension of action with the Dispute Tribunal pending the completion of management evaluation of OHCHR's decision to laterally transfer him from the SDG-post in New York. The Applicant immediately emailed the PSMS Chief, copying in OHCHR and UNOG senior management, indicating that her relocation preparations were well underway, that if the incumbent's application was successful it could have very negative consequences for her and her family and that she and her family could no longer remain in Geneva on such short notice. She therefore requested that alternatives to her imminent deployment to New York on 23 September 2016 be explored. An email exchange ensued and, on 16 September 2016, the PSMS Chief responded in writing that a vacant post in New York would temporarily be available against which the Applicant could be placed pending the resolution of the issue of the incumbent's refusal to vacate his SDG-post. He further indicated that should the matter take a long time to resolve, the Applicant could be placed against a one-year vacancy to work on Asia-Pacific issues commencing in January 2017. However, the PSMS Chief indicated that he did not expect such contingency plans would be necessary and that, notwithstanding the turn of events, the Applicant and her family should move to New York on 23 September 2016 as scheduled.

14. As requested by the incumbent of the SDG-post, by Order No. 189 (GVA/2016) of 19 September 2016, the Dispute Tribunal in Geneva granted the suspension of action pending management evaluation.

15. The Applicant learned of Order No. 189 (GVA/2016) on 20 September 2016. The same day, the Applicant informed the PSMS Chief incumbent that she had made a number of professional sacrifices, including foregoing a temporary P-4 level

position in Geneva that had secured temporary funding for at least 15 months, with the possibility of an extension of said funding. The Applicant stated that for the sake of her professional security and that of her family, she would not accept being placed against a temporarily funded post in the long term and asked to be transferred to another RB-post at the P-3 level similar to the SDG-post.

16. By email of 21 September 2016, the PSMS Chief responded to the Applicant and expressed his understanding that she had participated in the post-matching process in good faith, and was committed to making arrangements to proceed with her deployment to New York pending resolution of the issue surrounding the unavailability of her post. He further stated that, as a transitional measure, the Applicant would have to take up a different assignment involving different functions than originally planned, for an unspecified period of time. While the PSMS Chief hoped that the case involving the incumbent of the SDG-post would soon be resolved so that the Applicant could assume the SDG-post that the incumbent was occupying, he stated that he could not make any guarantees to that effect as the matter was now pending before the Dispute Tribunal. Moreover, the PSMS Chief could not confirm that the Applicant would be transferred to a RB-post at the completion of this process, nor could he guarantee that she would be able to cover any particular portfolio. He did promise to work with the Applicant in the event that a long-term alternative solution was needed and would be supportive if the Applicant were to reconsider her move to New York.

17. By email of 22 September 2016, the Applicant responded to the PSMS Chief that it would not be feasible to reconsider her move to New York at the last minute, as all the necessary preparations to wind-up her life in Geneva had been made and she was expected to deploy to New York the very next day. The Applicant requested that an official memorandum be issued regarding her deployment.

18. On 23 September 2016, the PSMS Chief issued a Memorandum to the Applicant, "Your move to New York Office". The PSMS Chief reiterated the situation regarding suspending the administrative decision to transfer the incumbent of the SDG post from the very same post the Applicant was expected to occupy, and sympathized with the hardship this situation had engendered for her and her family. He further reassured the Applicant that "we will make every effort to honour th[e] commitment" to transfer her to the SDG post that was "based on the decision of the High Commissioner for Human Rights of 9 December 2015". He then proceeded to instruct the Applicant that "your move to the New York takes effect as of today, i.e. 23 September 2016". The PSMS Chief informed the Applicant that "[u]nder the circumstances, and pending the outcome of the management evaluation process, you will be placed temporarily on a temporary post … performing temporarily the functions required of a Human Rights Officer in support of the New York office".

19. On 27 September 2016, the Applicant received a letter from a Human Resources Officer, HRMS/UNOG ("the Administrative Decision"), in which it was stated that:

> … This letter cancels and supersedes the previous one dated 22 [it is stated August but must have been July, as per above] 2016. We wish to confirm that you have been temporarily assigned to the post of Human Rights Officer (P-3) in the Office of the High Commission of Human Rights, New York, for an initial period of three months. This temporary assignment is effective 23 September 2016.

20. From her onboarding in New York until December 2016, the Applicant performed functions related to the General Assembly's Third Committee. From late December 2016 to the time of the filing of this application, the Applicant has been performing functions related to Asia-Pacific issues in the Country Situations Section

and occasionally has been performing programme support functions where there have been staffing gaps.

21. On 18 November 2016, the Applicant sought management evaluation of the contested administrative decision. In the Respondent's reply, it is stated that on 6 March 2017, the Management Evaluation Unit issued its evaluation letter in the case of the other staff member, whereby it determined that the case was not receivable *ratione temporis*.

22. As requested by the incumbent of the SDG-post, by Order No. 70 (GVA/2017) of 15 March 2017, the Dispute Tribunal in Geneva granted, as an interim measure, the suspension of action pending the Dispute Tribunal's consideration of the application on the merits (the case was subsequently closed by an order on withdrawal, namely Order No. 107 (GVA/2017) of 9 May 2017).

Procedural history

23. On 15 March 2017, the Applicant filed the application.

24. On 17 March 2017, the Registry acknowledged receipt of the application on 15 March 2017 and, pursuant to art. 8.4 of the Rules of Procedure, transmitted it to the Respondent, instructing him to file a reply by 17 April 2017 in accordance with art. 10 of the Rules of Procedure.

25. On 17 April 2017, the Respondent filed his reply.

26. The present case was reassigned to Judge Alexander W. Hunter, Jr. on 8 January 2018.

27. By Order No. 10 (NY/2018) issued on 19 January 2018, the Tribunal instructed the Applicant to file a response to the Respondent's reply, including on the

submissions on non-receivability, by 2 February 2018.

28. On 29 January 2018, the Applicant filed a motion for extension of time to file a response to the Respondent's reply. The Applicant informed the Tribunal that Applicant's counsel went on leave on 18 January 2018 and returned on 29 January 2018, learning of the Tribunal's instructions in Order No. 10 (NY/2018) for the first time upon his return. Given these circumstances, the Applicant requested a one-week extension to the 2 February 2018 deadline so that the Applicant could benefit from the assistance of her counsel.

29. By Order No. 22 (NY/2018) issued on 31 January 2018, the Tribunal granted the Applicant's request for an extension of time and instructed the Applicant to file a response to the Respondent's reply, including on the submissions on non-receivability, by 9 February 2018.

30. On 8 February 2018, the Applicant filed a response to the Respondent's reply.

31. On 12 February 2018, by Order No. 35 (NY/2018), the Tribunal instructed the parties to participate in a Case Management Discussion ("CMD") which was scheduled for 22 February 2018.

32. On 22 February 2018, the Tribunal conducted the CMD, at which counsel for the Applicant participated by telephone while the Applicant was present in person in the courtroom in New York. At the CMD, the Tribunal noted, *inter alia*, that the instant case appears to raise a preliminary issue of receivability *ratione materiae.* Both parties agreed that receivability could be dealt with on the papers as a preliminary issue.

33. By Order No. 45 (NY/2018) dated 26 February 2018, the Tribunal made the following orders (emphasis omitted):

> … The Respondent shall file a reply to the Applicant's submissions on the receivability of the application by 5:00 p.m. on Monday, 5 March 2018. In particular, the Respondent is to provide a detailed explanation in support of his contention that the "[t]he funding source of a staff members post is purely operational and does not impact the Applicant's terms of appointment", together with supporting documentation (including copies of the Applicant's terms of appointment before and after the contested decision).
>
> … The Applicant can file additional particulars and supporting evidence, if any, in relation to her claim that the contested decision has caused her "economic prejudice" by 5:00 p.m. on Monday, 5 March 2018.
>
> … Closing submissions, if any, on the issue of receivability are due by 5:00 p.m. on Wednesday, 14 March 2018.

34. Pursuant to Order No. 45 (NY/2018), on 2 March 2018, the Applicant filed a submission on the "economic prejudice suffered due to [the] administrative decision" and appended the Applicant's signed, "Solemn affirmation".

35. On 5 March 2018, the Respondent filed his reply to the Applicant's submissions on the receivability as per Order No. 45 (NY/2018).

36. On 13 and 14 March 2018, the parties filed their closing submissions on receivability.

37. On 23 March 2018, the undersigned Judge issued Judgment No. UNDT/2018/044 by which the application was found to be receivable.

38. By Order No. 167 (NY/2018) dated 5 September 2018, the Tribunal stated that:

> … Perusing the parties' submissions, the Tribunal finds that the substantive dispute in the present case is of a legal nature and that the parties do not disagree on the facts as set out in the application. Accordingly, it would therefore be appropriate for the Tribunal to decide the outstanding matters on the papers already on record.

> Furthermore, it would appear to the Tribunal that the remaining issues on the merits of the case can be identified as follows:
>
> > a. Was it appropriate for OHCHR to place the Applicant on a general temporary assistance funded post, also considering Orders No. 189 (GVA/2016) and 70 (GVA/2017) issued by the Dispute Tribunal in Geneva, or should they have done differently (for instance, by placing her on a post with a regular budget)?
> >
> > b. Did the Respondent meet its obligation to provide the Applicant with functions commensurate to her skills and professional experience?

39. Accordingly, the Tribunal ordered that, "In light of Judgment No. UNDT/2018/044 and based on the papers already before the Tribunal, the parties are to file their closing statements on the merits of the present case by 4:00 p.m. on Tuesday, 18 September 2018" (emphasis omitted).

40. On 10 September 2018, counsel for the Applicant filed a "motion for extension of time to file closing statement" by which he requested the Tribunal to grant a one-week extension to the 18 September 2018 deadline of Order No. 167 (NY/2018).

41. By Order No. 174 (NY/2018) dated 12 September, the Tribunal granted the Applicant's request for extension of time and, in light of Judgment No. UNDT/2018/044 and, based on the papers already before the Tribunal, ordered the parties to file their closing statements on the merits by 25 September 2018.

42. On 25 September 2018, the parties filed their respective closing statements on the merits.

Applicant's submissions

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

a. The Applicant's assignment to a GTA-post was contrary to the express terms of a post-matching exercise whereby she was promised in writing that she would be laterally transferred from her former RB-post in Geneva to another-RB post in New York;

b. This decision was inappropriate and illegal because: (i) OHCHR committed breach of contract when it reneged on its written commitment to reassign the Applicant to another RB-post; and (ii) OHCHR was negligent in how it reacted to the threat posed to the Applicant's promised transfer by the refusal of another staff member to relinquish the said post. OHCHR, through its repeated, reckless and ultimately incorrect assurances that the incumbent's refusal to relinquish the SDG-post to be assumed by the Applicant would not pose any impediment to the Applicant's transfer, caused the Applicant to rely on the actions of the Administration to her significant professional, pecuniary and moral detriment;

c. The Applicant opted in to the post-matching exercise between 5 and 16 November 2015 when a compendium of available posts was released (this exercise was formally initiated on 10 September 2015 through a memorandum from OHCHR senior management). On 8 June 2016, she formally conveyed in writing her "final decision" to accept "the offer" of a RB-post in New York that was conveyed to her orally on 30 May 2016 and in writing on 31 May 2016 by the PSMS Chief;

d. It is not disputed by the Respondent that the PSMS Chief possessed the delegated institutional authority to contractually bind OHCHR in

conveying an offer of an RB-post in the SDG Section in New York to the Applicant. As to the existence of the contract in question, it is trite law that a binding contract requires evidence of an offer and acceptance of the offer (in civil law jurisdictions) plus consideration (in common law jurisdictions). The Dispute Tribunal, being an international tribunal representative of the community of nations, should adopt the less demanding civil law standard for contract formation, of which there is irrefutable evidence in this case. Nonetheless, even if the common law standard is to be applied, the Applicant has abundantly demonstrated the exchange of valuable consideration on both her behalf as for instance, the offer of her services as a Human Rights Officer at the P-3 level in the SDG Section of OHCHR, as well as the corollary relinquishment of her RB-post in OHCHR Geneva and all the attendant sacrifices she has documented in relation to that process and that of her employer (through the offer of employment on a RB-post as a Human Rights Officer at the P-3 of the SDG Section);

e. The existence of this binding contract concluded between the Applicant and OHCHR on 8 June 2016 is further evidenced beyond any doubt by the memorandum, "Your lateral move under the OHCHR Change Initiative". This memorandum encapsulated all the essential terms of the contract, including the nature of the undertaking, meaning the Applicant's agreed-upon lateral transfer to the SDG Section of OHCHR in New York, the identification of the exact RB-post to which the Applicant would be transferred, and the exact date upon which said transfer would be effectuated;

f. The Administration breached this contract through a series of communications and actions in September 2016 that culminated in the

impugned administrative decision of 27 September 2016, in which a memorandum from HRMS/UNOG stated in material part,

> This letter cancels and supersedes the previous one dated 22 August … 2016. We wish to confirm that you have been assigned to the post of Human Rights Officer (P-3) in the Office of the High Commission of Human Rights, for an initial period of three months. This temporary assignment is effective 23 September 2016.

g. As the impugned decision makes clear, the contract concluded between the Applicant and OHCHR on 8 June 2016 was unilaterally "cancelled and superseded" by the Administration and a new arrangement was imposed according to which at least one material term (i.e. temporary assignment to a GTA-post) of the contract had been altered;

h. The Administration's breach of contract directly caused significant professional, pecuniary and moral damages to the Applicant. These damages have been chronicled extensively in the written submissions proffered by the Applicant, her oral representations during the CMD of 22 February 2018 and have been repeatedly and expressly acknowledged by OHCHR in its communications to the Applicant. These damages caused by the Administration's breach of contract have been conclusively proven;

i. In *Buckley* UNDT/NY/2016/065, the Dispute Tribunal "note[d] that the word 'negligence' may be defined as follows…: […] [c]arelessness amounting to the culpable breach of a duty: failure to do or recognize something that a reasonable person (i.e. an average responsible citizen) would do or recognize, or doing something that a reasonable person would not do. In case of professional negligence, involving someone with a special skill, that person is expected to show the skill of an average member of the profession.

[…]". The Tribunal further expounded that "[s]imilarly, negligence is defined as 'the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation' … the elements of negligence generally constituting duty of care, breach of the duty of care, causation and damage";

j. The facts of this case abundantly prove: the existence of this duty of care on behalf of OHCHR; the breach of said duty through the management's collective failure to show the skill of an average member of that profession; and the causation of numerous professional, pecuniary and moral damages to the Applicant;

k. The Applicant recalls that pursuant to the protracted post-matching exercise commenced on 10 September 2015 to which she opted-in when a compendium of posts was made available between 5 and 16 November 2015, she concluded a binding contract with the PSMS Chief on 8 June 2016 to be transferred from her RB-post at the P-3 level in Geneva to another RB-post at the P-3 level in New York;

l. The particulars and all material components of this binding contract were memorialized by written communications sent to her from HRMS and the PSMS Chief on 28 June and 22 July 2016, respectively. The rigorous and time-consuming process that the Applicant underwent *en route* to the conclusion of this contract, through which the Applicant was required to make many difficult decisions and incur numerous sacrifices, created a duty of care on the part of the Administration to take all reasonable steps to protect this covenant from external interference that may jeopardize its execution;

m. On or about 29 August 2016, after the contract between the parties had been concluded and memorialized, the Applicant came to learn of a potential threat to her ability to assume the RB-post in New York that she had been promised, through the refusal of her colleague Mr. RPR, the incumbent of the post in New York, to relinquish said post. The documentary evidence before this Tribunal amply demonstrates how the Applicant took immediate, urgent, proactive and repetitive steps to engage the Administration in an effort to prevent this threat from materializing before it was too late. The Applicant's repeated warnings and efforts were systematically rebuffed by OHCHR management that did not treat the threat posed by the incumbent's refusal to the contract concluded between the parties with the requisite seriousness and diligence it evidently merited, as the incumbent's success with the issuance of Order No. 189 (GVA/2016) on 19 September 2016 ultimately proved;

n. At no point in the weeks leading up to the issuance of Order No. 189 (GVA/2016) did the Administration provide any suitable "contingency plan" by attempting to find the Applicant a comparable RB-post in New York to which the Applicant and her family had taken irreversible steps to relocate, that would adequately mitigate her loss should the incumbent's legal challenge prove successful. To the stark contrary, the Administration misjudged the strength of the incumbent's legal case, insisting to the Applicant that his challenge would not be receivable. As the situation became more dire and the Applicant amplified her pressure on the Administration to explore alternative solutions, while the PSMS Chief paid brief lip service to a temporary solution, by systematically rebuffing the Applicant's increasingly desperate pleas for action. In view of this threat OHCHR breached its professional duty of care owed to the Applicant by failing to do or recognize something that a reasonable person would do or recognize and failed to

exercise the special skill that person is expected to show as an average member of the profession. The Administration therefore breached its duty of care owed to her through its negligent conduct;

o. The Administration's negligent conduct caused significant professional, pecuniary and moral damages to the Applicant that can be compensated. It is uncontested that the Applicant relied on the Administration's erroneous prognostications that the incumbent's legal challenge would not imperil her impending transfer by making numerous, onerous, costly and life-altering decisions that could not be rescinded by the time the incumbent won his suspension of action a few days before her prospective deployment to New York. Again, based on the totality of the evidence, the causation of these damages has been conclusively proven through her robust prior submissions;

p. The Respondent argues that the Applicant's placement on a GTA-post was a necessary consequence of suspensions of action ordered by Orders No. 189 (GVA/2016) and 70 (GVA/2017) pending the outcome of that case, and that this interim arrangement was the only option available to the Respondent at the present time. First, it is not disputed that once Order No. 189 (GVA/2016) was issued, in accordance with the rule of law, the Respondent was precluded from placing the Applicant on the specific RB-post occupied by the incumbent. However, the Administration acted improperly by failing to place the Applicant on any RB-post in accordance with her agreement to participate in the post-matching exercise, and failed to exercise due diligence to find an alternative RB-post for the Applicant. The Respondent attempts to use Orders No. 189 (GVA/2016) and 70 (GVA/2017) as a shield against his failure to properly accommodate the Applicant by placing her against any RB-

post. As a matter of logic, it does not ineluctably follow that the judicial proscription against placing the Applicant against the SDG-post *ipso facto* precluded the Respondent from taking appropriate actions to find her another suitable RB-post. The Respondent has not adduced any evidence to back up the claim that placing the Applicant on a GTA-post was the only option available to the Respondent in response to Orders No. 189 (GVA/2016) and 70 (GVA/2017) as has been claimed. Also, no evidence had been adduced by the Respondent in the written pleadings on record that it had considered alternative solutions of providing the Applicant with a parent post at the P-3 level in the New York duty station with a more secure funding stream (and by extension a longer-term and more stable assignment period) rather than a sequence of short-term placements subject to multiple renewals in accordance with the availability of GTA funds. For instance, the possibility of accommodating the Applicant by placing her on a regular post at the P-3 level funded by extra-budgetary ("XB") sources (being more secure than GTA funds but not as dependable as RB funds) in New York, if an RB-post in that duty station was not an option, has not been demonstrated by the Respondent. Moreover the Respondent's ostensible inability to place her on another RB-post in New York because it was the only option available to the Respondent at that time, and the serial interim solutions of precarious professional stability to which she has been subjected since September 2016, fails to acknowledge that any such averred inability must be considered in light of significant facts anterior to the issuance of Orders No. 189 (GVA/2016) and 70 (GVA/2017), insofar as the Administration chronically failed to exercise diligence in heeding the threat posed by the incumbent's legal challenge, which in turn precluded the Applicant from exploring appropriate alternative arrangements with the Administration before the predicament occasioned by the issuance of these judicial suspensions of action became a *fait accompli*. The Respondent's

claim that the Applicant somehow consented to an interim temporary arrangement in New York was clearly vitiated by duress given the extraordinary circumstances with which she was faced. After the issuance of Order No. 189 (GVA/2016) made the Administration's breach of contract *a fait accompli*, in a desperate attempt to salvage what she could, the Applicant informed the PSMS Chief that she was willing to accept a certain degree of flexibility in the short term while the situation was sorted out (as she had been left with no other viable option); whilst simultaneously underscoring that for the sake of her professional security and that of her family, she would not accept to be placed against a temporarily-funded post in the long-term. Two years have now passed without a material change in circumstances regarding the funding security of the various posts she has encumbered;

q. At the CMD on 22 February 2018, the issue of the Applicant's performance of appropriate functions pursuant to "Component B" of her application was expressly and extensively canvassed by the parties and the Tribunal. This included *viva voce* evidence presented by the Applicant herself, who appeared in person and answered numerous questions on this subject. The Applicant takes heed of this Tribunal's Order that the arguments contained in this closing statement shall be confined exclusively to arguments. This evidence should be considered by the Tribunal to the extent it is germane and probative to the issue at hand, which poses no prejudice to the Respondent, whose Counsel attended the CMD and posed a number of questions, many of them in the style of a cross-examination, to the Applicant on this issue. It is in the interest of justice that this matter be resolved by reference to all the best evidence available to this Tribunal, including oral evidence that was adduced in a solemn setting before the Tribunal, court

officer, and in the presence of and with the assistance of Counsel for both parties;

r. The written record demonstrates that the Applicant has conclusively proven that from the moment of her transfer to New York on 23 September 2016 and continuing for numerous months afterward, the Respondent did not meet his obligation to provide the Applicant with functions commensurate to her skills and professional experience. As part of the post-matching exercise, the Applicant was expected to encumber a Human Rights Officer position at the P-3 level at the New York duty station of OHCHR. In light of the decision to renege on this contractual agreement, the Applicant was initially informed that as an interim measure she could be assigned to different functions than originally planned for an unspecified period of time. Upon the Applicant's on-boarding in New York until December 2016, the Applicant performed functions that were not commensurate with the Terms of Reference agreed upon as part of her post-matching exercise. Specifically, the Applicant covered functions related to the General Assembly's Third Committee on Social, Humanitarian and Cultural Issues. From late December 2016 to the filing of the application on 15 March 2017, the Applicant was still not performing functions commensurate with the SDG post that was contractually promised by the Administration as she was performing work related to Asia-Pacific issues in the Country Situations Section as well as occasional programme support functions, where there had been a need to fill staffing gaps. While, from 1 April to 30 November 2017, the Applicant took on a temporary assignment on promotion as a Programme Management Officer at the P-4 level in the OHCHR New York duty station, this assignment resulted from a competitive recruitment process through a temporary job opening in which the Applicant had participated of her own initiative and succeeded. Due

to the competitive nature of this recruitment process, it would be highly disingenuous for the Administration to claim that the Applicant's successful outcome was the result of any accommodation afforded her by the Administration in response to her situation. At any rate, she was subsequently transferred to a GTA-post again on 1 December 2017 upon the return of the incumbent of the Programme Management post at the P-4 level;

s. Since 23 September 2016, the Applicant has assumed three different sets of temporary functions as a Human Rights Officer and Programme Management Officer and has been placed on four different position numbers, covering significantly different areas of work. Although all three assignments covered human rights or human rights-related work, this constant reassigning of functions over a short period of time, coupled with the constantly precarious nature of her employment situation in New York that was contrary to the Applicant's expressed consent when she accepted the terms of her RB-post in SDG in good faith, has caused disruption to her career progression, in terms of lost opportunity to acquire a robust professional expertise in a given field;

t. While the Applicant had been willing to demonstrate flexibility in the short term, she has been on temporary assignment status in the New York duty station for two years. It is hereby submitted that appropriate functions must not be construed narrowly by aligning the tasks performed by a staff member at a given time against their skills and experience, but rather expansively so that the staff member [is] given an opportunity to maximize her professional potential without being persistently professionally stymied by being transferred away from a portfolio just as she is hitting her stride in that domain;

u. Despite the professional qualifications possessed by the Applicant in her respective field, the "merry-go-round" of professional functions for which OHCHR has still not provided any sustainable solution, only served to unfairly penalize the Applicant by limiting her ability to build her competencies and deprived her of the full panoply of training and experience she would have gained as a SDG Human Rights Officer consistently focused on sustainable development work for two years. This failure to provide her with meaningful career progression in a specific field constitutes compensable harm owed by the Administration toward the Applicant;

v. Had the Applicant been assigned a SDG-post with a secure funding nature and consequently a stable assignment as she was promised, instead of repeatedly filling in resource gaps on temporary assignments for the General Assembly and on Asia-Pacific issues, she would have been able to build on her human rights skills and deepen her expertise in the SDGs, a major priority area of work for the Organization;

w. The Administration should place the Applicant on a comparable RB-post, or, failing that, place her on an XB P-3 level post in New York which would afford her a parent post with a more secure funding stream and a more stable assignment period, and by extension an enhanced opportunity to obtain functions commensurate to those promised under the original RB-post that was unilaterally revoked by the Administration days before her deployment. Had these actions been undertaken by the Respondent in a timely fashion during these proceedings, the professional, pecuniary and moral damages suffered by the Applicant as a consequence of the Respondent's litany of inadequate makeshift interim solutions would not have occurred, or at least would have been significantly mitigated.

Respondent's submissions

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

a. The Applicant could not be placed against the RB-post as anticipated as the result of the applications for suspension of action and for interim measures brought before the Tribunal by another staff member. Yet, having proposed and arranged her move in good faith, the Organization undertook to provide her with a post in New York on a GTA-post, being the only immediate option. The Organization had no possibility under the circumstances to provide a RB-post to accommodate the Applicant;

b. Another approach would have been to require the Applicant to remain in Geneva on her post. That was not considered appropriate nor fair as she had just given up her accommodation in Geneva and prepared her family for the move. The Organization did everything possible to minimize the disruption and negative impact of that late legal action by the other staff member;

c. While the Applicant was not placed on the position within the SDG, the Applicant was nonetheless placed on a P-3 level post of Human Rights Officer, with functions commensurate to her skills and professional experience. The Applicant was working in Geneva in the Asia Pacific, Middle East and North Africa Branch, Asia-Pacific Section, as a Human Rights Officer at the P-3 level. Although the SDG-post was in a different substantive area, the core functions of a Human Rights Officer at the P-3 level are fundamentally similar;

d. The last-minute changes in the decision did not affect her career opportunities. In fact, the Applicant subsequently applied and was selected for a temporary assignment at the P-4 level in New-York, which she commenced

on 1 April 2017 and continues to date, and for which she receives a Special Post Adjustment to the higher level since July 2017. There was no significant disruption to her career progression;

e. It is for the Applicant to demonstrate that the last-minute changes, in particular her placement on a GTA-post, caused her direct harm for which a compensation could be warranted. The decisions taken to ensure compliance with Orders No. 189 (GVA/2016) and 70 (GVA/2017), while at the same time meeting the Organization's obligations vis-à-vis the Applicant, did not cause her direct economic prejudice or loss of career opportunities;

f. The Applicant received the payment of full relocation entitlements upon taking up her functions in the New York Office. This demonstrates the Organization's commitment vis-à-vis the Applicant, and the Organization's effort to ensure that the compliance with Orders No. 189 (GVA/2016) and 70 (GVA/2017) did not affect her financially. Thus, the last-minute changes in the nature of the post and the expected duration of its funding did not cause her financial harm. The entitlements were paid "as if" the assignment would at least be for one year;

g. The Applicant signed for a five-year fixed-term appointment in December 2016 that the Organization has, thus, committed to maintain her on a post during that period;

h. The Applicant's move to New York was recorded as a temporary assignment instead of a transfer. The Applicant, therefore, has kept a lien on her post in Geneva since her move to New York. The Applicant's original position in Geneva has been encumbered only on a temporary basis since her move to New York. The Applicant can, if she wishes so, return to her post in

Geneva. This again demonstrates the Organization's commitment vis-à-vis the Applicant;

i. With respect to the Applicant's claims of cumulative financial impact, she suffered no financial harm due to the changes in the decision. The Applicant indeed was placed on a P-3 level post as initially planned, received the full relocation benefits, and the same amount of salary she would have received had she been placed on the regular budget post as initially planned. The Applicant therefore cannot argue financial loss because of the last-minute changes;

j. With respect to the Applicant's allegations that the decision affected her spouse's ability to secure employment in New-York or her ability to negotiate rental leases, these alleged damages are too speculative and cannot be directly attributable to the contested decision. Further, these claims are not supported by evidence. Any request for compensation based on the Applicant's spouse's situation should therefore be rejected;

k. The last-minute changes in the decision, in particular the Applicant's placement on a GTA-post, did not harm the Applicant and no compensation is warranted. The changes in the decision did not constitute a fundamental breach of the Applicant's contract of employment, and there is no basis to award the staff member pecuniary or moral damages. The Appeals Tribunal has constantly reaffirmed its disapproval for the awarding of compensation in the absence of actual prejudice, referring to, for instance, *Applicant* 2012-UNAT-209, quoting *Bertucci* 2011-UNAT-114.

Consideration

Scope of the case

45. In Order No. 167 (NY/2018), the Tribunal delineated the remaining issues on the merits as set out below and requested the parties to file closing statements based on the documents before the Tribunal, in light thereof. Neither party objected to the Tribunal's identification of the issues and they presented their closing submissions as summarised above. Accordingly, the substantive issues are defined as follows:

> a. Was it appropriate for OHCHR to place the Applicant on a GTA-post, also considering Orders No. 189 (GVA/2016) and 70 (GVA/2017) issued by the Dispute Tribunal in Geneva, or should they have done differently (for instance, by placing her on a RB-post)?
>
> b. Did the Respondent meet his obligation to provide the Applicant with functions commensurate to her skills and professional experience?

Applicable law and relevant jurisprudence of the Appeals Tribunal

46. Staff regulation 1.2(c) provides that,

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

47. Aside therefrom, no further relevant guidance is given in the Staff Regulations and Rules on how to deal with a situation such as the one in the present case. However, in a number of seminal judgments, the Appeals Tribunal has pronounced some general principles on restructuring and reassignment that are also applicable

here. For instance, in *Hassanin* 2017-UNAT-759, the Appeals Tribunal found that "[t]he Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities" and that "an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff". The Appeals Tribunal will therefore "not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff […] even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members" (see similarly in *Matadi* et al. 2015-UNAT-592, *Khalaf* 2016-UNAT-677, *De Aguirre* 2016-UNAT-705 and *Loeber* 2018-UNAT-884).

48. In line herewith, in *Kamunyi* 2014-UNAT-482 and *Beidas* 2016-UNAT-685, the Appeals Tribunal found that "it is within the Administration's discretion to reassign a staff member to a different post at the same level and […] such a reassignment is lawful if it is reasonable in the particular circumstances of each case and if it causes no economic prejudice to the staff member". In *Awe* 2016-UNAT-667, para. 27 (see also *Rees* 2012-UNAT-266), the Appeals Tribunal indicated the following circumstances for Tribunals to consider on the question of whether a reassignment is lawful, namely:

> … […] An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's competence and skills; and, whether he or she had substantial experience in the field.

49. As for the staff member's duty in a restructuring exercise, s/he has a duty to "cooperate fully" in the process (see, for instance, *Hassanin* 2017-UNAT-759, *Smith* 2017-UNAT-768 and *Timothy* 2018-UNAT-847).

The merits

50. As follows from the factual background set out above that, as part of a restructuring exercise in OHCHR, the Applicant's original RB-post in Geneva was to be moved to the field but, as an alternative to moving along with her post, she was offered the opportunity to participate in a post-matching exercise by which she would be assigned to another post at her grade and level. The Applicant opted to participate in the post-matching exercise and OHCHR eventually offered the Applicant a reassignment to a specific RB-post at the P-3 level in the SDG section in New York. The Applicant accepted this offer and made preparations for her family and herself to move to New York. However, shortly before the Applicant and her family were to move from Geneva to New York, the incumbent of the RB-post to which the Applicant was to be reassigned filed a suspension of action application with the Dispute Tribunal in Geneva against the decision to reassign him to another post. The Dispute Tribunal in Geneva granted the suspension of action pending management evaluation, and OHCRH instead temporarily assigned the Applicant to a GTA-post in New York. After the Dispute Tribunal in Geneva then extended the suspension of action to the pendency of the substantive case before it, the Applicant remains on a GTA-funded post in New York (as stated above, this case was closed in 2017).

<u>Was it appropriate to place the Applicant on a GTA-post in New York?</u>

51. The first question for the Tribunal to determine is whether, under the given circumstances, it was appropriate for OHCHR to place the Applicant on a GTA-post in New York. The aforementioned jurisprudence of the Appeals Tribunal provides

that, while OHCHR had broad discretion to restructure its work to meet changing needs and economic realities, it also had the duty to act fairly, justly and transparently towards the Applicant (see *Hassanin, Matadi* et al., *Khalaf*, *De Aguirre* and *Loeber*).

52. In essence, the Applicant contends that the Respondent failed to consider all of the options for reassigning the Applicant in New York, including by placing her on a XB-post in case a RB-post was not available. In response, the Respondent essentially submits to the Tribunal—but without substantiating this by evidence—that the GTA-post was the only immediate option and that the Organization had no ability under the circumstances to provide a RB-post to accommodate the Applicant.

53. From the documentation provided regarding the post-matching exercise, it is only reasonable to assume that the staff members who participated in the exercise, including the Applicant, were to be reassigned to a RB-post and not a GTA-post. At least, nowhere in the documentation before the Tribunal is the option of assignment to a GTA-post even mentioned. Also, when perusing the correspondence between the Applicant and OHCHR concerning her reassignment, it does not follow that OHRCR at any time advised the Applicant that, by opting-in to the exercise, she would risk being assigned to a GTA-post rather than a RB-post. Actually, on 22 July 2016, OHCHR offered the Applicant, with specific reference to post no. 30501032, a RB-post in the SDG in New York, which the Applicant duly accepted. It was therefore only reasonable for the Applicant to expect that she did so with the understanding that she would be placed on this specific RB-post. Also, while the memorandum concerning the lateral staff movement exercise makes no statements regarding the funding of a post to which a OHCHR staff member would be reassigned, it clearly follows from the correspondence between OHCHR and the Applicant that she had specifically accepted the RB-post with the SDG and not any other post with a different funding basis in New York and reasonably expected it to be so.

54. The fact that the Applicant also expected that the move to New York to be more than temporary follows from the email exchange of 14 to 16 September 2018 between the Applicant and the OHCHR Administration. On 14 September 2016, the Applicant stated that it was no longer an option for her to remain in Geneva as she had made long-lasting arrangements to relocate to New York as: (a) she had terminated her lease in Geneva; (b) the shipping company had already collected her family's personal effects; (c) her spouse had resigned from his job in Geneva; (d) her child's place in school in Geneva had been given to someone else; (e) she had made deposits for a school application in New York; and (f) her relocation costs had already come up to USD25,000.

55. Considering her personal circumstances, it therefore appears obvious that the Applicant would not have accepted a post with GTA-funding rather than a RB-post in order to secure her position since the RB-post had more secure funding on a long-term basis and she was aware of this. In response, in an email on 14 September 2016, OHCHR admitted that a mistake had been made placing the Applicant in a very difficult position and that she had fully cooperated with the post-matching exercise, as it was indicated that:

> Without prejudice to the possibility of a more precise answer from us, the human reality of what you are facing obliges me to respond immediately! As management we see things very much as you do. And further we are working hard to avoid the scenario that you fear. We have taken action already in this regard. And I hope we will be able to confirm soon the result. […].
>
> I am very sorry for this (I hope) "hiccup" and very grateful for all you have done to cooperate with the process, which was at times for you and your family also difficult.

56. Accordingly, while the Tribunal does not doubt that OHCHR acted in good faith when assigning to the Applicant to the GTA-post in order to comply with Orders No. 189 (GVA/2016) and 70 (GVA/2017), the evidence on the record shows that

OHCHR and the Applicant had concluded a proper agreement according to which the Applicant was to be placed on a RB-post and, relying on OHCRC's undertaking, the Applicant had also organized her personal life in order to do so (on the doctrine of legitimate expectations, see *Sina* 2010-UNAT-094, affirming the liability definition of *Sina* UNDT/2010/060). The Applicant, therefore, had a legitimate right and expectation that she would be placed on a RB-post. Furthermore, the Respondent has failed to demonstrate that no other RB-posts were available when reassigning her, or that, at least, other alternative options were considered such as, for instance, placing her on a XB-post, which would also have offered a more secure and solid funding source than a GTA-post. The Tribunal is therefore not convinced that OHCHR acted with the appropriate duty of care and the appropriate level of due diligence by fairly, justly and transparently dealing with the Applicant when placing and subsequently keeping her on a GTA-post in New York, particularly when being fully apprised of her precarious personal situation.

57. In the Respondent's closing submissions, as a new fact, his counsel states that the Applicant has kept a lien on her previous Geneva post and can always return to it. The Tribunal notes that it is trite procedural law that new facts are not to be introduced at the closing state of the proceedings, that the Respondent has not asked for permission from the Tribunal to introduce this new fact, and that nothing appears to have impeded his counsel in introducing this fact earlier in the proceedings.

58. Nevertheless, the Tribunal notes that, even if this new fact is accepted, it does not change the fact that the Applicant's employment in New York is less secure on a GTA-post than on a RB-post, or, for that matter, on a XB-post. The alternative, namely moving back to Geneva, as she already made clear in 2016, was at the relevant time, and presumably still is, not an option. Also, the Tribunal is surprised to learn that the Applicant's parent post is still located in Geneva as the objective with

the post-matching exercise was to move the post to the field, which was also the reason why the Applicant opted-in for the exercise.

59. In conclusion, under the circumstances of the present case and with reference to the documentation on record, the Tribunal finds that it was not appropriate for OHCHR to place the Applicant on a GTA-post in New York instead of a RB-post.

60. As such this branch of the Applicant's claim is accepted.

Was the functions of GTA-post in New York commensurate to the Applicant's skills and professional experience?

61. When assessing the propriety of an reassignment decision, the Appeals Tribunal in *Awe* and *Rees* (*supra)* specifically stated that, amongst other the circumstances, the Dispute Tribunal could consider whether the functions to be performed were commensurate with the staff member's competence and skill; whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; and whether he or she had substantial experience in the field.

62. The Applicant, essentially, contends that the functions of the GTA-post to which she was reassigned were not commensurate with her skills and professional experience; that the functions she undertook did not match the terms of reference she had agreed to under the post-matching exercise and that, in her new posts, she has covered functions related to the General Assembly's Third Committee and the Asia-Pacific region, which did not correspond to the SDG-post that she had initially been offered and accepted. The Respondent, while admitting that the Applicant was reassigned to a different post than initially planned, responds that she was placed on a P-3 level post of Human Rights Officer with functions commensurate to her skills and professional experience from her previous job in Geneva.

63. The Tribunal notes that, with reference to staff regulation 1.2(c) and *Hassanin, Matadi* et al., *Khalaf*, *De Aguirre* and *Loeber,* OHCHR has a broad discretion to restructure its work and, in accordance with *Kamunyi* 2014-UNAT-482 and *Beidas* 2016-UNAT-685, this would also include reassignment of a staff member to a different post at the same level.

64. In the present case, the Applicant was eventually not assigned to work on the SDG as initially agreed upon but instead was reassigned to work on issue related to the General Assembly's Third Committee, which the Tribunal notes is the General Assembly Committee that is generally charged with questions concerning human rights. The Applicant admits that she has subsequently worked on Asia-Pacific issues and that she had previously worked in the Asia-Pacific Section within the Field Operations and Technical Cooperation Division of OHCHR. The Applicant further admits that functions to which she was assigned to in New York were those of a regular Human Rights Officer position but rather argues that it provided her with less favourable career opportunities and/or perspectives than the SDG position would have afforded her.

65. Based on the parties' submissions and the legal test outlined by the Appeals Tribunal, the Tribunal concludes that OHCHR acted properly within its scope of authority when it reassigned the Applicant to work as a P-3 level Human Rights Officer on the General Assembly's Third Committee and with Asia-Pacific issues as she had the necessary skills and professional experience to undertake these functions. The Tribunal further notes that, unlike what the Applicant suggests, it would not appear as if this reassignment has had a negative impact on the Applicant's career—she has subsequently been promoted to the P-4 level, although on a temporary basis.

66. Consequently, this branch of the Applicant's claim is rejected.

Remedies

Scope of assessment and relevant law

67. Under the consistent jurisprudence of the Appeals Tribunal, compensation may only be awarded insofar as an illegality has been established (see for instance, *Kucherov* 2016-UNAT-669, referring to *Wishah* 2015-UNAT-537 and *Bastet* 2015-UNAT-511). In the present case, it is therefore only relevant for the Tribunal to consider the question of remedies in relation to the first issue, namely OHCHR's inappropriate placement of the Applicant to a GTA-post.

68. Article 10.5 (b) of the Dispute Tribunal's Statute limits the remedies that the Tribunal may order as follows:

> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

Specific performance

69. The Applicant primarily, in effect, requests that the Dispute Tribunal should give specific performance to her right to be placed on a comparable RB-post, or, failing that, place her on an XB-post at the P-3 level in the New York as this would provide her with a parent post with a more secure funding stream and a more stable

assignment period. The Applicant further requests financial compensation for her pecuniary and non-pecuniary damages. The Respondent submits that since the Applicant moved to New York on a temporary assignment and not a transfer, she has kept a lien on her post in Geneva and, if she wishes, she can return to her old post in Geneva. As for financial compensation, the Respondent avers that she has not suffered any compensable harm.

70. As this Tribunal has held above, the Applicant had a right and a legitimate expectation to be placed on a RB-post, as her parent post rather than placed on a GTA-post, as a Human Rights Officer with OHCHR in New York. Pursuant to art. 10.5(a) of its Statute, the Tribunal hereby instructs the Respondent to place the Applicant on an RB-post with the appropriate level of due diligence as soon as said post becomes available and, in the interim, if applicable, place her on a XB-post (see also *Rantisi* 2015-UNAT-528, para. 62, in which the Appeals Tribunal found that, "In as much as fair and equitable damages are an element of an effective remedy, so too must be the entitlement to have an unlawful administrative decision rescinded or to have a particular obligation performed"). As for *in lieu* payment to specific performance, with reference to the Appeals Tribunal's judgment in *Chemingui* 2016-UNAT-641, the Tribunal finds that, as the case concerns reassignment and not appointment, promotion or termination as defined in art. 10.5(a), the Tribunal is constrained not to order any such payment.

<u>Financial compensation</u>

71. As follows from art. 10.5(b) of the Dispute Tribunal's Statute, compensation for harm must be supported by evidence, which applies to any type of monetary compensation whether it is based on pecuniary or non-pecuniary damages.

72. As for the pecuniary damages, the Appeals Tribunal held in in *Krioutchkov* 2017-UNAT-712, para. 16, held that (footnotes omitted):

> … [The Dispute Tribunal] may award compensation for actual pecuniary or economic loss, including loss of earnings. We have consistently held that "compensation must be set by [the Dispute Tribunal] following a principled approach and on a case by case basis" and "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case".

73. In the present case, as follows from the application, the Applicant requests financial compensation for the professional opportunities the Applicant has lost in reliance to OHCHR's undertaking. However, the Tribunal notes that the Applicant has submitted no evidence whatsoever to substantiate this claim.

74. Regarding non-pecuniary damages, the Applicant requests financial compensation for the moral damages suffered by the Applicant and her family for the severe and unnecessary stress to which she was subjected. While the Tribunal believes that all the circumstances which occasioned the uncertainties regarding the Applicant's precarious assignment and questionable duties must have been most unsettling for her and her family, similar to the request for pecuniary damages, the Applicant filed no written evidence to substantiate her claim. Furthermore, even if her statements at the 22 February 2018 CMD were taken as oral evidence, in *Timothy* 2018-UNAT-847, the Appeals Tribunal held that, "Generally speaking, the testimony of an applicant alone without corroboration by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred is not satisfactory proof to support an award of damages". The Tribunal sees no reasons to depart from *Timothy* in the present case since this case is not sufficiently distinguishable.

75. Consequently, and under art. 10.5(b) of the Dispute Tribunal's Statute, the Tribunal is not in a position to award the Applicant any financial compensation.

Conclusion

76. Based on the above, the Tribunal finds that:

a. The application is granted in part;

b. As to the Applicant's parent post and with all deliberate speed, OHCHR is to place her on a P-3 level RB-post as Human Rights Officer in New York commensurate with her skills and expertise. In the interim, if a P-3 level RB-post as noted above is not immediately available, OHCHR is to place her on a similar XB-post forthwith until such time that a P-3 level RB-post as aforesaid becomes available;

c. All other claims are rejected.

(*Signed*)

Judge Alexander W. Hunter, Jr.

Dated this 26th day of October 2018

Entered in the Register on this 26th day of October 2018

(*Signed*)

Nerea Suero Fontecha, Registrar, New York