



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MBOOB

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Introduction

1. The Applicant, a former Humanitarian Affairs Officer at the P-4 level with the Office for the Coordination of Humanitarian Affairs (“OCHA”) in Geneva, contests the Administration’s decision to terminate her fixed-term appointment following abolition of her post as part of the 2018 OCHA restructuring exercise.

Facts and procedural history

2. The Applicant joined the Organization on 7 March 2013, on a two-year fixed-term appointment as a Humanitarian Affairs Officer at the P-4 level, in the Private Sector Section (“PSS”), OCHA.

3. In June 2017, OCHA published a document entitled “Creating a better OCHA” setting forth its plan for restructuring. It was stated, among other things, that OCHA decided to restructure its organization to “refocus[] and anchor[] [its] work on OCHA’s five core functions” and “[i]n order to focus on [its] areas of strength, [OCHA] will stop or phase out activities out of scope as well as unnecessary internal duplications”.

4. In November 2017, OCHA shared with its staff members the methodology agreed upon by the Staff Management Committee (“SMC”) for the upcoming 2018 OCHA restructuring/downsizing exercise, which would consist of five phases:

- a. Phase 1 (Review Phase): based on the 2018 budget proposal submissions, the 2017 positions and the 2018 budget structure and posts were to be compared to determine the list of affected posts, and the proposed list of functional group titles to be used to create functional group/retention-review groups would be prepared. An overall review of the 2018 posts versus OCHA staff within the functional groups was to provide an indication of the impact on staff in the respective groups;

b. Phase 2 (Mitigating Measures Phase): contract buy-out (agreed termination) would be offered to eligible staff members; staff on temporary assignments, reimbursable loans or on secondment with OCHA would be asked to return to their parent organization;

c. Phase 3 (Retention Phase): in the event that there were to be a need for a downsizing (i.e., the number of staff in a particular function and at a particular grade within the affected area being restructured exceeds the number of posts available), staff members would be retained according to staff rules 9.6(e) and 13.1(d). First, staff members who received at least satisfactory performance in the last five years and who had not been subjected to a disciplinary measure in the past five years would be considered first. Second, among staff members who met the above-mentioned criteria, staff members would be retained in the following order: (1) permanent appointment holders, (2) continuing appointment holders, (3) staff recruited through a competitive examination under staff rule 4.16 serving on a fixed-term appointment, and (4) staff on fixed-term appointment. When there were more staff members than available posts within the same group, a comparative review would be conducted based on the length of continuous service in the UN Common System (one point for every month) and performance (12 points for a rating of “exceeds performance” for every performance cycle in the last five full performance cycles);

d. Phase 4 (Placement Phase): the remaining staff members were to be placed on a suitable unencumbered post with a reasonable expectation of funding within OCHA. The Human Resources were to conduct a matching exercise based on the terms of reference provided by relevant programme managers and affected staff members’ Personal History Profiles (“PHP”), performance documents, and their personal preferences/constraints. The list of suitable candidates for each vacancy in order of retention would be presented to the Heads of Offices/Divisions, who then were to make recommendations for placement/reassignment respecting the order of retention and taking into account the evaluation criteria for the vacant

position and relevant personal circumstances of the staff member. Placement options included placement at the same or the lower level or temporary vacancies. The list of staff on permanent, continuing or fixed-term appointments not placed within OCHA was to be shared with the Office of Human Resources Management (“OHRM”) for consideration for positions across the Secretariat. Staff members not placed within OCHA or the Secretariat were to have the option to take Special Leave Without Pay (“SLWOP”) for up to 12 months; and

e. Phase 5 (Termination and Separation): all staff members not placed at the end of the placement phase were to be separated according to Chapter IX of the Staff Regulations and Rules.

Restructuring exercise

5. In Phase 1 (Review Phase), the post encumbered by the Applicant was identified as one of the posts that was no longer being funded in 2018.

6. While the Administration stated throughout the restructuring process and the proceedings before the Tribunal that OCHA had seen a net reduction of 156 posts in the 2018 budget, the documents disclosed pursuant to Order Nos. 116 and 118 (GVA/2020) show that the restructuring exercise led to a net reduction of 116 posts in the 2018 budget.

7. Since the Applicant did not express interest for an agreed termination under Phase 2 (Mitigating Measures Phase), she was moved to Phase 3 (Retention Phase).

8. In Phase 3, following the comparative review process, the Applicant ranked 20th out of 26 P-4 Humanitarian Affairs Officers in Geneva.

9. On 12 January 2018, the Chief, Human Resources Section (“HRS”), OCHA, informed the Applicant that following a retention review she was moved to Phase 4 (Placement Phase) and her profile would be reviewed for placement against posts compatible with it and her level. She was therefore requested to submit her

updated PHP and her latest three performance evaluation reports. On 16 January 2018, the Applicant submitted the requested documents and expressed her appreciation for taking into account her preference to stay in Geneva for family reasons.

10. In Phase 4, there were nine P-4 posts with OCHA in Geneva and seven P-4 staff members (four of them were from Geneva) who needed placement. On 9 February 2018, a desk suitability review (“suitability review”) of the profiles of the seven P-4 staff members was conducted against the nine P-4 posts in Geneva. The Applicant was not recommended for eight posts and recommended with reservation for one post (Post Number 30517464). The outcome of this review was shared with the Applicant verbally at a meeting on 20 February 2018, which was followed by an email on 25 February 2018.

11. With respect to Post Number 30517464, for which the Applicant was recommended with reservation, a staff member holding a permanent appointment held a lien against it but was temporarily assigned to another post. Another staff member with a fixed-term appointment, whose post was also abolished, was instead temporarily placed against Post Number 30517464, effective 3 April 2018, on the ground that this staff member, unlike the Applicant, was recommended without reservation for it.

12. By email of 22 March 2018, the Chief, HRS, OCHA, informed the Applicant that no suitable post was identified for her within OCHA and that her name and PHP would be shared with the United Nations Office in Geneva (“UNOG”) and OHRM. It was noted that if SLWOP was not a feasible option for the Applicant, OCHA would initiate the process of requesting the termination of her fixed-term appointment with a proposed effective date of 30 June 2018. It was also noted that this email did not constitute an official notice of the termination but advance information to keep her informed.

13. On 24 March 2018, the Applicant sent an email to the Chief, HRS, OCHA, summarizing a phone conversation they had on 21 March 2018 where she noted that she would be considered for any P-4 posts advertised in Geneva and that the Chief, HRS, would send her a list of P-3 posts and their terms of reference so that she could consider expressing her interest.

14. In a follow-up email dated 25 March 2018, the Chief, HRS, OCHA, informed the Applicant that she was found not suitable for two additional temporary posts as well, namely Posts Number 30526209 and 30515784, Humanitarian Affairs Officer (P-4), Operations and Advocacy Division, OCHA Geneva. In particular, an acting Deputy Director of the relevant Division determined that the Applicant had not been recommended as she did not have the required “minimum of seven (7) years of progressively responsible experience in humanitarian affairs, emergency preparedness, crisis/emergency relief management, rehabilitation, development, or other related area of which at least three (3) years must be at the international level” and “At least three (3) years of humanitarian experience in the field ... in emergency situations”.

15. On 4 April 2018, the Applicant submitted a first request for management evaluation of the “failure to retain [her] against a P-4 post in the new structure and the decision to terminate [her] appointment as of 31 June 2018 or to place conditionality on employment beyond that date”.

16. On 5 April 2018, OCHA submitted a request for termination of the Applicant’s fixed-term appointment to the Assistant Secretary-General, OHRM. In this request, it was noted that OCHA reduced 156 posts in the 2018 budget, out of which 101 posts were at the professional level.

17. On 15 April 2018, the Applicant followed up with the Chief, HRS, OCHA, seeking updates about the list of available P-3 posts, which she had not received, for her to consider expressing an interest.

18. On 17 April 2018, the Chief, HRS, OCHA, informed the Applicant that her PHP was under review for suitability against a P-3 temporary vacancy of Humanitarian Affairs Officer, Donor Relations Section in Geneva, advertised under temporary job opening 95939 (“TJO 95939”), and that there were no other regular vacancies at the P-3 level under recruitment in Geneva. The Applicant was also informed that OCHA had reached out to hiring managers in Geneva to ensure that OCHA would be notified about any potential upcoming vacancies at the P-3 level, which would be shared with the Applicant upon receipt. The Chief, HRS, also attached a list of 17 P-4 Humanitarian Affairs Officer vacancies across OCHA, all of them outside Geneva, for the Applicant’s review and consideration to express her interest.

19. On 24 April 2018, the Chief, Donor Relations Section, Partnership and Resource Mobilization Branch (“PRMB”), OCHA, namely the hiring manager for TJO 95939, informed the Chief, HRS, OCHA, that the Applicant was not suitable for the post since she did not have “knowledge of a range of humanitarian assistance, emergency relief and related human rights issues” as required in the “Professionalism” competency.

20. On 18 May 2018, the Applicant was informed of the decision to terminate her fixed-term appointment effective 30 June 2018. At this time, she was on a fixed-term appointment with an expiration date of 6 March 2019.

21. On 6 June 2018, an HR Business Partner of OCHA requested hiring managers to review the Applicant’s suitability for four P-3 posts with OCHA before advertising the respective job openings (Posts Number 31018599, 31023653, 30067974, and 30517757).

22. On 11 June 2018, the Chief, PRMB, OCHA, namely the hiring manager for the above-mentioned four P-3 posts, responded that, referring to a previous review of the Applicant’s suitability for TJO 95939, the Applicant’s PHP did not show that she has any experience or familiarity with humanitarian assistance or emergency relief. The hiring manager further noted that in the Applicant’s performance document, her first reporting officer noted that “I would have also liked to have seen this year a stronger

attention to detail and the quality of content in the drafts of different communications products that she produced” and she should be encouraged to develop “her skills and knowledge of OCHA’s core areas of work”. A hiring manager concluded that, for all these posts, a deep understanding of OCHA’s work, and excellent communication and writing skills with attention to detail are essential competencies.

23. On 8 June 2018, the Applicant filed a second request for management evaluation of the decision to terminate her fixed-term appointment.

24. By letter dated 27 June 2018, in response to the Applicant’s second request for Management Evaluation, the Management Evaluation Unit informed the Applicant of the Administration’s decision to uphold the contested decision.

Consideration of the Applicant’s suitability for additional OCHA posts

25. On 3 July 2018, the Applicant, who was then on certified sick leave, asked the Chief, HRS, OCHA, to clarify her situation given that her termination was planned to take place on 30 June 2018. The Applicant specifically asked whether the Administration would continue to make efforts to place her within the Secretariat beyond 30 June 2018. She also asked if she was considered for the Humanitarian Affairs Officer post with the Inter-Agency Standing Committee (“IASC”) Secretariat before it was advertised.

26. The Chief, HRS, OCHA, responded that HR would continue to support the Applicant’s job applications while she remained on certified sick leave. Regarding the IASC post (JO 98827), the Chief, HRS, explained that the Applicant had been already reviewed against this post, referring to her email of 25 February 2018 (the review of the Applicant’s profile in Phase 4). The Chief, HRS, also confirmed that this post was the same as “Humanitarian Affairs Officer (Emergency Director Group) (P-4), Post Number (New), Coordination Division, OCHA Geneva”.

27. In response, the Applicant pointed out that she was found not suitable for the post in the Emergency Director Group on the ground that she did not have field experience, and yet under JO 98827 two years of recent field experience was only highly desirable and thus she should be found suitable for this post. The Applicant also inquired about the status of her application for TJO 99940 (P-4, Programme Management Officer).

28. Regarding the change of field experience from “required” during Phase 4 to “highly desirable” in JO 98827, the Chief, HRS, OCHA, explained that field experience was listed as required in the classification document and yet it was changed to “highly desirable” since due to the retention/placement exercise, a lot of selection processes were delayed and thus there was an urgent need to fill the post.

29. On 9 July 2018, OCHA HR requested hiring managers to review the Applicant’s suitability for JO 98827 and TJO 99940, respectively.

30. The hiring manager for JO 98827 responded that the Applicant was found not suitable since in addition to not meeting the two years of field experience, which was listed as highly desirable, she also did not meet the substantive requirements of this job, i.e., solid operational and/or policy experience in the humanitarian field.

31. The hiring manager for TJO 99940 responded that the Applicant was not suitable for the position indicating that the Applicant did not meet the “Seven years of progressively responsible experience in project or programme management, administration or related area” as she worked as a P-4 with similar levels of responsibilities since 2009 and her levels of responsibility did not demonstrate project management skills or programme management or administrative skills. In addition, it was found that the Applicant did not have the required knowledge of OCHA field and Headquarters (“HQ”) operations since she had limited knowledge of OCHA and only worked in Geneva since 2006, and it was noted that this position required significant field operational experience and knowledge as well as an understanding of various components of HQ support field operations.

32. On 17 July 2018, the Chief, HRS, OCHA, informed the Applicant that she was found not suitable for both posts: for JO 98827, it was stated that the Applicant lacked “solid operational and/or policy experience in the humanitarian field”, and for TJO 99940, it was stated that the Applicant did not meet two required criteria: “Seven years of progressively responsible experience in project or programme management, administration or related area” and “Knowledge of OCHA field and headquarter operations”.

33. On 19 July 2018, the Applicant wrote to the Chief, HRS, OCHA, to ask if she had been assessed for four P-3 posts recently advertised. She was found not suitable for those posts for the following reasons:

a. JO 98575 (Humanitarian Affairs Officer/Special Assistant): the Applicant was found as not having “professional knowledge of the Middle East or Central Asia” as required in the “Professionalism” competency;

b. TJOs 99233 and 100584 (Humanitarian Affairs Officer, PRMB): the Applicant was found as not having sufficient “knowledge of a range of humanitarian assistance, emergency relief and related human rights issues, including approaches and techniques to address difficult problems. Analytical capacity and in particular the ability to analyze and articulate the humanitarian dimension of issues which require a coordinated UN response” as required in the “Professionalism” competency; and

c. TJO 99176 (Humanitarian Affairs Officer, PRMB): the Applicant was found as not having sufficient knowledge of humanitarian assistance and emergency relief as required in the “Professionalism” competency and as not meeting the requirement of knowledge of French.

34. On 25 March 2019, the Applicant applied to a Humanitarian Affairs Officer post at the P-4 level with OCHA (TJO 113533). She was found not suitable due to not meeting the following requirements: “Knowledge of wide range of humanitarian

assistance, emergency relief ... and related humanitarian issues” and “a minimum of seven years of progressively responsible experience in humanitarian affairs, emergency preparedness” as well as a “minimum of two years of experience in humanitarian affairs in emergencies during the last ten years is required”.

Consideration of the Applicant’s job applications outside OCHA

35. On 3 July 2018, the Applicant applied to two Programme Management Officer posts with the United Nations Conference on Trade and Development. One job opening was cancelled. For the other job opening (JO 97977), the Applicant was “long-listed” as she did not meet the following desirable criterion: “Experience, in international public organizations, in the conceptualization, implementation and management of technical cooperation projects on trade and climate change”. Also, she was not flagged in Inspira as coming from a downsizing entity.

36. On 17 July 2018, the Applicant applied to a Programme Officer post in Partnerships with the United Nations Office for Disaster Risk Reduction (TJO 100493). The Applicant was assessed as “not suitable”.

37. On 25 September 2018, the Applicant submitted the present application.

38. The Applicant was separated from service on 22 June 2019 after being on certified sick leave from 10 March 2018 to 21 June 2019.

39. After the present case was assigned to the undersigned Judge, the Tribunal issued a series of orders instructing the parties to disclose information and documents relevant to the case (Order Nos. 90, 98, and 101 (GVA/2020)).

40. On 6 November 2020, the parties filed their respective closing submission in response to Order No. 109 (GVA/2020).

41. On 16 and 23 November 2020, the Respondent filed additional documentation in response to Orders No. 116 and 118 (GVA/2020), and on 27 November 2020, the Applicant filed comments regarding the newly disclosed documents.

Receivability

42. Before addressing the merits of the case, the Tribunal will first examine the Respondent's claim that the application is not receivable in part. The Respondent argues that any non-selection decisions made following the completion of OCHA restructuring process are not receivable as the Applicant failed to request a management evaluation of such non-selection decisions.

43. In response, the Applicant submits that, referring to *Timothy* 2018-UNAT-847, when examining the legality of the termination decision, whether priority consideration had been provided for a staff member as required under law is part of the scope of review. It is not required to seek a management evaluation of each non-selection decision for a number of posts.

44. The Tribunal is of the view that the Applicant is not challenging individual non-selection decisions directly but rather challenges the Administration's alleged failure to give her priority consideration for vacant posts before terminating her fixed-term appointment, which is required under staff rule 9.6(e) (see *Timothy*).

45. Therefore, the Tribunal finds that the application is receivable and will thereby examine the merits of the case.

Parties' submissions

46. On the merits, the Applicant's principal contentions are:

- a. Phase 3 (Retention Phase) was not conducted properly under the restructuring methodology. In the event that there are more available posts than affected staff members, they should be retained in the order of retention. The fact that there were seven staff members who required placement when there were nine available posts in Phase 4 means that Phase 3 was skipped and these staff members, including the Applicant, were improperly moved to Phase 4;

b. In Phase 4, the Applicant was found suitable, albeit “recommended with reservation”, for one post (Post Number 30517464). Yet, she was not placed since, based on the order of retention, another staff member holding a permanent appointment was allegedly placed against that post. It was later disclosed during the proceedings that another staff member holding a fixed-term appointment was subsequently placed against the post in question, when it became available temporarily, on the ground that this staff member was recommended without reservation and, hence, was deemed “more suitable” than the Applicant. This shows that the Administration used an undisclosed relative suitability, instead of the order of retention, to decide who would be placed against this post, to the detriment of the Applicant;

c. When the Administration reviewed the Applicant’s suitability for other posts within OCHA, the Administration deviated from the agreed definition of suitability and/or failed to apply a definition of suitability in a consistent and equal manner when it reviewed her suitability against desirable criteria or elements of competencies of the job opening, instead of restricting review against required criteria. Further, a review of the Applicant’s suitability was conducted by a hiring manager, instead of a P-5 panel, which led to a lack of objectivity in the process; and

d. The evidence shows that the Administration failed to provide the Applicant with priority consideration in the broader Secretariat.

47. The Respondent’s principal contentions are:

a. Staff regulation 9.3(a)(i) and staff rule 9.6(c)(i) provide that the Secretary-General may, giving the reasons therefor, terminate a staff member’s appointment on the grounds of abolition of posts or reduction of staff;

- b. The decision to terminate the Applicant's fixed-term appointment was made following the OCHA restructuring process, which led to the abolition of the Applicant's post;
- c. All efforts were made to place the Applicant in all phases of the restructuring exercise. As no suitable post was found and the Applicant did not successfully apply for another post, the Applicant's fixed-term appointment was terminated; and
- d. The Applicant bears the burden of proving bias and improper motivation and yet she did not meet her burden.

Consideration

The applicable legal framework and the issues of the case

48. The present case concerns a decision to terminate the Applicant's fixed-term appointment following the abolition of her post.

49. Staff regulation 9.3(a)(i) and staff rule 9.6(c)(i) provide that the Secretary-General may terminate the appointment of a staff member for reasons of abolition of posts or reduction of staff.

50. It is also well settled jurisprudence that an international Organization necessarily has power to restructure some or all of its departments or units, including through the abolition of posts, and the Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. Nevertheless, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with staff members (see *Hersh* 2014-UNAT-433, *Bali* 2014-UNAT-450, *Matadi et al.* 2015-UNAT-592). As the Appeals Tribunal stated in *Sanwidi* 2010-UNAT-084, at para. 40 when judging the validity of the exercise of discretionary authority:

the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

51. In addition, when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts (see, for instance, *Islam* 2011-UNAT-115). If an applicant claims that the decision was ill-motivated or based on improper motives, the burden of proving any such allegations rests with him/her (see, for instance, *Azzouni* 2010-UNAT-081, para. 35; *Obdeijn* 2012-UNAT-201, para. 38).

52. If a staff member's appointment is terminated as a result of the abolition of a post, under staff rule 9.6(e), subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference: (i) staff members holding a continuing appointment; (ii) staff members recruited through competitive examinations for a career appointment; and (iii) staff members holding fixed-term appointments.

53. In *Timothy* (para. 31), the Appeals Tribunal held that staff rules 9.6(e) and 13.1(d) create an obligation on the Administration to make reasonable and good faith efforts to find suitable placements for the redundant staff members whose posts have been abolished.

54. As the Appeals Tribunal held, "the Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given" (*Timothy*, para. 32).

55. The Appeals Tribunal also held that while the Administration is required to consider the relevant staff members on a preferred basis for the available suitable posts, “this requires, as per the clear language of this provision, determining the suitability of the staff member for the post, considering the staff member’s competence, integrity and length of service, as well as other factors such as nationality and gender. If the redundant staff member is not fully competent to perform the core functions and responsibilities of a position, the Administration has no duty to consider him or her for this position” (*Timothy*, para. 38).

56. Regarding the definition of “suitable posts” in which a staff member’s services can be utilized under staff rule 9.6(e), the Appeals Tribunal held that “suitable posts” include posts at the displaced staff member’s grade level or even at a lower grade, if, in the latter case, the staff member has expressed an interest by way of application thereto (*Timothy*, paras. 56-58).

57. While efforts to find a suitable post for the displaced staff member rest with the Administration, it is lawful and reasonable to expect that the affected staff members cooperate fully in the process: the relevant staff member is required to cooperate fully in these efforts and must show an interest in a new position by timely and completely applying for the position. Once the application process is completed, however, the Administration is required to consider such staff members “on a preferred or non-competitive basis” for the position in an effort to retain him or her (*Timothy*, paras. 45-47).

58. In light of the applicable legal framework, the issues of the present case can be defined as follows:

a. Whether the contested decision to terminate the Applicant’s fixed-term appointment was lawful. In particular, whether:

i. The restructuring process followed the pre-established procedures and was thereby conducted lawfully; and

ii. The Organization complied with its obligations to make all reasonable efforts to place the Applicant, whose post was abolished, for available suitable posts within the Secretariat, as required by staff rule 9.6(e).

b. Whether the Applicant is entitled to remedies she requests.

Restructuring process

59. The Applicant raises several issues in relation to the restructuring process, and the Tribunal will review the following:

a. Whether Phase 3 (Retention Phase) was conducted properly under the restructuring methodology and whether it was lawful to move the Applicant to Phase 4 (Placement Phase);

b. Whether the Applicant's profile was reviewed properly against nine P-4 posts with OCHA in Geneva; and

c. Whether OCHA's decision to place another staff member with a fixed-term appointment to the P-4 post (Post Number 30517464), for which the Applicant was recommended with reservation, was lawful.

Phase 3 (Retention Phase)

60. Bearing in mind the arguments raised by the parties, the Tribunal will first assess the criteria defined by the Organization for Phase 3 (Retention Phase) of the restructuring exercise to establish if it was conducted properly under the agreed restructuring methodology, and whether it was lawful to move the Applicant to Phase 4 (Placement Phase).

61. According to the agreed methodology, the first step of the restructuring exercise was the establishment of “functional groups”, which were to be shared with the SMC, as indicated below:

The proposed list of functional group titles that will be used to create functional groups/retention-review groups, including stand-alone posts that will not be part of the 2018 budget, (i.e. posts within OCHA that have a unique title/function).

62. In an email dated 27 December 2017 addressed to the Applicant, the Chief, HRS, OCHA, indicated that the Applicant was included in the retention phase and, consequently, in a functional group (P-4, Humanitarian Affairs Officer (“HAO”)).

63. In this regard, the Tribunal points out to the fact that, in OCHA’s new structure, there were more P-4 HAO posts than staff members who were supposedly affected by the restructuring (i.e., nine available P-4 posts as opposed to seven P-4 staff members who needed placement), and, as a consequence, a staff member who is part of a certain functional group should have been retained for any post within the said functional group.

64. Indeed, the document entitled “Concept note on restructure procedures”, dated 9 November 2016 and prepared for the OCHA restructuring exercise, indicates that a retention exercise takes place when “the number of staff in a particular function and at a particular grade within the affected area being restructured exceeds the number of posts available”, which was not the case here.

65. An example provided in the agreed restructuring methodology further shows when and how a retention exercise was to be conducted (emphasis in the original):

Example: In the 2018 budget, OCHA has provisioned for 10 [Information Manager Officer (“IMO”)] positions in New York, 10 in Geneva and 20 in the field for a total of 40 IMO posts at the P-4 level. Currently there are 50 IMO’s across all of OCHA at the P-4 level, 10 [permanent appointment (“PA”)], 10 [continuing appointment (“CA”)] and 25 [fixed-term appointment (“FTA”)] (all with satisfactory performance and no disciplinary measures) and 5 [temporary

appointment (“TA”)]. *(Note: As per the SMC Guidelines, staff on temporary appointments are not formally considered as part of the retention exercise).*

2.3.1. Review the 45 IMO staff under the mitigation measures. Following the mitigation measures if the number of affected staff remain the same, the 10 PAs will be retained followed by the 10 CA’s and the remaining 25 FTA will go through a comparative review exercise for the remaining 20 posts.

The comparative review will consist of a scoring system comparing length of continuous service, performance and integrity as outlined in the SMC Framework.

The 5 TA who are not retained will be moved to the placement phase (Phase # 4).

66. The Tribunal finds that the retention criteria and the subsequent comparative review (which includes the scoring system) only applies when the number of affected staff members exceeds the number of available posts.

67. Therefore, the Tribunal concurs with the Applicant who argues that since there were more posts than staff within the relevant functional group, there should have been no risk that appointments of such staff would be terminated and that OCHA would not have had the need to apply the retention criteria in accordance with staff rule 9.6(e).

68. Furthermore, even if there had been a need for a retention exercise (which is not the case as discussed above), the evidence shows that it was not conducted properly.

69. According to the retention criteria, staff members holding a permanent appointment were to be retained first over staff members with a continuing appointment or a fixed-term appointment before a comparative review was conducted among staff members with lower retention priority. However, Ms. B. (a permanent appointment holder in the same functional group as the Applicant) was subjected to a comparative review along with a staff member on a fixed-term appointment, like the Applicant, and not retained in Phase 3 and moved to Phase 4. This was a clear violation

of the retention criteria as set forth in staff rule 9.6(e) and the restructuring methodology.

70. Furthermore, according to the available evidence, only four P-4 HAOs in Geneva were moved to Phase 4. Therefore, the Applicant should have been one of the four staff members with the lowest score in a comparative review. However, even though the Applicant did not reach a “top position” in the comparative review, she still ranked 20 out of 26 P-4 HAOs in Geneva and, therefore, she was not one of the four staff members with the lowest score. Considering that only four P-4 HAOs in Geneva were moved to Phase 4, it is evident that a comparative review outcome was not used in determining which staff members were to be moved to Phase 4.

71. Consequently, the Applicant is correct when she argues that there was no “retention phase” as this was conflated with Phase 4.

72. The above-mentioned sequence of facts clearly shows that OCHA did not follow the proper procedures and, as a consequence, the agreed process was not adhered to and it is *ab initio* flawed in the Applicant’s case.

73. The Applicant should have been retained against one of the available P-4 posts according to the comparative review outcome. The Tribunal finds that moving her to Phase 4 was illegal and no suitability review was applicable to her. The Tribunal will, nevertheless, assess whether the Applicant’s profile was reviewed properly against nine P-4 posts with OCHA in Geneva during Phase 4, and if OCHA’s decision to place another staff member with a fixed-term appointment against Post Number 30517464 (P-4 level), for which the Applicant was recommended with reservation, was lawful.

Phase 4 (Placement Phase)

74. The Tribunal recalls that on 12 January 2018, the Chief, HRS, OCHA, informed the Applicant that, following a retention review, she was moved to Phase 4 (Placement Phase) and that her profile would be reviewed for placement to the posts compatible with her profile and level (see para. 9 above).

75. She was therefore requested to submit her updated PHP and her latest three performance evaluation reports, which she did on 16 January 2018 (see also para. 9 above).

76. In Phase 4, into which the Applicant was unduly moved, there were nine P-4 posts with OCHA in Geneva and seven P-4 staff members (four of them were from Geneva) who needed placement. On 9 February 2018, a suitability review of the profiles of the seven P-4 staff members was conducted against the nine P-4 posts in Geneva. The Applicant was not recommended for eight posts and recommended with reservation for one post (Post Number 30517464).

77. In fact, in the Methodology, the suitability review entails the following steps:

- a. HR contacts the Program Manager for Terms of Reference (including evaluation criteria in terms of education, work experience, language and required skills) for each vacant post;
- b. HR asks the concerned staff member to provide a copy of his/her updated PHP and performance management documents as well as an indication of his/her preferences and constraints;
- c. HR facilitates an initial matching exercise based on the criteria established by the Programme Manager and the information provided by the staff member;
- d. A list of suitable candidates, in order of retention, is then presented to Heads of Office and Divisions; and

e. Heads of Office and Divisions make recommendations based on the suitability of the staff member for placement or reassignment, respecting the order of retention and the evaluation criteria for the relevant position and the personal circumstances of the staff member.

78. Contrary to what is argued by the Applicant, the Methodology does not impose a P-5 Panel review at this stage of the restructuring exercise. This means that the way in which the suitability review is performed falls under the discretion of the Administration which is better placed to decide on the best way to perform the matching exercise and define the “most suitable candidate”.

79. The Tribunal recalls that it is well-settled case law that in matters of appointment and/or promotions (which can similarly be applicable to restructuring exercises when assignment and placement of staff is at stake), the Administration has broad discretion in determining the relevant set of competencies and skills for a post and, therefore, the Tribunal’s role is not to substitute its opinion for that of the Administration.

80. The evidence on file shows that following the suitability review, the Applicant was not recommended for eight posts and recommended with reservation for one post (Post Number 30517464). Indeed, the result of said review, in relation to the Applicant, was the following:

- a. Programme Management Officer (P-4), Post Number 30081879, Humanitarian Financing, OCHA Geneva: the Applicant was not recommended as she did not have the required “Humanitarian field experience”;
- b. Humanitarian Affairs Officer (P-4), Post Number 30512991, Humanitarian Financing, OCHA Geneva: the Applicant was not recommended as she did not have the required “Working experience in humanitarian and/or UN field operations”;

c. Humanitarian Affairs Officer (Financial Tracking Service Manager) (P-4), Post Number 30515765, Coordination Division, OCHA Geneva: the Applicant was not recommended as she did not have the required “Experience in preparation or handling of international statistics and proven skills in financial and quantitative analysis”;

d. Humanitarian Affairs Officer (P-4), Post Number 30517225, Coordination Division, OCHA Geneva: the Applicant was not recommended as she did not have the required “[a]t least seven (7) years of progressively responsible experience in training and professional development or related area that includes specifically leadership development”;

e. Humanitarian Affairs Officer (P-4), Post Number 30517464, Coordination Division, OCHA Geneva: the Applicant was recommended with reservation as she did not have the desirable criterion of “[t]hree years of relevant experience at the international level in an organization dealing with complex environmental issues and disaster response”;

f. Humanitarian Affairs Officer (P-4), Post Number 30518714, Coordination Division, OCHA Geneva: the Applicant was not recommended as she did not have the required “minimum of seven (7) years of progressively responsible professional experience in humanitarian affairs, emergency preparedness, crisis and emergency relief management, humanitarian policy development, humanitarian programme planning and implementation ... both at the headquarters and field levels”;

g. Humanitarian Affairs Officer (P-4), Post Number 30519307, Coordination, OCHA Geneva: the Applicant was not recommended as she did not have the required “minimum of seven years of progressively responsible relevant professional experience, in humanitarian affairs, emergency relief management, development, or political affairs, of which at least two years working in humanitarian emergencies in the field”;

h. Humanitarian Affairs Officer (P-4), Post Number 30519321, Coordination Division, OCHA Geneva: the Applicant was not recommended as she did not have the required “minimum of one (1) year experience in humanitarian situations in the field”; and

i. Humanitarian Affairs Officer (Emergency Director Group) (P-4), Post Number (New), Coordination Division, OCHA Geneva: the Applicant was not recommended as she did not have the required “HQ and Field experience”.

81. Having reviewed the outcome of the suitability review, the Tribunal does not find fault with the review itself. However, the Tribunal is particularly troubled by the way in which the recruitment for Post Number 30517464 was made. In fact, this post was, at the Placement Phase, offered to a permanent appointment holder (Ms. B.) but, later on, it was offered to another staff member on a fixed-term appointment who came from Brussels.

82. The Tribunal recalls that under the above-mentioned suitability review, the Applicant was “recommended with reservation”, contrary to the selected candidate who was “recommended without reservation”.

83. In this regard, the Tribunal notes with concern that this distinction between “recommended with reservation” and “recommended without reservation” was not included in the agreed methodology and, therefore, it should not have been taken into consideration. Yet, this distinction was used to the Applicant’s detriment and led to her non-placement against the (only) post for which she was found suitable.

84. In light of the above, the Tribunal finds additional support for its conclusion that in the Applicant’s case the restructuring exercise was not conducted lawfully and in accordance with the agreed restructuring methodology.

Efforts to find a suitable post under staff rule 9.6(e) following the restructuring process

85. With regard to the Organization's obligation to make all reasonable efforts to place the Applicant against a suitable post, the Tribunal will review the following issues:

- a. Whether the Administration properly found the Applicant not suitable for various posts at the P-3 and P-4 level with OCHA; and
- b. Whether the Administration properly gave the Applicant a priority consideration with regard to her job applications to a Programme Management Officer post with the United Nations Conference on Trade and Development (JO 97977) and a Programme Officer post with the United Nations Office for Disaster Risk Reduction (TJO 100493).

Posts within OCHA

86. The Tribunal notes that the review of the Applicant's suitability against additional posts with OCHA occurred after the restructuring process ended. Thus, the question is whether the Administration complied with its obligation to make all reasonable efforts to find a suitable post under staff rule 9.6(e), in accordance with the Appeals Tribunal's jurisprudence.

87. The Applicant was found not suitable for two temporary P-4 posts with the Operations and Advocacy Division, OCHA Geneva (Posts Number 30526209, 30515784) on the ground that she did not meet the work experience requirement listed in the job openings.

88. The Applicant was also found not suitable for five P-3 posts with OCHA Geneva: TJO 95939 (a post in Donor Relations Section, PRMB), and four P-3 posts with PRMB (Posts Number 31018599, 31023653, 30067974, and 30517757).

89. With respect to TJO 95939, the hiring manager found the Applicant not suitable since she did not have “knowledge of a range of humanitarian assistance, emergency relief and related human rights issues” as required in the “Professionalism” competency.

90. With respect to the other four P-3 posts with PRMB, the hiring manager referred to a previous finding of the Applicant’s non-suitability for TJO 95939 and stated that she did not have the required experience as well as skills and knowledge as evidenced by her PHP and performance documents.

91. The Applicant was also found not suitable for two P-4 posts with OCHA Geneva (JO 98827 and TJO 99940).

92. With respect to JO 98827, the Applicant was found not suitable since she did not meet the substantive requirements of this job, i.e., solid operational and/or policy experience in the humanitarian field. Additionally, she was found not to have the two years field experience listed as highly desirable criterion.

93. With respect to TJO 99940, the Applicant was found not suitable since she did not have the required skills and knowledge.

94. The Applicant was also found not suitable for four P-3 posts with OCHA Geneva (JO 98575, TJOs 99233, 100584, and 99176) on the ground that she did not meet the respective requirements in the “Professionalism” competency.

95. The Applicant was found not suitable for one P-4 post with OCHA Geneva (TJO 113533) on the basis that she did not meet the work experience requirement.

96. The Applicant challenges OCHA’s suitability review of her profile against the above-mentioned posts on several grounds. The Applicant argues that the Administration deviated from the agreed definition of suitability and/or failed to apply a definition of suitability in a consistent and equal manner when it reviewed her

suitability against desirable criteria or elements of competencies of the job opening, instead of restricting review against required criteria. Further, she alleges that the review of her suitability was conducted by a hiring manager, instead of a P-5 panel, which led to a lack of objectivity in the process.

97. Since the suitability review for the above-mentioned posts occurred after the restructuring process ended, such decisions are governed by staff rule 9.6(e) and the relevant Appeals Tribunal's jurisprudence.

98. The Applicant argues that a suitability review should have been conducted by a P-5 panel, not hiring managers, and that a suitability review conducted by hiring managers led to a lack of objectivity in the process. However, there is no requirement under law that a suitability review be conducted by a panel. The Applicant seems to allude that certain hiring managers were not objective towards her but did not present any evidence in that regard.

99. The Applicant also argues that it was unlawful to review her suitability against desirable criteria or elements of competencies of the job opening. Recalling the Appeals Tribunal holding in *Timothy* with respect to suitability (see para. 55 above) and since the competencies listed in the job opening are required for a staff member to perform the core functions and responsibilities of a position, the Tribunal does not find any fault with the Administration's suitability review in relation to elements of competencies listed in the job opening.

100. Desirable criteria, by definition, are not required to perform the core functions and responsibilities of a position, and therefore they should not be used to find a staff member not suitable under staff rule 9.6(e). In this case, however, the Tribunal notes that while in some cases a hiring manager noted that the Applicant did not meet certain desirable criteria, her being found not suitable was based on her not meeting the required criteria or competencies of the job opening. Therefore, the Tribunal finds that the suitability assessments were lawful.

101. As already stated above, the Tribunal's role is not to substitute its decision for that of the Administration when it comes to the evaluation of the Applicant's profile. Having rejected the Applicant's arguments concerning procedural matters, the Tribunal finds that the Administration exercised its discretion appropriately in finding that the Applicant was not suitable for various posts with OCHA.

Posts outside OCHA

102. In relation to this matter, the Tribunal, at the outset, recalls the Appeals Tribunal's finding in *Timothy* concerning the Administration's obligation to undertake all reasonable efforts to consider the staff member concerned for available suitable posts (see para. 54 above), and with respect to suitability (see para. 55 above).

103. A careful analysis of the recruitment processes for the posts outside OCHA, namely those of Programme Management Officer with the United Nations Conference on Trade and Development (JO 97977) and of Programme Officer with the United Nations Office for Disaster Risk Reduction (TJO 100493), shows that the fact that the Applicant came from a downsizing entity and was therefore entitled to "priority consideration" was totally ignored by the Organization.

104. There is no evidence demonstrating that the Organization made all reasonable and good faith efforts to afford priority consideration to the Applicant with respect to these posts.

105. As a consequence, the Tribunal finds that the failure of the Administration in this regard is also a severe irregularity that taints the recruitment process for these two positions outside OCHA and, therefore, renders the decision to terminate the Applicant's fixed-term appointment unlawful.

Remedies

106. In the application, the Applicant requests the following remedies:

- a. That the decision to terminate her appointment be rescinded and that she be reinstated at the P-4 level;
- b. As an alternative to rescission, the Applicant seeks two years' net base salary; and
- c. Moral damages for the impact the decision has had on her.

107. Article 10.5 of the Dispute Tribunal's Statute provides that the Tribunal may order one or both of the following:

(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.

Rescission and compensation in lieu

108. Since the contested decision concerns "appointment, promotion or termination", in ordering the rescission under art. 10.5(a) of the Statute, the Tribunal must set an amount of compensation in lieu of rescission or specific performance, which needs to be supported by evidence. As per the Appeals Tribunal, compensation in lieu "should be as equivalent as possible to what the person concerned would have received, had the illegality not occurred" (*Ashour* 2019-UNAT-899, para. 20).

109. In the case at hand, the Tribunal notes that the Applicant joined the Organization on 7 March 2013, on a two-year fixed-term appointment. On 18 May 2018, she was informed of the decision to terminate her fixed-term appointment effective 30 June 2018. By then, she was on a fixed-term appointment until 5 March 2019.

110. However, the Applicant was on certified sick leave from 10 March 2018 until 21 June 2019. After having exhausted all her sick leave entitlements, she was separated on 22 June 2019.

111. The Tribunal finds that due to the gravity of the Organizations's behaviour towards the Applicant and the above-mentioned irregularities and procedural flaws, the decision to terminate her fixed-term appointment is unlawful. Therefore, the contested decision should be rescinded and the Applicant should be reinstated at the P-4 level.

112. Nonetheless, as per art. 10.5 of the Tribunal's Statute, the Organization may elect to pay compensation in lieu of reinstatement. Bearing in mind the specific circumstances of the case, i.e., type and duration of the contract, length of service and the gravity of the Administration's procedural flaws, the Tribunal finds adequate to set the amount of compensation in lieu at two years' net base salary at the P-4 level as per the salary scale in effect at the time the Applicant was separated.

Compensation for harm

113. In addition, the Applicant seeks compensation for moral damages greater than two years' net base salary for the impact the contested decision has had on her. She submits that a medical report dated 13 June 2018 shows a direct link between her illness and the contested decision.

114. Under art. 10.5(b) of the Dispute Tribunal's Statute, compensation for harm should be supported by evidence, and the Appeals Tribunal held that it should be supported by three elements: the harm itself, an illegality, and a nexus between them, and the claimant bears the burden of proof to establish that the harm is directly caused by the Administration's illegal act (*Kebede* 2018-UNAT-874, paras. 20-21). The

Appeals Tribunal further held that “the testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise)” (*Langue* 2018-UNAT-858, para. 18, citing *Kallon* 2017-UNAT-742).

115. The Tribunal is of the view that the medical certificate indeed confirms that the Applicant was sick due to work-related issues, mainly the termination of her fixed-term appointment. As a consequence, the Applicant is entitled to USD5,000 for moral damages.

Conclusion

116. In view of the foregoing, the Tribunal decides that:

- a. The decision to terminate the Applicant’s fixed-term appointment is unlawful and is, consequently, rescinded;
- b. The Applicant is entitled to be reinstated at the P-4 level. Should the Organization opt to pay compensation in lieu of rescission, its amount is set at two years of net base salary at the P-4 level, according to the salary scale in effect at the time the Applicant was separated;
- c. As compensation for moral damage under art. 10.5(b) of the Tribunal’s Statute, the Applicant is awarded USD5,000; and
- d. The aforementioned compensations shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Teresa Bravo

Dated this 30th day of December 2020

Case No. UNDT/GVA/2018/106

Judgment No. UNDT/2020/219

Entered in the Register on this 30th day of December 2020

(Signed)

René M. Vargas M., Registrar, Geneva