UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2014/073/R1
Judgment No.: UNDT/2019/057
Date: 15 April 2019
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

JEAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Aleksandra Jurkiewicz, OSLA

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a former Administrative Assistant at the G-4 level in the Office of the Special Advisor on Africa ("OSAA"). On 16 December 2014, she filed an application challenging the decision not to renew her fixed-term appointment as an Administrative Assistant at the G-4 level in OSAA beyond 31 August 2014, and to separate her from service.

2. By Judgment No. UNDT/2016/044 dated 26 April 2016, the Tribunal dismissed the application as not receivable.

3. By Judgment No. 2017-UNAT-743 dated 22 June 2017, the United Nations Appeals Tribunal vacated the Dispute Tribunal's decision on receivability in *Jean* UNDT/2016/044 and remanded Case No. UNDT/NY/2014/073 "to the Dispute Tribunal for full consideration of its merits by another Judge".

Facts

4. The Applicant joined the Organization in September 2007 as a proof-reader with the Department of Public Information in New York. She moved to OSAA in February 2008.

5. In a joint submission dated 9 February 2018, the parties confirmed that there are no facts in dispute and submitted the following agreed facts.

Facts and findings adopted from the Judgment in Jean *2017-UNAT-743 (emphasis in the original, references and footnotes omitted):*

> [2] At the material time, [the Applicant] was a Personal Assistant at the G-4 level to the Under-Secretary-General ["USG"] and the Special Advisor on Africa, within the Office of the Special Advisor on Africa […].
>
> [3] On 20 July 2012, a Personnel Action was approved to extend [the Applicant's] fixed-term appointment for two years from 1

September 2012 until 31 August 2014. She signed the new contract on 26 July 2012.

[4] According to [the Applicant], she had a meeting with the USG/OSAA and the Director of OSAA on 27 March 2013, during which the Director of OSAA informed the Applicant that a G-4 level post would be reclassified and it could be the Applicant's post. In an e-mail titled "My contract termination with OSAA" dated 1 April 2013 addressed to the Director of OSAA and copied to the USG/OSAA and the Executive Officer of the Department of Economic and Social Affairs ["DESA"], [the Applicant] stated:

> As per our last meeting with the USG in his office on Wednesday 27 March informing me that my position will be cut off, I am kindly enquiring about any appropriate action I need to take in this regard.
>
> I thank you for informing me early enough so I can have enough time, as it was stated in the meeting, to apply for another position and explore any other options available.

[5] On 11 September 2013, the USG/OSAA wrote to the Executive Officer, DESA, requesting that the post at the G-4 level encumbered by [the Applicant] be reclassified upwards to the G-6 level to enable his office to "recruit a regular and suitable staff member" to meet the increased needs of the USG/OSAA. The USG/OSAA's request to reclassify [The Applicant's] post was approved on 28 October 2013.

[6] The Job Opening for the newly reclassified post of Staff Assistant at the G-6 level with OSAA was published on 22 January 2014.

[7] [The Applicant] attended a number of meetings on 11, 12, 19 and 25 June 2014 concerning her employment in OSAA. The Secretary-General provided to the Dispute Tribunal four e-mails, respectively dated 11 June 2014, 12 June 2014, 25 June 2014 and 28 August 2014. Below each e-mail were one or multiple icons titled "Minutes of the meeting. 11.6.14.docx; Minutes of the meeting. 12.6.14.docx; Minutes of the meeting. 19.6.14.docx; and Minutes of the meeting. 25.6.14.docx". None of the minutes was signed or dated. According to the minutes, [the Applicant] was verbally informed at those meetings that her post had been reclassified to the G-6 level and had been advertised, and that OSAA and DESA would assist her in applying for alternative employment in other departments at the G-4 or G-5 level. She was encouraged to make every effort to apply for other available positions before the expiry of her fixed-term appointment. The Executive Officer of DESA also drew [the Applicant's] attention to the possibility of an agreed termination. Those meeting minutes were not

shared with [the Applicant] until the proceedings before the [Dispute Tribunal].

[8] On 26 August 2014, by interoffice memorandum, an Administrative Assistant from the Executive Office, DESA, informed [the Applicant] that her separation from service would take place effective close of business on 31 August 2014 and advised [the Applicant] of the applicable separation procedures.

[9] On 29 August 2014, [the Applicant] filed a request for management evaluation of the decision not to renew her fixed-term appointment. She stated that she was notified of the contested decision on 26 August 2014. [The Applicant] was informed on 1 October 2014 that the Secretary-General had decided to uphold the non-renewal decision.

[10] On 16 December 2014, [the Applicant] filed an application with the Dispute Tribunal, seeking rescission of the contested decision and the issuance of a new fixed-term appointment, or alternatively, compensation for material and moral damages. The Dispute Tribunal conducted hearings for two days on the issue of receivability of [the Applicant's] application as raised by the Secretary-General.

[…]

[23] It is undisputed that the minutes—upon which testimony was given and the [Dispute Tribunal] based its finding—were unsigned, undated and not shared with [the Applicant] at the time. It is also clear that the meetings held in June 2014 did not have the aim of notification of the administrative decision of non-renewal of her appointment, but rather were intended to help [the Applicant] identify new job opportunities within the Organization. We note further that there was no other corroborating evidence at that time or proximate thereto, contrary to what is suggested by the [Dispute Tribunal]. The [Dispute Tribunal's] finding here—based on meeting minutes that were, as noted above, unsigned, undated and not shared with [the Applicant], who came to know about their existence and contents only during the [Dispute Tribunal] proceedings—is both incompatible with good practice for the Organization and insufficient to support the finding that [the Applicant] had been notified for purposes of Staff Rule 11.2(c). There is no mention in them that [the Applicant] was expressly and unambiguously informed about the decision not to renew her appointment. While it may have been reasonable to conclude that [the Applicant] had knowledge by June 2014 that her appointment would probably not be renewed, to extract from these meetings a legal notification implies extending their meaning to purposes not expressly specified by the parties or otherwise clearly supported by the record. A

> staff member's knowledge of a decision is not necessarily the same thing as a staff member receiving notification of a decision.
>
> [24] We hold that [the Applicant] "received notification" of the contested decision for purposes of Staff Rule 11.2(c) on 26 August 2014 in the form of the interoffice memorandum. This is the only evidence on record supporting a finding, "based on objective elements that both parties (Administration and staff member) can accurately determine", as to the date upon which it is possible to state with precision that [the Applicant] received notification of the contested decision for purposes of Staff Rule 11.2(c).

Facts and findings adopted from the Judgment in Jean *UNDT/2016/044 (references and footnotes omitted):*

> 4. On 20 July 2012, a Personnel Action was approved to extend the Applicant's appointment as an Office Assistant at the G-4 level in OSAA for two years from 1 September 2012 until 31 August 2014. The Personnel Action indicated that the Applicant occupied post number 50387 and BIS post number UNA-011-03010-EOL-0005 [unknown abbreviations].
>
> 5. On 26 July 2012, the Applicant signed a Letter of Appointment accepting a two-year fixed-term appointment as described above. The Letter of Appointment stated that the appointment would expire "without prior notice" on 31 August 2014. It also stated, "A Fixed-Term Appointment, irrespective of the length of service, does not carry any expectancy, legal or otherwise, of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations".
>
> 6. The Respondent submits that at a meeting in March 2013, the Applicant was informed verbally that, because OSAA intended to request reclassification of the post that she encumbered (from the G-4 level to the G-6 level), it was possible that her fixed-term appointment would not be renewed beyond 31 August 2014.
>
> 7. On 1 April 2013, the Applicant wrote to the Director of OSAA stating:
>
> > As per our last meeting with the [USG] in his office on Wednesday 27 March informing me that my position will be cut off, I am kindly enquiring about any appropriate action I need to take in this regard.
> >
> > I thank you for informing me early enough so I can have enough time, as it was stated in the meeting, to apply for another position and explore any other options available.

8. By email dated 30 August 2013, an Administrative Officer from the Executive Office, […] DESA, asked the Applicant if she had been contacted by the Office of Human Resources Management ("OHRM") regarding any "placement opportunities". The Applicant responded via email the same day, stating, "Yes, I have".

9. By interoffice memorandum dated 11 September 2013, the USG/OSAA wrote to the Executive Officer, DESA as follows:

> Subject: Association of Post No. UNA-011-03010-EOL-0005 with a [Generic Job Profile ("GJP")] G-6 Staff Assistant
>
> 1. As you are aware, the G-6 post (Personal Assistant) in OSAA was abolished in the year 2009 as at that time the post of the Special Adviser on Africa remained vacant. However, now that the post of the Under-Secretary-General/Special Adviser on Africa has been filled as of May 2012, the need for a Personal Assistant has greatly increased.
>
> 2. So far, we have been using our temporary funds for a G-6 post but these funds would soon be exhausted. We would, therefore, request that our existing Post No. UNA-011-03010-EOL-0005 may be associated with GJP, G-6 Staff Assistant so that we are able to recruit a regular and suitable staff member. …

10. By interoffice memorandum dated 9 October 2013, the Chief of the Personnel Section, Executive Office, OSAA, wrote to the Compensation and Classification Section, Human Resources Policy Services, OHRM, as follows:

> Subject: <u>Post Number: UNA 011-03010-EOL-0005, Senior Staff Assistant, OSAA</u>
>
> As requested by [the] USG of OSAA, it would be appreciated if you could please approve the association of the subject post with the GJP for a G-6 Senior Staff Assistant. There is no previously classified job description on record for this post, but we are attaching a current organizational chart, together with a list of duties and responsibilities specific to the post in support of our request.
>
> …

11. By email dated 28 October 2014, the Chief of the Compensation and Classification Section, OHRM, wrote to the Chief of the Personnel Section, Executive Office, OSAA stating that "we hereby approve the association of post UNA-011-03010-EOL-0005 to the GJP for GS-6, Senior Staff Assistant".

12. On 22 January 2014, Job Opening number 14-ADM-OSAA-32673-R-NEW YORK (R) was published for the position of Staff

> Assistant, G-6 in OSAA. The closing date for applications was 21 February 2014.
>
> 13. On 4 April 2014, the Applicant reported to the Security and Safety Service, Department of Safety and Security that she had been assaulted by a colleague while seated at her desk.
>
> 14. In June 2014, the Applicant attended a number of meetings concerning her employment in OSAA (unsigned minutes produced by the Respondent record the relevant meetings as taking place on 11, 12, 19, and 25 June 2014). The Respondent submits that the Applicant was verbally informed at these meetings that her contract would not be renewed as her post had been reclassified to the G-6 level. The Applicant disputes the assertion that she was verbally informed/notified that her G-4 post was to be reclassified or had been reclassified and/or that she was informed of the non-renewal of her fixed term appointment with OSAA before 26 August 2014. She submits that she understood the purpose of the meetings was to discuss a lateral move which she had requested because of the alleged assault by a colleague that occurred on 4 April 2014.
>
> 15. On 11 July 2014, a Personnel Action was approved recording the Applicant's temporary assignment in the Office of Operations, Department of Peacekeeping Operations, for the period 1 July to 15 August 2014.
>
> 16. On 26 August 2014, an Administrative Assistant from the Executive Office, DESA, informed the Applicant that her separation from service would take place effective close of business on 31 August 2014 and to provide information on the applicable separation procedures.

6. In their joint submission dated 9 February 2018, the parties also provided additional factual information concerning the Applicant's employment history and the reclassification of the post encumbered by the Applicant as follows.

> *The Applicant's employment history*
>
> … The Applicant was promoted to the G-4 position of Administrative Assistant in the Office of the Special Advisor on Africa on 1 November 2009.
>
> … Following the 26 August 2014 correspondence identified in paragraph 16 of *Jean* UNDT/2016/044 and the Applicant's filing of a request for management evaluation of the decision not to renew her fixed-term appointment, the Applicant's appointment was extended through 7 October 2014.

… The Applicant was subsequently reappointed at the G-5 level from 17 February 2015 to 8 May 2015.

… On 12 August 2015, the Applicant was reappointed at the G-4 level. The Applicant resigned from that appointment on 27 August 2015 to accept an appointment at the G-5 level through 31 December 2015. Following the expiration of that appointment, the Applicant applied for and was reappointed to other positions with the Organization.

The reclassification of the Post encumbered by the Applicant

… The Applicant's position was funded by the Post.

… The Applicant's primary functions were to assist the two Assistants at the G-5 and G-7 level in the front office of the USG/[O]SAA.

… In May 2012, [Mr. MA] was appointed to the position of USG/[O]SAA. The Applicant provided temporary support to the USG/[O]SAA from September 2012 to March 2013.

… The Respondent submits that the Organization identified a need to recruit a Senior Staff Assistant at the G-6 level to strengthen the front office of the USG/[O]SAA. The OSAA's mandate was expanded to include the role of convener of the Inter-departmental Task Force on African Affairs, and Secretariat of the United Nations monitoring mechanism to review commitments made towards Africa's development needs. The OSAA's expanded mandate led to an increase in the number of staff in the Office and increased high-level activity for the USG/[O]SAA.

… The Respondent further submits that the Organization determined that OSAA's staffing needs would be best met if the Post that was used to finance the Applicant's G-4 position was instead used to fund a new position at the higher level (G-6) in the front office of the USG/[O]SAA. Following a review of the functions and role of support staff in the front office, the Post was identified as the most appropriate post for reclassification to the G-6 level.

… The Respondent finally submits that the Secretary-General requested an additional post to fund the G-6 position in the proposed budget for the 2014-2015 biennium, however this request was rejected by the [Advisory Committee on Administrative and Budgetary Questions] ("ACABQ").

Procedural background

7. On 16 December 2014, the Applicant filed an application with the Dispute Tribunal. By Judgment No. UNDT/2016/044 dated 26 April 2016, the Tribunal dismissed the application as not receivable.

8. On 22 June 2017, the Appeals Tribunal published *Jean* 2017-UNAT-743, vacating the Dispute Tribunal's decision on receivability in *Jean* UNDT/2016/044 and remanding Case No. UNDT/NY/2014/073 "to the Dispute Tribunal for full consideration of its merits by another Judge".

9. On 4 August 2017, the case file was re-opened by the New York Registry under Case No. UNDT/NY/2014/073/R1.

10. Upon assignment of this remand to the undersigned Judge, on 20 September 2017, by Order No. 189 (NY/2017), the Tribunal instructed the parties to participate in a Case Management Discussion ("CMD") set down for 27 September 2017.

11. At the CMD on 27 September 2017, the Tribunal enquired regarding the state and extant of the pleadings in the reopened case file Case No. UNDT/NY/2014/073/R1. The parties discussed the logistical aspects of the remanded case with a view to the most efficient way forward, including adopting the previously filed pleadings for the record. At the Tribunal's request, the parties agreed to review the current filings contained within the Dispute Tribunal's eFiling portal and confirm whether all relevant filings have been uploaded. In facilitating future conduct of the matter, the parties also agreed to confer and prepare a jointly signed submission setting forth agreed facts and legal issues. Both parties agreed that the case could be dealt with on the papers, subject to confirmation of relevant filings, final submissions and an agreed transcription, failing which oral testimony would be called. Applicant's then Counsel also advised that he would be abroad and unavailable for at least 6 months.

12. By Order No. 227 (NY/2017) dated 12 October 2017, the Tribunal instructed the parties to file "a confirmation as to whether all relevant filings and documents have

been uploaded to the Dispute Tribunal's eFiling portal for purposes of the merits proceedings under Case No. UNDT/NY/2014/073/R1", as well as a joint submission on a series of issues, by 27 October 2017.

13. On 24 October 2017, the Applicant's Counsel filed a motion for extension of time, mentioning difficulties in the communications with his client and requesting a two-week extension to comply with Order No. 227 (NY/2017). He also indicated the Respondent had no objections to such a request.

14. On 24 October 2017, in the absence of the presiding Judge assigned to the case, and in light of the urgency of the matter, the motion was considered by Judge Greceanu who granted the motion for extension of time for the parties to file the submissions indicated in Order No. 227 (NY/2017) by 10 November 2017.

15. On 6 November 2017, the Applicant informed the Tribunal by email that she was no longer represented by Counsel, Mr. Didier Sepho, and requested an extension of time to seek another counsel. Due to the Applicant being unrepresented and as the Tribunal saw no discernable prejudice to the Respondent, the presiding Judge assigned to the case granted the motion for extension of time by Order No. 248 (NY/2017), and directed the parties to file the submissions by 12 January 2018.

16. On 11 January 2018, the Applicant submitted a signed Legal Representation Form consenting to legal representation by Ms. Aleksandra Jurkiewicz from the Office of Staff Legal Assistance ("OSLA"). On the same day, the newly appointed Counsel for the Applicant filed a motion for an extension of time stating that Ms. Jurkiewicz "[…] had a short time to familiarize herself with a large number of documents relating to the case and therefore it is in the interest of justice that an additional extension of time to file the above-mentioned submissions be granted".

17. By Order No. 6 (NY/2018) dated 12 January 2018, the Tribunal granted the requested time extension and ordered the parties to file the submissions indicated in Order No. 227 (NY/2017) dated 12 October 2017 by 9 February 2018.

18. On 9 February 2018, the parties filed a joint submission in which they set forth a consolidated list of agreed facts and a list of agreed and disputed issues. The parties further indicated that they do not request the disclosure of further documents, that the case may be decided on the papers before the Dispute Tribunal, that they agree that the testimony of the witnesses previously heard by the Dispute Tribunal forms part of the record of the case, and that the Dispute Tribunal may refer to that testimony.

19. By Order No. 65 (NY/2018) dated 27 March 2018, the Tribunal ordered a transcription of the previous proceedings to be made as soon as possible. The Tribunal further instructed the parties to file closing statements on 17 April 2018 and noted that the Tribunal would thereafter proceed to determine the case on the papers before it, subject to any further submissions, if any, on the transcription of the previous testimonies of witnesses.

20. On 17 April 2018, the parties filed their closing statements.

21. On 31 May 2018, the transcription of the previous proceedings was made available to the parties.

22. Neither party having filed any submission on an agreed or the availed transcription of the previous proceedings, the Tribunal, considering that the parties had had sufficient time, *sua sponte*, by Order No. 246 (NY/2018) dated 13 December 2018, ordered the Respondent to provide confirmation, and any relevant documentation thereto, of the outcome of the Applicant's complaint against the former Special Adviser on Africa at the level of USG pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) dated 6 November 2014. The Tribunal deemed this information pertinent in light of the Applicant's claims of alleged harassment by her supervisor and the USG's personal hostility towards her, inferring extraneous reasons for the non-renewal of her contract and eventual separation.

23. On 20 December 2018, the Respondent filed his submission in response to Order No. 246 (NY/2018) confirming that the Applicant had indeed received an

outcome to her complaint of 6 November 2014 against the former Special Adviser on Africa pursuant to ST/SGB/2008/5, and provided a copy of the outcome by way of correspondence from the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") dated 6 April 2016.

24. Following the Respondent's 20 December 2018 submission, surprisingly, neither party addressed nor filed any submissions regarding this essential aspect of the matter, nor on the transcription of the previous proceedings. Deeming the pleadings closed, the Tribunal thereafter proceeded to determination of this matter on the papers and submissions before it.

Applicant's submissions

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

The decision not to renew the Applicant's appointment beyond 31 August 2014 was unlawful

a. The Applicant joined OSAA in February 2008. Prior to the tenureship of the USG/OSAA, the Applicant had no difficulties with her former supervisors in OSAA. However, following the appointment of the USG/OSAA, the Applicant was belittled, harassed, verbally abused and put under enormous pressure;

b. It became increasingly clear to the Applicant that the USG/OSAA wanted to remove her from OSAA, and perhaps also from the Organization. On 27 March 2013, the USG/OSAA called the Applicant into his office, where the Director was also present. The Applicant was informed that the USG/OSAA wanted a G-4 post to convert into a G-6 post and that it was her post he wished to convert. The USG/OSAA provided no reasoning for the decision, or for why he had not selected her post over two other G-4 posts in the office. Importantly, he stated that, although he had no obligation to do so, he would use his contacts to ensure that she received another fixed-term appointment in the Organization;

c. On separate occasions, the USG/OSAA told the Applicant that he did not intend to renew her fixed-term contract, but he did not explain why. The USG/OSAA also verbally informed the Applicant that, if she completed her performance evaluation under his supervision, he would give her a negative rating;

d. The Applicant was under such strain that she consulted the offices of the Office of the United Nations Ombudsman and Mediation Services and the staff counsellor seeking their advice and intervention. *Inter alia*, she asked the ombudsman to assist her to find a new position in DESA or elsewhere in the Secretariat in order to move her away from her supervisor;

e. Despite the Applicant's concerns and the continued stress in her work environment, she completed her tasks and duties responsibly and to the best of her ability. She sought, and hoped to find, another position within the Organization before she was separated;

f. On Monday, 25 August 2014, the Applicant met with the Director of OSAA, and enquired as to the decision regarding her contract. Her contract was due for renewal at the end of that month and the Applicant was concerned that that renewal would go smoothly. The Director of OSAA replied that everything was going well, that the DESA Executive Office had found the Applicant a post in DESA and that he would confirm with her the following day. That same day the Applicant called a senior Human Resources ("HR") Adviser in the DESA Executive Office, who similarly told her Applicant "not to worry". When she specifically asked about her contract, the senior HR Adviser replied that "we are not there yet … we will find you a post elsewhere and transfer you there". By these conversations, the Applicant was reassured that she would be able to continue working in the United Nations, and may even be able to do so under the supervision of someone other than the USG/OSAA;

g. Notwithstanding these assurances, the Applicant received an email the following day on 26 August 2014 from an administrative assistant in the DESA Executive Office. The administrative assistant informed her that her contract would end on 31 August 2014 and would not be renewed. This written notice of separation came as a complete shock;

h. The Applicant subsequently contacted OSLA, which submitted a management evaluation request and suspension of action request on her behalf. The Applicant's appointment was extended to 30 September 2014 and then again to 7 October 2014, at which point she was finally separated from service;

i. Prior to her separation, the Applicant had several years of highly successful United Nations service and, in light of her age, had the potential for many years of further successful service before reaching retirement, as demonstrated in the Applicant's electronic performance evaluation system reports for the periods 2008-2009, 2009-10 and 2011-12;

j. The unfair and prejudicial separation of the Applicant has denied her the opportunity to pursue that career path. Further, the entire process has greatly affected the Applicant and caused her significant stress. The Applicant sought medical advice for stress and high blood pressure. She suffered from constant headaches and insomnia. Her primary care physician wrote a 'To Whom it May Concern' letter requesting that she be moved to a less stressful position as her working environment was hazardous to her health;

k. The Applicant is determined that she receive the justice to which she is entitled. Knowing that the USG/OSAA can now no longer retaliate against her, the Applicant is thus seeking not only a review of her case before this Tribunal; she has, in parallel, submitted a complaint against the USG/OSAA for harassment and abuse of authority pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority);

l. The decision to separate the Applicant from service was not taken for proper reasons. Administrative decisions must be made based on proper reasons and the Administration has the duty to act fairly, justly and transparently in dealing with its staff members, including in matters of appointments, separation, and renewals. In the present case, no rational reasons were given for the decision to separate the Applicant from service. Where no rational reasons are given, the Tribunal is permitted to draw adverse inferences;

m. Indeed, in the present case, where the harassment at the hands of her supervisor was constant and pronounced, it is submitted that the only reasonable inference to be drawn is that the USG/OSAA sought to separate the Applicant from service because of his own personal hostility towards her;

n. Further, the fact that a fixed-term contract contains a disclaimer of no expectancy of renewal is not in itself conclusive or dispositive. As the Appeals Tribunal stated in *Schook* 2012-UNAT-216 "[n]on-renewal has always been and must remain a distinct and challengeable administrative decision";

o. In its determination, the Management Evaluation Unit ("MEU") also acknowledges that "it is reflected in the jurisprudence of the Dispute Tribunal that … a decision not to renew may not be taken for improper motives". The MEU asserts, however, that the Applicant has failed to "provide any evidence for your claim that the non-renewal of your appointment was a result of irrelevant concerns or a personal conflict between you and [the USG/OSAA]". Yet the Applicant has since filed an extensive and detailed complaint against the USG/OSAA for harassment and abuse of authority;

p. It is well-established that the continued existence of a post, continuing evidence of a need for functions, and the absence of performance issues can contribute to an expectation of renewal;

q. There were no performance issues associated with the Applicant ever identified, funding was available and there was a continuing need for her

functions (which the Applicant understands are now being performed by another staff member). The Applicant's separation thus permits inferences of illegality, including as to the rationale for reclassifying the Applicant's post;

r. The MEU's focus on the fact that the Applicant received (allegedly sufficient) notice of the reclassification is to miss the larger point. That point is that there was no justifiable, communicated reason for the reclassification or for why her G-4 post in particular was selected. Again, the logical conclusion in light of the USG's behaviour towards the Applicant is that her post was reclassified as a means by which unlawfully to separate her;

The Applicant had a legitimate expectancy of renewal

s. The Tribunals have repeatedly held that, notwithstanding the fact that a fixed-term appointment generally carries no expectation of renewal, where "countervailing circumstances" exist—including assurances of renewal—they are enforceable;

t. The Applicant was given explicit assurances by senior officials, including the USG/OSAA, the Director of OSAA and senior HR Adviser in the DESA Executive Office, that she "had nothing to worry about", that her contract would be renewed and that her employment with the Organization (if not in OSAA) would continue. The MEU's insistence that the Applicant has "provided no evidence that indicated that the [Executive Office] or DESA gave you any assurances to that effect" is to punish the Applicant for situations beyond her control; namely, that these assurances were provided by senior-level United Nations officials whom she could not compel to document their assurances in writing. It is also to accept the denials of the Executive Office and DESA without testing that evidence;

u. It is immaterial in this case whether those individuals had actual authority to provide such assurances. The fact is that those assurances were provided and that the USG/OSAA, the Director of OSAA and the senior HR

Adviser in the DESA Executive Office had ostensible authority, such that it was reasonable for the Applicant to rely upon them. The Applicant was conducting herself at all times in good faith. It was (and is) incumbent upon those persons, and the Administration, to do likewise;

v. In addition, the Dispute Tribunal found in *Kasmani* UNDT/2009/017 that the applicant's hopes of renewal of his temporary appointment were raised when his First Reporting Officer promised him that his contract was likely to be renewed. It was held in that case that the promise created a legitimate expectation of renewal;

w. The Appeals Tribunal found in *Ahmed* 2011-UNAT-153, that "unless the Administration has made an 'express promise … that gives a staff member an expectancy that his or her appointment will be extended' … the non-renewal of a staff member's fixed-term appointment is not unlawful". *A contrario*, non-renewal of a staff member's fixed-term appointment is unlawful in the case where the Administration has made an express promise that the staff member's appointment will be extended;

x. In the present case, it is undisputed that the Applicant joined the United Nations in September 2007 and that she was subsequently reassigned to OSAA in February 2008. It is also undisputed that the Applicant's contract was systematically renewed, last contract being a two-year fixed-term appointment from 1 September 2012 to 31 August 2014;

y. It is undisputed that the Applicant attended a number of meetings on 11, 12, 19, and 25 June 2014 concerning her employment in OSAA. During these meetings, the Applicant was systematically reassured that OSAA and DESA would assist her in applying for alternative employment in other departments at the G-4 or G-5 level (see para. 7 of *Jean* 2017-UNAT-743);

z. It is also undisputed, as found by the Appeals Tribunal, that the meetings held in June 2014 did not have the aim of notification of the

non-renewal of the Applicant's appointment but rather were intended to reassure the Applicant that the Administration was to help her in identifying new job opportunities within the Organization (see para. 23 of *Jean* 2017-UNAT-743);

aa. On 25 August 2014, that is, six calendar days prior to the expiration of her contract, renewed systematically during the period 2007–2014, the Applicant was again reassured by OSAA Director and by the DESA Executive Office that they would reassign her within the Organisation;

bb. In light of the above, the Applicant submits that, in spite of the provision in her contract that her appointment "did not carry any expectancy … of renewal", a legitimate expectation of a renewal of her contract was created by the conduct of the Administration and therefore the decision not to renew her contract on 31 August 2014 was unlawful;

The Applicant was not given reasonable notice of non-renewal

cc. The Tribunal may also draw adverse inferences from the Administration's failure to provide reasonable written notice of non-renewal. *Inter alia*, short notice is indicative of irresponsible managerial practice and allows the Tribunal to infer that the Administration has sought to shield the decision from review. These inferences can be drawn notwithstanding the MEU's assertion that "notification is not mandatory at all";

dd. In other words, the Administration's very late notice to the Applicant is elucidating in light of the entire factual matrix which this case presents. The MEU's analysis on this point overlooks the key fact that the Administration only provided the Applicant with final notice a few days before the date on which her fixed-term appointment was due to expire. It also overlooks the fact that that notice arrived by email just one day after the latest verbal assurances

to the Applicant by the Director of OSAA and the senior HR Adviser in the DESA Executive Office that she was "not to worry";

ee. In terms of what constitutes reasonable notice, the Administration has published two sets of "Guidelines" for separation from service: "Separation from Service – General Procedures"; and "Separation from Service – Expiration of Appointment". The Applicant does not maintain that these Guidelines themselves have the force of law. However, they reflect good administrative and management practice that may establish expectation as to the procedure to be followed;

ff. The "General Procedures" document contemplates an extensive set of procedures that will give notice to staff of an impending separation from service. The "Expiration of Appointment" guideline, although fixing no particular "notice period", does establish that good practice requires notification of separation – in the case of contracts of six months or more, "in writing, at least 30 days in advance";

gg. It is undisputed, as found by the Appeals Tribunal, that the Applicant received an unequivocal notice of non-renewal on 26 August 2014 only, that is, five calendar days prior to the expiration of her two-year contract following a seven-year service with the Organization (see para. 24 of *Jean* 2017-UNAT-743);

hh. The issued guidelines on separation from service provide that it is best practice in the case of fixed-term appointments that staff members are provided 30-day notice. In this case, this best practice was not followed;

ii. The Applicant submits that to give a staff member who has served the Organization for almost seven years a five-day notice of non-renewal represents an irresponsible managerial decision;

jj. In light of the above, the Tribunal should award the Applicant, *in lieu* of the notice period, compensation equivalent to salary, applicable post adjustment and allowances corresponding to the 30 calendar days' written notice period at the rate in effect on the last day of service;

Whether the Administration made good faith efforts to find the Applicant an alternative suitable position and place her outside of the competitive selection process following the reclassification of the post

kk. Against all promises expressed orally and in writing, the Administration did not engage in any good faith effort to find an alternative position for the Applicant outside of the competitive selection process;

ll. Pursuant to staff rules 9.6(e) and 9.6(f), if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post, staff members holding fixed-term appointments shall be retained in preference to staff members with a lower level of protection (such as temporary appointments);

mm. As a fixed-term appointment holder, whose post was reclassified, the onus was on the Administration, and not simply on the Applicant, to make good faith efforts to find a suitable available post;

nn. Pursuant to staff rule 9.6(f) and because the Applicant was a staff member serving in the General Service, such obligation on the part of the Administration would have been satisfied if the Applicant received consideration for suitable posts available within the Secretariat at her duty station in New York;

oo. The Applicant was never provided with a list of all available suitable posts at her duty station and that the entire burden of finding a suitable post rested on her. As such, the Administration failed to meet the requirement to

reassign the Applicant as a matter of priority to another post matching her abilities;

pp. In light of the above, the Tribunal should rescind the implied administrative decision not to comply with its obligation to make good faith efforts to find an alternative position following her post reclassification. In the alternative, an appropriate award of compensation for the Administration's failure to comply with its contractual obligations towards her should be granted;

Remedies sought

qq. Prior to the Applicant's separation, she had a stable fixed-term position and prospects of a great career within the Organization. The unfair and prejudicial separation has denied the Applicant the opportunity to pursue this career path. Subsequently to the separation in dispute, the Applicant did manage to find sporadic short-term temporary positions within the Organization. However, these temporary positions could not be regarded as equivalent in terms of benefits and stability to holding a fixed-term position within the Organization;

rr. Further, the entire process greatly affected the Applicant causing her significant stress; and

ss. In light of the above and in light of the above submissions, the Tribunal should order:

i. That the administrative decision not to renew her appointment be rescinded;

ii. That the implied administrative decision not to make good faith efforts to find an alternative position for the Applicant be rescinded and she be provided with a fixed-term appointment;

iii. To be adequately compensated for: (a) loss of income for the months the Applicant was not employed by the Organization during the period 2014 – 2018;

iv. Specifically, to be awarded, in lieu of the notice period, compensation corresponding to the 30 calendar days' written notice period; and finally

v. To be adequately compensated for moral injury resulting from stress, anxiety and humiliation caused by the unlawful and unfair treatment by the Organization.

Respondent's submissions

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

a. The Application is without merit and should be rejected. The Applicant had no expectation of renewal of her fixed-term appointment. The reason given to the Applicant for the non-renewal decision is lawful, and supported by the facts. The position held by the Applicant under her fixed-term appointment, Administrative Assistant at the G-4 level no longer exists in OSAA. For operational reasons, the post that funded the position, post number UNA 011-03010-EOL-0005, was reclassified to fund a new position of Senior Staff Assistant at the G-6 level. It was not possible to renew the Applicant's fixed-term appointment to a position that no longer exists. The Applicant's allegations that the contested decision was motivated by improper purposes have no merit, and are unsupported by evidence;

The decision not to renew the Applicant's appointment was lawful

b. The decision not to renew the Applicant's fixed-term appointment was a lawful exercise of discretion. To meet OSAA's operational needs, the Organization decided to use the Post to finance a new position at the G-6 level

instead. The Post was subsequently reclassified to the higher G-6 level, and it was not possible to renew the Applicant's fixed-term appointment. Her former position no longer exists;

c. A fixed-term appointment does not carry any expectancy of renewal, irrespective of length of service and any prior renewal of the appointment. The Secretary-General has broad discretion in assessing the operational needs of the Organization, and to organize and restructure the work of the Organization accordingly;

The contested decision was not tainted by extraneous considerations

d. The Applicant's allegations that the contested decision was motivated by improper purposes have no merit. The Applicant bears the burden of proving that the decision was biased or was motivated by other improper purposes. The Applicant has not met this burden;

The Applicant's appointment expired without notice

e. The Applicant's claim with respect to notice have no merit. The Secretary-General is not obliged to give notice of non-renewal of a fixed-term appointment. As stated in her letter of appointment and in accordance with staff rule 9.4, the Applicant's fixed-term appointment expired without notice;

f. In any case, the Applicant establishes no harm from the timing of the notice she received on 26 August 2014. Since June 2014, the Applicant was aware that her fixed-term appointment would not be renewed beyond 31 August 2014, as the post had been reclassified to the G-6 level and thus her position at the G-4 level no longer existed. Lastly, as agreed by the parties in their joint submission of 9 February 2018, the Applicant's appointment was subsequently extended to 7 October 2014. The Applicant therefore received in excess of 30 days' notice prior to her separation;

The Applicant has no right to placement outside of the competitive process

g. The Applicant has no right to placement outside of the competitive process. Section 4.3 of ST/AI/1998/9 (System for the classification of posts) only provides that staff members whose posts are classified above their personal grade may be "considered for promotion in accordance with established procedures". The established procedures in ST/AI/2010/3 (Staff selection system) require staff members to participate in a competitive selection process;

h. In any case, the Organization provided the Applicant with assistance in identifying and competing for other positions. Following a request from the Executive Officer, OHRM contacted the Applicant regarding placement opportunities;

i. The Director of the Office testified that he had a meeting with the Applicant in late December 2013 to "take stock" of her progress in finding another position. He offered to help her by recommending her for positions, and to do so he asked her to give him a list of her applications;

j. The former Administrative Assistant in the Office testified that in January 2014, after he saw the vacancy for the G-6 position, he told the Applicant that the G-6 position had been advertised and she should "not wait any more" to apply for positions;

k. As documented in the parties' joint submission, the Applicant eventually succeeded in obtaining a number of subsequent appointments;

Remedies

l. The Applicant is not entitled to the rescission of the contested decision. The decision was lawful. In addition, Article 10.5(b) of the Dispute Tribunal's Statute (as amended), provides that compensation for harm may be awarded

only where supported by evidence. The Applicant does not identify any harm, or provide any evidence to show that she suffered any harm.

Consideration

Issues

27. The Tribunal notes that the parties agree in their joint submission dated 9 February 2018 that the primary legal issue before the Tribunal is whether the decision not to renew the Applicant's fixed-term appointment beyond 31 August 2014 was lawful.

28. The Applicant further submits that the following legal issues are also before the Tribunal:

a. Whether the Applicant had a legitimate expectancy of renewal?

b. Was the Applicant given was given a rational reason for, and reasonable notice of non-renewal?

c. Whether the Administration made good faith effort to find the Applicant an alternative suitable position and place her outside of the competitive selection process following the reclassification of her post?

Whether the decision not to renew the Applicant's fixed-term appointment beyond 31 August 2014 was lawful?

29. The Applicant repeats paras. 25 to 28 of her application and states that the Tribunal may draw adverse inference from the lack of reasonable notice and further submits that the decision not to renew her fixed-term appointment beyond 31 August 2014 was unlawful as she was given no rational reasons for the decision to separate her from service. She further contends that the contested decision was tainted by improper reasons, namely harassment from her supervisor, the USG/OSAA.

30. The Respondent, on the other hand, submits that the decision not to renew the Applicant's fixed-term appointment was a lawful exercise of discretion in assessing the operational needs of the Organization, and to organize and restructure the work of the Organization accordingly. The Applicant's post was reclassified to fund a new position of Senior Staff Assistant at the G-6 level due to operational needs of the Organization. As the Applicant's former position no longer exists, it was not possible to renew her fixed-term appointment. The post was reclassified to the G-6 level with effect from 28 August 2013. The new G-6 level position of Senior Staff Assistant was advertised in Inspira [the online United Nations jobsite] in January 2014. Because of the reclassification, it was not possible to renew the Applicant's fixed-term appointment. Her former position at the G-4 level no longer existed.

31. As way of background, the Respondent explained that the OSAA's mandate was expanded to include the role of convener of the Inter-Departmental Task Force on African Affairs and the United Nations Secretariat monitoring mechanism to review commitments made towards Africa's development needs. The OSAA's expanded mandate led to an increase in the number of staff in the Office and increased high-level activity for the USG/OSAA. The Organization therefore identified a need to recruit a Senior Staff Assistant at the G-6 level to strengthen the front office of the USG/OSAA.

32. Although the record demonstrates that the Applicant was aware of the reclassification process, and that her position or post would be "cut off", the Applicant states that she was not given rational reasons for the non-renewal of her contract. She confirms in her application that she was informed at a meeting on 27 March 2013 with the USG/OSAA and the Director that the Office would be making a request to reclassify the Post from the G-4 to the G-6 level. The Tribunal notes that the Applicant acknowledged the 27 March 2013 meeting in her email to the Director of the Office dated 1 April 2013 entitled "My contract termination with OSAA", noting as follows:

> Dear [Director of OSAA],

> As per our last meeting with the USG in his office Wednesday 27 March informing me that my position will be cut off, I am kindly enquiring about any appropriate action I need to take in this regard.
>
> I thank you for informing me early enough so I can have enough time, as it was stated in the meeting, to apply for another position and explore any other options available.
>
> With regards,
>
> [The Applicant]

33. The Tribunal finds that, the Respondent has argued and demonstrated that there was a legitimate reason for the decision to reclassify the Applicant's post. The Secretary-General has broad discretion in assessing the operational needs of the Organization, and to organize and restructure the work of the Organization accordingly Having reviewed the record, the Tribunal is satisfied that the decision to reclassify the Applicant's G-4 level post was made pursuant to this board discretion. In particular, the Tribunal notes that in his oral testimony before the Dispute Tribunal, the Director of the Office explained that the Office needed a position at the higher level due to the requirements of a larger office and the post encumbered by the Applicant was identified because the functions of the G-4 position did not include providing "substantive support" to the Office and the position was "the least demanding" of the G-4 positions in the Office. The Tribunal also takes note that the Secretary-General requested an additional post to fund the G-6 position in the proposed budget for the 2014-2015 biennium, but that this request was rejected by the ACABQ.

42. Thus, the Respondent has advanced that in organizing and restructuring the unit, the Applicant's post was lawfully reclassified and no longer existed, that is, her post was abolished. Having found that there was a legitimate reason for the reclassification, and thus abolishment of the Applicant's post, was the Respondent obligated to provide a reason for the nonrenewal of the Applicant's contract? In the case of *Obdeijn* UNDT/2011/032 (upheld by the Appeals Tribunal in *Obdeijn* 2012-UNAT-201), the Dispute Tribunal pronounced the general principle of international law that every administrative decision must be reasoned, including a decision not to renew a fixed-term appointment:

> 52. The right of a staff member to know the reasons for a decision not to renew her or his appointment has been part of [the Administrative Tribunal of the International Labour Organization's, "ILOAT"] long-standing jurisprudence. The ILOAT, which was established in 1946 and exercises jurisdiction over disputes arising out of more than 50 international organisations, has described the right to know the reasons for a decision not to renew a staff member's appointment as "a general principle of international civil service". See ILOAT Judgment No. 675, In re *Pérez del Castillo* (1985) (stating at paras. 8 and 11 that "[t]here must be a good reason [for a decision not to renew] and the reason must be given" and that "[t]he failure to give a reason will in many cases lead to the conclusion either that the Director-General mistakenly thought that he held an arbitrary power to do as he liked or that his decision was in fact arbitrary or wrongly motivated"); Judgment No. 1154, In re *Bluske* (1992) (stating at para. 4 that "it is a general principle of international civil service that there must be a valid reason for any decision not to renew a fixed-term appointment and that the reason must be given to the staff member"); Judgment No. 1911, In re *Ansorge (No. 3)* (2000); and Judgment No. 2499 (2006) (stating at para. 6 that "there must be a valid reason for any decision not to renew a fixed-term contract [which] must be given to the staff member, who must be told the true grounds for non-renewal. I note the persuasive value of these pronouncements of the ILOAT.

34. In the aforementioned case, the Tribunal also found that in pursuance of the duty of good faith, reasons should be given particularly so that staff members can properly exercise their right to appeal and take whatever action necessary (at para. 54). Further that, not disclosing the reasons for an administrative decision, including the decision not to renew a fixed-term contract, is an act in violation of the requirements of good faith and fair dealing and the organization must ensure that staff members have reasonable and effective means to contest administrative decisions.

35. That it is a general principle of international civil service law that there must be a valid reason for the non-renewal of any contract, including a fixed-term contract, and that the staff member must be informed of that reason explicitly, was reiterated recently in ILOAT Judgment No. 3838 (2017), the case of *S v UNESCO* at paragraph 6 (emphasis added):

> 6. *It is a general principle of international civil service law that there must be a valid reason for the non-renewal of any contract, and*

> *the official must be informed of that reason explicitly in a decision against which she or he can appeal. This principle also applies to the non-renewal of a fixed-term appointment which, under the staff regulations or by agreement between the parties, ends automatically upon its expiry.* This approach is justified by the fact that international organisations frequently resort to fixed-term contracts and the fact that the legitimate career expectations of those entering the service of these organisations would otherwise be denied.
>
> *It follows that an official who holds a fixed-term contract that automatically ends upon expiry must be informed of the true reasons for not renewing that contract and must receive reasonable notice thereof* (…).
>
> 7. The contested decision does not fulfil this requirement to provide reasons. It is true that the complainant received from the Organization a memorandum reminding him that his limited duration appointment would end on the date initially specified and giving him information on the administrative formalities to be completed before he left. However, the memorandum contains no indication of the reasons why the Organization was adhering strictly to the specified departure date, such as a reference to the fact that the duties for which the appointment had been made had come to an end, or to the fact that it was not possible to assign him to other duties.
>
> In response to the complainant's contention that it failed to provide reasons, the defendant merely invokes the first clause of the offer of appointment, cited in consideration 5, above, and the provisions of the General Conditions Applicable to Appointments of Limited Duration, without providing the slightest justification as required by the aforementioned case law.

36. The ILOAT declared the complaint well-founded and set aside the impugned decision, on the finding that the holder of a fixed-term contract that automatically ends upon expiry must be informed of the "true reasons" for non-renewal and must receive reasonable notice In the instant case, on Tuesday, 26 August 2014, the Applicant received an inter-office memorandum from an Administrative Assistant from the Executive Office of DESA notifying her that her "separation is effective close of business, 31 August 2014" being a Sunday. This memorandum contains no reasons for the non-renewal, for example, the fact that the Applicant's post had been abolished or the fact that it was not possible to assign her to other duties. It simply conveys information on the administrative formalities to be completed.

37. The Applicant maintains the notice she received on 24 August 2014 came as a complete shock, especially as she had been reassured of placement the day before. The Tribunal notes that it was only on 2 September 2014, that the Executive Officer OSAA wrote a letter to the Applicant, *after the fact,* stating that "the post you are currently charged against was re-classified to the G-6 level in order to meet the programmatic needs of the Office…" and confirming the extension of her contract until 30 September 2014 so that "the matter should be resolved efficiently". The Tribunal finds that the short notice in the "separation" memorandum from the Administrative Assistant was in violation of the requirements of good faith and fair dealing, and the Organization failed to ensure that the Applicant could properly, reasonably and effectively exercise her right to appeal to contest the administrative decision as is evident from the disputed legal arguments put forth in this particular case.

38. Furthermore, even though a staff member does not have a right to an automatic renewal of a fixed-term contract, a decision not to renew such contract may not be taken for improper motives, and thus the Tribunal is required in any event to consider whether the motives were proper or whether there were any countervailing circumstances that may have tainted such decision with unlawfulness (see *Azzouni* UNDT/2010/005 and *Abdalla* UNDT/2010/140). This is particularly the case in a matter in which an applicant asserts that she or he expected that her or his contract would be renewed.

39. The Applicant contends that the non-renewal of her appointment was not genuine as the contested decision was motivated by improper purposes, namely that she was subject to harassment by the USG/OSAA. On 6 November 2014, the Applicant submitted a complaint against the USG/OSAA for harassment and abuse of authority pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The Respondent, on the other hand, submits that the Applicant's post was reclassified two grades higher due to organizational needs, as reasoned in the after the fact letter from the Executive Officer OSAA.

40. In the complaint, the Applicant alleged that, between July 2012 and October 2014, the USG/OSAA engaged in harassment and/or abuse of authority by, among other things: (a) shouting, insulting and using abusive language towards the Applicant and others; (b) leaving the Applicant abusive hand-written notes; (c) accusing staff members of "plotting" against management and making other adverse remarks; (d) in February 2013, shouting and waving a piece of paper in the Applicant's face while standing so close to the Applicant that his legs were touching her chair; (e) following the February 2013 incident, refusing to allow the Applicant to move cubicles so that the Applicant would not have to sit as close to him, despite the fact that the Applicant had been diagnosed with high blood pressure after the February 2013 incident, and that the move had allegedly been approved by the Director and arrangements had been made to complete the move; (f) tasking the Applicant to run personal errands for him; (g) threatening to write negative comments in the Applicant's performance evaluation for improper reasons, threatening to adversely affect the Applicant's career at the United Nations and improperly influencing the decision to convert the Applicant's post from the G-4 level to the G-6 level, in order to "get rid of you"; (h) complaining that the Applicant used the restroom too often; and (i) calling his previous assistant a "stupid idiot", telling the Applicant that his previous assistant was unable to perform her functions as well as the Applicant, and saying that the Applicant was "the most intelligent G staff in the office".

41. On 6 April 2016, the Applicant received the outcome to her complaint against the USG/OSAA pursuant to ST/SGB/2008/5 in correspondence from the ASG/OHRM. The ASG/OHRM informed the Applicant that following a fact-finding investigation into the Applicant's complaint the panel had found insufficient evidence to establish various aspects of the complaint.

42. However, the ASG/OHRM informed the Applicant that the panel did find evidence to substantiate, in whole or in part, the Applicant's allegations that the USG/OSAA shouted and/or acted harshly and/or disrespectfully towards staff, including the Applicant. In particular, the panel concluded that:

> (a) Although the majority of witnesses did not "necessarily explicitly support the specific instances of alleged harassment made by [the Applicant], their testimony in very large measure spoke to a broader pattern of verbal abuse and other disrespectful behaviour by [USG/OSAA] directed at several [...] staff". Among other things, witnesses described [USG/OSAA] as "shouting, yelling or screaming in certain incidents".
>
> (b) Regarding the handwritten notes, the panel noted that the documents themselves were part of the record, as were e-mails that [USG/OSAA] had written "in a similar style and harsh tone". The panel concluded that, taken as a whole, these communications "could be construed as harsh and insensitive at best and unnecessarily rude and abusive at worst".
>
> (c) Regarding the allegation that [USG/OSAA] had accused staff of "plotting", the panel noted that [USG/OSAA] may have made such remarks in jest. Nevertheless, the panel noted that "[h]umour or attempts at it are sometimes hard to evaluate for staff[,] particularly when coming from a very senior official" and that, based on the statements of several witnesses, [USG/OSAA's] "claims of humour [...] cannot adequately explain a number of the alleged hostile and demoralizing remarks" that [USG/OSAA] made to staff.
>
> (d) Regarding [USG/OSAA's] refusal to allow [the Applicant] to move cubicles, the panel concluded that "there was probably a failure of communication and understanding" on [the Applicant's] part but that, nevertheless, the "harsh tone" of [USG/OSAA's] reaction, as reflected in the e-mails that he sent to [the Applicant] about the incident, "was disproportionate, lacked moderation and[,] towards a staff member with known health concerns[,] was insensitive to the point of being hostile".

43. The ASG/OHRM further informed the Applicant that following the completion of the investigation process, and having regard to the entire dossier, the Secretary-General concluded that the USG/OSAA frequently raised his voice, spoke loudly, shouted and/or communicated in a manner that was reasonably perceived as harsh, insensitive, rude, abusive and/or threatening by multiple staff members. On this basis, the Secretary-General decided to take administrative action in relation to the USG/OSAA, although it is not stated what precise measures were taken.

44. It follows from the above that an investigative process was conducted by the Administration into the Applicant's claim of harassment and abuse of authority by the USG/OSAA. On this issue, the panel found that there was insufficient evidence to

establish the Applicant's allegations that the USG/OSAA had threatened to write negative comments in her performance evaluation, that he had threatened to adversely affect the Applicant's United Nations career or that he had improperly influenced the decision to convert the Applicant's post from the G-4 level to the G-6 level.

45. Any decision to reclassify and/or abolish a post must be based on objective grounds and its purpose should never be the removal of a staff member. Having reviewed the outcome of the investigation as presented in the letter of the ASG/OHRM, which does not appear to have been contested by the Applicant, it is clear that the USG/OSAA was "reasonably perceived" as an intimidating and abusive manager, with a harsh communication style that affected multiple staff members. Whilst it is the panel's findings that the USG/OSAA was abusive and threatening to multiple staff members, there is, however, no clear indication on the record that the Applicant was singled out, her post reclassified, and her contract not renewed due to the alleged actions of the USG/OSAA. The panel's finding regarding the moving of cubicles and that the reaction of the USG/OSAA was disproportionate, lacked moderation and was insensitive to the point of being hostile towards the Applicant, a staff member with known health concerns, is worrisome. The Tribunal is encouraged that the Secretary-General decided to take administrative action in relation to the USG/OSAA as a result of the Applicant's complaint and the investigative process that followed. The Tribunal understands that the Applicant's role working with a manager "reasonable perceived" as abusive and threatening would have been challenging and stressful, in the resultant hostile work environment, as evident from the assault at her desk in April 2014 from a colleague who apparently received a reprimand.

46. In light of the findings of the panel and the information before the Tribunal, there is insufficient evidence to establish a link between the USG/OSAA's abusive management style and the decision to convert the Applicant's post from the G-4 level to the G-6 level. The Tribunal is therefore satisfied that the Applicant has not met her burden of proving that the contested decision was biased or was motivated by other improper purposes.

47. As an observation, the Tribunal notes that the outcome of the Applicant's complaint against the USG/OSAA pursuant to ST/SGB/2008/5 dated 6 April 2016 was not disclosed to the Tribunal, until the Tribunal, following perusal of the previous filings prior to the remand from Appeals Tribunal, the transcription of proceedings before another Judge, and previous submissions, requested the said document pursuant to Order No. 246 (NY/2018) dated 13 December 2018.

48. It is difficult to understand why neither party disclosed this highly relevant evidence, especially in light of their duties of disclosure. It remained for the Tribunal to wade through the previous filings, the copious transcription of proceedings consisting of over 200 pages, and all the submissions on file, to properly identify the claims and arguments, with the corresponding evidence and then to pronounce on pertinent evidence such as the investigation report. Submissions filed by legal counsel should be well articulated, disclosing proper causes of action, clearly and concisely stating all material facts relied upon relating to the contested issue and identifying up-to-date evidence, with submissions on the said evidence. Lack of full and up-to-date disclosure delays the disposal of cases. However, the Tribunal is also appreciative of the complex and lengthy procedural history of this case, the lengthy transcription of two days of proceedings, and the fact that there have been several Counsel engaged in the conduct of this matter, particularly on behalf of the Applicant, who appears to have had no fewer than four different Counsel, one of whom was an external private Counsel who was abroad and unavailable for 6 months.

Whether the Applicant had a legitimate expectancy of renewal

49. The Applicant submits that she had a legitimate expectation of renewal of her appointment, on the basis that she was given explicit assurances to that effect by senior officials, including the USG/OSAA, that her contract would be renewed and that her employment with the Organization (if not in OSAA) would continue.

50. The Respondent contends that the Applicant had no expectation of renewal of her fixed-term appointment. The Applicant has not adduced any evidence that a written

promise was made to renew her fixed-term appointment. On the contrary, the Applicant was repeatedly informed that her fixed-term appointment would not be renewed unless she was selected for another position.

51. Legitimate expectation may result in the creation of an enforceable legal right, although the application of the doctrine is subject to a number of qualifications (*Candusso* UNDT/2013/090). A legitimate expectation giving rise to contractual or legal obligations occurs where a party acts in such a way, by representation by deeds or words, that is intended or is reasonably likely to induce the other party to act in some way in reliance upon that representation, and the other party does so (*Checa-Meedan* UNDT/2012/009). Where a staff member claims that she had a legitimate expectation arising from a promise made by the Administration, such expectation must not be based on mere verbal assertions, but on a firm and express commitment made individually to the staff member by a competent authority of the Administration (*Abdalla* 2011-UNAT-138; *Ahmed* 2011-UNAT-153; *Igbinedion* 2014-UNAT-411; *Samuel Thambiah* UNDT/2012/185).

52. The Respondent contends that the Applicant's offer of appointment dated 26 July 2012 clearly stated that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or of conversion to any other type of appointment in the Secretariat (see also staff rule 14.3(c)). The letter of appointment stated that the appointment would expire "without prior notice" on 31 August 2014.

53. However, in the matter of *Obdeijn* UNDT/2011/032 (as affirmed in *Obdeijn* 2012-UNAT-201, with variation to compensation), at para. 40, the Tribunal stated:

> … The practice of inserting disclaimers into fixed-term contracts to the effect that an employee has no expectation of renewal is not conclusive proof that the employee could not reasonably have expected his or her contract to be renewed […] What constitutes a reasonable expectation will be a question of fact in each particular case. […]

54. As the Dispute Tribunal stated in *Ahmed* UNDT/2010/161 (affirmed in *Ahmed* 2011-UNAT-153), an expectancy of renewal may also be created by countervailing

circumstances, such as a violation of due process, arbitrariness or other extraneous motivation on the part of the Administration. In order for a staff member's claim of legitimate expectation of a renewal of appointment to be sustained, "it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case" (*Abdalla* 2011-UNAT-138; *Munir* 2015-UNAT-522; *Toure* 2016-UNAT-660). It is also trite law that not only must the expectation be "legitimate" or have some reasonable basis, but the fulfilment of the expectation must lie within the powers of the person or body creating the expectation (see *Candusso* UNDT/2013/090, not appealed).

55. Generally, it is for the party who asserts a fact to prove it (see, for instance, *Azzouni* 2010-UNAT-081 and *Hepworth* 2011-UNAT-178). In support of her claim, the Applicant states that it is undisputed that her contract was systematically renewed, her last contract being a two-year fixed-term appointment from 1 September 2012 to 31 August 2014. The Applicant states that she attended a number of meetings on 11, 12, 19, and 25 June 2014 concerning her employment in OSAA, and during these meetings, the Applicant was systematically reassured that OSAA and DESA would assist her in applying for alternative employment in other departments at the G-4 or G-5 level. It is also undisputed, as found by the Appeals Tribunal, that the meetings held in June 2014 did not have the aim of notification of the non-renewal of the Applicant's appointment but rather were intended to reassure the Applicant that the Administration was to help her in identifying new job opportunities within the Organization (para. 23 of *Jean* 2017-UNAT-743). The Applicant further states that on 25 August 2014, that is, six calendar days prior to the expiration of her contract, renewed systematically during the period from 2007 to 2014, the Applicant was again reassured by the OSAA Director and by the DESA Executive Office that they would reassign her within the Organization. In light of the above, the Applicant submits that, in spite of the provision in her contract that her appointment did not carry any expectancy of renewal, a legitimate expectation of a renewal of her contract was created by the conduct of the Administration.

56. The Applicant submits that these reassignment promises were provided by senior-level United Nations officials whom she could not compel to document such assurances in writing. For the Tribunal to find otherwise, she contends, would be to accept the denials of the Executive Office and DESA without testing that evidence. In this regard, the Tribunal notes that the Applicant waived her right to a hearing as the parties agreed to a determination of this matter on the papers, and the Applicant filed no further documents or submissions following the receipt of the transcriptions of the previous proceedings.

57. Although the Tribunal finds that the sudden short notice given to the Applicant by way of the separation memo of 24 August 2014 may have created the expectation that she will be renewed as she had not heard to the contrary even a week before, the Tribunal finds that there is insufficient evidence that the Administration made a firm commitment or express promise to renew the Applicant's fixed-term appointment such that a legitimate expectation was created in all the circumstances.

Whether the Administration made good faith efforts to find the Applicant an alternative suitable position and place her outside of the competitive selection process following the reclassification of the post

58. In the present case, the Applicant claims that the decision to not renew her fixed-term appointment is unlawful since the Administration failed to discharge its obligation under staff rule 9.6(e) and 9.6(f) to find a suitable post for her following the notification of abolition of her post. The Respondent argues that the Applicant's contract was simply not renewed because her post was reclassified and thus she has no right to any placement in terms of the aforesaid staff rules and outside of the competitive process.

59. In terms of staff rule 9.6(a), termination is a separation from service initiated by the Secretary-General. A separation because of expiration of appointment is not regarded as a termination under staff rule 9.6(b). The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member holding a temporary,

fixed-term or continuing appointment in accordance with the terms of the appointment on the grounds of abolition of posts or reduction of staff see staff rule 9.6(c)(ii).

60. The Respondent's submission that the Applicant's post was reclassified due to operational needs and was no longer existing, means, in effect, that the Applicant's post was abolished. Prior to and following the reclassification and eventual abolition of her G-4 position, the Respondent submits that the Applicant was provided with assistance in identifying and competing for other positions. That she was encouraged to apply and follow-up meetings were held with the Applicant in efforts to place her elsewhere. The Executive Officer of DESA also drew the Applicant's attention to the possibility of an agreed termination.

61. The Tribunal has accepted the Respondent's explanation of the financial and programmatic situation which led to the abolition of the Applicant's G-4 level post to accommodate a G-6 position. Whilst the so-called memorandum of separation makes no reference to any reasons, the Applicant acknowledged that her position will be "cut off" in her email of 1 April 2013 titled "My contract termination with OSAA", following which the possibility of an agreed termination was raised.

62. The Applicant maintains that the Respondent did not make good faith efforts to find her an alternative suitable position outside of the competitive process following the reclassification of her post. Contrary to the Applicant's assertion, the Tribunal finds that the record indicates that the Administration was supportive of the Applicant being retained within the Organization and the Applicant's supervisors encouraged her from the outset, within a realistic timeframe, to apply for vacant positions elsewhere where her immediate capabilities could be utilized. More specifically, the Respondent submitted that following a request from the Executive Officer, OHRM contacted the Applicant regarding placement opportunities. The Director of the Office testified that he had a meeting with the Applicant in late December 2013 to "take stock" of her progress in finding another position. He offered to help her by recommending her for positions, and to do so he asked her to give him a list of her applications, which the Applicant apparently declined to do on the basis of confidentiality. The Tribunal

reiterates that even where the Administration may be under an obligation to make proper reasonable and good faith efforts to find alternative posts for displaced staff members, the latter are expected to apply for suitable available positions and obliged to fully cooperate and make good faith efforts in order for their applications to succeed. Even where a staff member shall be retained in preference, the latter must show readiness and interest by timely and completely applying for positions before any determination regarding suitability can be made (see *Fasanella* 2017-UNAT-765).

63. As regards the Applicant's allegations that as a General Service staff member she did not receive consideration for suitable posts available within the parent organization duty station in terms of staff rule 9.6(f), the Applicant did not request the disclosure or discovery of any relevant information upon which any finding could be made if warranted.

64. In any event, the Tribunal notes that the Applicant eventually succeeded in securing a series of temporary appointments at the G-4 and G-5 level since her appointment with OSAA ended on 7 October 2014, and even secured a G-5 level appointment for some months up to December 2015. In the joint submission dated 9 February 2018, it is agreed that subsequent thereto the Applicant applied for and was reappointed to other positions within the Organization.

Was the Applicant given reasonable notice of non-renewal?

65. The Applicant states that she was not given reasonable notice of non-renewal. She submits received a notice of non-renewal on 26 August 2014, only five calendar days prior to the expiration of her contract. Furthermore, the issued guidelines on separation from service provide that it is best practice in the case of fixed-term appointments that staff members are provided 30-day notice. In this case, this best practice was not followed.

66. The Respondent asserts that the Secretary-General is not obliged to give notice of non-renewal of a fixed-term appointment, and that in any case, the Applicant

establishes no harm from the timing of the notice she received on 26 August 2014. Since June 2014, the Applicant was aware that her fixed-term appointment would not be renewed beyond 31 August 2014, as the post had been reclassified to the G-6 level and thus her position at the G-4 level no longer existed. The Tribunal notes that this latter submission is not entirely correct, since as noted by the Appeals Tribunal, it could only be reasonably concluded that the Applicant may have known that her appointment would "probably" not be renewed (para 23). However, it is common cause that the Applicant's appointment was subsequently extended to 7 October 2014.

67. In the 'after the fact' letter dated 2 September 2014, the Executive Officer OSSA, states that, following the Applicant's request for management evaluation and suspension of action, whilst the Applicant's claims were not accepted "it was decided to extend [the Applicant's] appointment until 30 September 2014" in order to "resolve the matter efficiently". Whatever the import of the latter expression, the Tribunal finds that the Respondent acknowledged that the Applicant should receive at least 30 days' notice which she apparently served. It is common cause that the Applicant's appointment was actually extended to 7 October 2014. Therefore, the Tribunal finds that the lack of sufficiency of notice is assuaged as the Applicant received in excess of 30 days' notice prior to her separation as her appointment was subsequently extended to 7 October 2014, and thus there is no award *in lieu* of the 30 days' notice period.

68. The Applicant has also requested compensation for moral injury resulting from stress, anxiety and humiliation caused by the unlawful and unfair treatment by the Organization. Presumably this includes the state of shock she says she was in after the administration initially only gave her five calendar days' notice following her seven-year service with the Organization. Aside from a medical certificate dating back to 2013, the Applicant waived the right to provide testimony, and also provided no further document evidence in support. The Tribunal finds that the Applicant having provided no evidence of any harm, there is no basis for an award for moral damages (see *Kallon* 2017-UNAT-742).

Comment

69. With its tortuous bundle of documents, transcription, and complex procedural history, this remand matter has engaged the Tribunal and the parties over a considerable length of time. The Tribunal has highlighted the challenges facing Counsel for both parties, the Applicant having had a total of four different Counsel representing her. Following the Respondent's final submission of 20 December 2018, judgment in this matter should have been rendered by the Tribunal by 20 March 2019 or thereabouts. However, in the interim the Tribunal, with the undersigned Judge presiding, dealt with and issued five urgent orders, including at least two urgent *Villamoran* type orders, arising from urgent suspension of action applications which require attention within five days in terms of its rules.

Conclusion

70. In view of all of the foregoing, the application is dismissed.

(Signed)

Judge Ebrahim-Carstens
Dated this 15th day of April 2019

Entered in the Register on this 15th day of April 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York