



Before: Judge Rachel Sophie Sikwese

Registry: New York

Registrar: Isaac Endeley

FUSCO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Alister Cumming, UNICEF

Introduction

1. The Applicant, a former staff member who held a permanent appointment with the United Nations Children’s Fund (“UNICEF”), filed an application on 16 March 2023 contesting two decisions: firstly, the decision to separate him “by termination without applying appropriate priority consideration for suitable available posts”, and secondly, the decision not to select him for the post of Director, Brussels Office, Public Partnership Division (“PPD”).
2. On 17 April 2023, the Respondent filed a reply urging the Tribunal to dismiss the first contested decision on the ground that it was not receivable *ratione materiae* because “the Applicant failed to submit a timely request for management evaluation”. The Applicant submitted that the contested decision was receivable.
3. The parties filed submissions on receivability of the first contested decision and on the merits of both decisions.
4. For the reasons set out below, the application is allowed in its entirety.

Facts and procedure

5. On 1 November 2023 the Tribunal convened a Case Management Discussion (“CMD”) to identify, discuss and agree on the claims and issues in the case. The parties agreed that the case may be decided on the papers.
6. On 1 December 2023, the parties filed their respective closing statements.
7. The Applicant joined UNICEF in March 2003 as a Deputy Director, at the D-1 level, in the Private Fundraising and Partnerships (“PFP”) Division based in Geneva. In May 2012, he was granted a permanent appointment retrospectively from 30 June 2009.
8. In 2013, the Applicant was informed that his unit would be closing and the post he encumbered was to be abolished. He began to apply for other posts at the D-1 level, including the post of Deputy Director, Private Sector Engagement and that of Deputy Director, Fundraising in the PFP Division.

9. In September 2014, the Applicant received a letter from the PFP Director notifying him that following a budget review process and a reconsideration of organizational priorities, his post was among the positions proposed for abolition by 31 March 2015. The abolition was later postponed to 30 June 2015 and then to 30 September 2015, when it became effective. The Applicant was advised that a formal notice would follow and was encouraged to apply for other positions. He was also advised that UNICEF would support him in his search for a new assignment and that his name would be “added on shortlists of vacancies of potentially suitable posts”. In addition, the notification letter granted the Applicant “a general waiver regarding the minimum time-in-post requirement or the minimum period of time [he was] expected to serve at a duty station”.

10. From 2014 to September 2022, the Applicant held various assignments of temporary duration, including at the P-5 level and in different duty stations, in anticipation of a more permanent position at the D-1 level consistent with his status as a staff member on a permanent appointment whose post was abolished due to organizational requirements.

11. The Applicant also participated in the 2021, 2022 and 2023 editions of the Senior Staff Rotation and Reassignment Exercise (“SSRRE”), which allowed senior staff members to be reassigned periodically to other suitable and available posts within UNICEF. On each occasion, he expressed an interest in the available posts for which he considered himself suitable, but he was not selected for any of them.

12. On 29 December 2021, the Applicant received an offer of a temporary assignment to the post of Senior Adviser in PPD, at the P-5 level, for a period of one year until 30 December 2022. This letter also advised him that should he “not be successful in securing a new appointment before the end of this assignment, [he would] be separated from the [Organization]”.

13. In March 2022, the Applicant was notified that Senior Management had decided not to have a 2022 edition of the international forum on children and youth that he had led in New York. Therefore, the Applicant was reassigned to work at the UNICEF PPD Office in Brussels.

14. On 20 May 2022, he applied for the post of Principal Adviser of PFP, at the P-6 level.

15. On 29 May 2022, he applied for the post of Director of the PPD Office in Brussels, at the D-1 level.

16. In August 2022, the Applicant expressed a preference for five posts in the 2023 SSRRE but did not receive any communication about the status of his applications by the time he separated from the Organization in December 2022.

17. On 30 September 2022, the Applicant received a letter informing him that the post he was encumbering would expire on 31 December 2022 and that it was “not subject to further extension”. The Applicant was advised that if he had not been selected for a different post within UNICEF by 31 December 2022, his permanent appointment would be terminated, and he would be separated from service.

18. On 24 October 2022, the Applicant learnt of the appointment of another candidate to the position of Director of the PPD Office in Brussels for which he had applied on 29 May 2022.

19. On 18 November 2022, the Applicant sought management evaluation of the decision to terminate his permanent appointment and the decision not to select him for the position of Director of the PPD Office in Brussels. On 19 December 2022, he received the management evaluation response.

20. On 31 December 2022, the Applicant separated from service.

Issues

21. At the CMD of 1 November 2023, the parties agreed that the issues for consideration were as follows:

- a. Whether the first contested decision is not receivable *ratione materiae* because the Applicant failed to submit a timely request for management evaluation after notification of the administrative decision;

b. Whether the Applicant was given priority consideration for placement after the abolition of his post leading to termination of his permanent appointment;

c. Whether UNICEF met its obligations to assist the Applicant in identifying available suitable posts in which his services could be utilized; and

d. Whether the Applicant was subjected to a competitive selection process for available suitable posts.

Receivability

22. The starting point is to decide the issue of whether the first contested decision is receivable *ratione materiae*.

Parties' submissions on receivability

23. In his reply dated 17 April 2023, the Respondent submits that on 29 December 2021, the Applicant received an offer of a temporary assignment to the post of Senior Adviser in PPD, at the P-5 level. The letter containing the offer notified the Applicant that his appointment would be terminated on 30 December 2022 unless he was successful in obtaining a new assignment by that date. As a result, “the Applicant ought to have requested management evaluation of the decision within 60 days of that notification”. Since the Applicant failed to do so, the application, “insofar as it relates to the decision to terminate the Applicant’s appointment, is not receivable”.

24. According to the Respondent, this notification “was not a preparatory decision, nor did it contain a condition that had to be fulfilled prior to it taking effect”. The decision to terminate the Applicant’s appointment had been taken, and unless he was successful in securing a new position, it would take effect on 30 December 2022. No further decision was required from UNICEF. The Respondent further submits that “a decision to terminate an appointment is a final administrative decision, even if separation could be avoided by selection for another position”.

25. The Respondent asserts that to the extent that the Applicant challenges his non-selection for any position other than that of Director, Brussels Office, PPD, those matters are not properly before the Tribunal because the Applicant has not requested management evaluation of any such non-selection decision. Therefore, the Tribunal lacks jurisdiction.

26. On 1 September 2023, the Applicant filed his submissions on the issue of receivability. The crux of the Applicant's argument is that a challenge filed within 60 days of 29 December 2021 might have been adjudicated by the Dispute Tribunal before the Applicant's right to priority consideration ended with separation a year later. UNICEF suggested that the Applicant should have challenged the 21 December 2021 decision before his right to priority consideration was breached. Such challenge would have lacked required *gravamen* and have been premature.

27. The Applicant submits that the Respondent provides no rationale for the claim that a final termination date was communicated on 29 December 2021 and that priority consideration was triggered only from that date; nor does the Respondent explain why the three prior renewals of the Applicant's appointment did not trigger priority consideration. According to the Applicant, "the same language [was] communicated on 1 July 2019, in July of 2020, and 30 November 2020". "That the language did not communicate a completed decision on those occasions demonstrates it did not on the 29 December 2021".

28. The Applicant concludes that a further communication was required to comply with the staff rule on notice of termination, and that his deadline to contest the decision "plainly ran from notice of termination".

Consideration

29. Staff rule 11.2(c) provides that "[a] request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested".

30. Regarding the filing of applications, art. 8 of the Dispute Tribunal's Statute provides in relevant parts as follows:

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) ...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission;

...

31. The Tribunal is competent to hear the application if satisfied that the Applicant met the requirements stipulated above.

32. According to the chronology of events, the Tribunal finds that the Applicant met the requirements. This is because after receiving the notice on 30 September 2022 that the post he encumbered as at that date would be expiring on 31 December 2022 and that it was not subject to further extension, he, on 18 November 2022, filed a request for management evaluation of the decision and received a response on 19 December 2022 before filing the present application on 16 March 2023. These were within the timeframes stipulated in the law.

33. The Respondent's argument that the Applicant received notice of separation on 29 December 2021 and that he should have filed a request for management evaluation within 60 calendar days of that date is without merit for the reasons set out below.

34. The language used in the 30 September 2022 notice was different from that used in the 29 December 2021 notice. Unlike the 30 September 2022 notice, the 29 December 2021 notice lacked finality. As a result, the Applicant remained in service

for another one year after receipt of the notice. The 30 September 2022 notice, on the other hand, stated clearly that the post that the Applicant encumbered was “not subject to further extension”. This phrase is missing in the 29 December 2021.

35. It is a well-established legal principle that to be reviewable, an administrative decision must be final. A reviewable decision is one that “is of an administrative nature, adversely affects the contractual rights of a staff member and has a direct, external legal effect... The rationale for this principle is the idea that judicial review should concentrate pragmatically on consequential decisions of a final nature” (see, *O’Brien* 2023-UNAT-1313, para. 24, and also *Michaud* 2017-UNAT-761, para 50).

36. According to the evidence, before September 2022 the Applicant had received at least four notices of separation (on 1 July 2019, in July of 2020, on 30 November 2020, and on 29 December 2021) and on those prior occasions he was not separated. For context, below are the relevant parts of the notice of 29 December 2021:

... On behalf of the Executive Director, I am pleased to offer you a temporary assignment as a Senior Adviser with the Public Partnerships Division in New York. You will retain your permanent appointment and current level and step (D-1, Step 13). The Terms of Reference of this assignment are attached. This assignment is from 1 January 2022 until 30 December 2022.

I understand your willingness to accept this temporary assignment and that you accept the conditions of this assignment. During your assignment as Senior Adviser we encourage you to apply to suitable vacancies in line with your profile and skillset. In addition, you will be afforded the same status and preferential treatment as staff on abolished posts in accordance with PROCEDURE/ DHR/2018/001.

Should you not be successful in securing a new appointment before the end of this assignment, you will be separated from the organization. At that time, you will be entitled to a termination indemnity.

...

37. To appreciate the distinction, relevant text of the 30 September 2022 notice is reproduced below:

... Following communications in December 2021 and June 2022, the post you currently encumber will expire on 31 December 2022 and is not subject to further extension.

In the period between the date of this letter and 31 December 2022, you are encouraged to apply for all available posts within UNICEF for which you believe you have the required skills and competencies. You will be afforded the same status as staff on abolished post.

Your Human Resources Business Partner [“BJ” (name redacted for privacy reason)] will assist you and keep you informed of the posts for which you are applying and being reviewed. However, as selection and appointment to another post in UNICEF cannot be guaranteed, I encourage you to also explore opportunities in other United Nations agencies as well as outside the United Nations system.

If you have not been selected for a different post within UNICEF before 31 December 2022, your permanent appointment with UNICEF will be terminated and you will be separated from service due to reduction of the staff in accordance with the Staff Regulations and Rules and the terms applicable to your current supernumerary post assignment as listed in the letter by [“MS” (name redacted for privacy reasons)] to you dated 29 December 2021. In that case, in accordance with [Division of Human Resources—“DHR”] Procedure on Separation from Service and Annex III (d) (ii) to the United Nations Staff Regulations, you will be entitled to a termination indemnity.

We understand that this may present you with difficult career decisions. Please be assured that, together with our HR colleagues, we remain available to assist you in every possible way.

I wish you success in your applications within and outside UNICEF.

Decision

38. The two letters reproduced above are self-explanatory and support the Applicant’s case that the decision is receivable. For this reason, the Tribunal finds that the contested decision is receivable *ratione materiae*.

39. The Tribunal has competence to hear and determine the contested decision and the application in full.

Merits

Issue

40. The two contested decisions are based on staff rule 9.6(e) in effect at the time and two UNICEF legal issuances governing the treatment of staff facing abolition of post. The issue can be summarized as whether the Respondent fully complied with his legal obligations of (a) making proper, reasonable and good faith efforts to place the Applicant in a suitable and available post where his services could be effectively utilized and (b) giving the Applicant priority consideration for posts in which he expressed interest under the SSRRE or which he applied for.

The parties' submissions

41. The Applicant's main contentions in his application can be summarized as follows:

42. Pursuant to staff rule 9.6, since the Applicant held a permanent appointment when his post was abolished, UNICEF was under an obligation to assist him in identifying suitable alternative posts and provide priority non-competitive consideration as to suitability. There was a "shared responsibility" between the Applicant and the Organization to identify and secure a suitable available vacant post.

43. UNICEF unlawfully limited the period for priority consideration and the posts to which this applied. From the moment the Applicant was first notified of the abolition of his post, he was entitled to receive priority consideration in all the SSRRE exercises, and it was unreasonable for UNICEF to state that priority consideration only applied to the last extension of the Applicant's assignment after displacement. While the Applicant could only express an interest in a maximum of five posts for each SSRRE, an obligation accrued to UNICEF to identify other suitable posts and provide him with priority consideration.

44. UNICEF failed to meet its obligation to assist the Applicant in the identification of suitable vacant posts. As early as in 2014, when the Applicant was

first notified that his post was scheduled for abolition, he was informed that his name would be “added on shortlists of vacancies of potentially suitable posts”. UNICEF’s rules require it to “assist staff members whose posts are abolished in identifying available and potentially suitable posts at their grade level” and this obligation is “mirrored in the jurisprudence”. This is a shared responsibility, and the Applicant met his obligations by “assiduously applying for posts and expressing interest in posts within ... and outside the SSRRE”. However, no such assistance was provided after the Applicant’s displacement on 1 July 2019.

45. The Applicant submits that in his case, “this was particularly important as he was subject to the SSRRE, a process where he could be transferred to any post” included in the exercise and not only to those in which he had expressed interest. However, according to the Applicant, the evidence shows that “no priority consideration was provided” to him and “he was only considered for the posts where interest was expressed”.

46. The Applicant also asserts that UNICEF is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. He adds that this means considering such staff member before other staff to whom priority does not apply, and that priority consideration “is not met by inclusion in a competitive recruitment process”. Moreover, priority consideration also applies to vacancies advertised before the termination was anticipated. The argument by UNICEF that no priority consideration accrued from 1 July 2019 represents an admission that they did not provide such priority consideration. Whereas UNICEF committed in writing to provide the Applicant with “the same status and preferential treatment as staff on abolished posts”, it failed to meet its obligations.

47. According to the Applicant, the evidence regarding UNICEF’s individual selection processes shows that no priority consideration was provided to him. His closing statement contains a list of instances, including SSRRE processes, where he was subjected to a competitive selection process or otherwise treated in the same manner as “non-priority candidates”.

48. The Respondent's main arguments can be summarized as follows:

49. The contested decisions were lawful because UNICEF complied with its obligations under staff rule 9.6(e). The decision not to select the Applicant for the position of Director, Brussels Office, PPD, was taken in accordance with the relevant provisions.

50. Under staff regulation 9.3(i) and staff rule 9.6(c)(i), the Secretary-General may terminate the appointment of a staff member if the necessities of service require abolition of the post or reduction of the staff.

51. Under the jurisprudence of the Appeals Tribunal and in line with DHR/PROCEDURE/2022/002, the UNICEF Procedure on Separation from Service, a staff member facing termination of his or her appointment must be found to be suitable for an available position for which he or she has applied in order to receive priority consideration on a non-competitive basis. The Administration does not have an obligation to place affected staff members in new positions. Further, requiring such staff members to participate in an assessment process is not inconsistent with the requirement to provide priority consideration. Regarding the position of Director, Brussels Office, PPD, the Applicant was not assessed competitively against the other candidates. Instead, his own skills and experience were assessed to determine if he was suitable for the position and the assessment panel found that he was not suitable.

52. Under the jurisprudence of the Appeals Tribunal, a staff member facing termination of his or her appointment must be found to be suitable for an available position for which he or she has applied in order to receive priority consideration on a non-competitive basis. The Organization is entitled to assess a candidate to ensure that he or she is able to demonstrate the requirements for the post. This does not breach the right to priority, non-competitive consideration, as the candidate's success or failure would not be based on a competition with other candidates but rather on whether he or she is able to demonstrate an independent understanding and experience of the technical requirements for the post.

53. Contrary to the Applicant's assertions, his status from 1 July 2019 was not that of a staff member "facing termination". Instead, he was an SSRRE candidate in

need of a placement and this status “was properly drawn to the attention of hiring offices”. There was no requirement to inform those offices that the Applicant was a staff member on an abolished post, as at that point he was a staff member with an ongoing appointment who had an assignment, and he was not “facing termination”.

54. The Applicant’s candidacy for the position of Director, Brussels Office, PPD was properly assessed in accordance with UNICEF’s obligations, and simply because the Applicant was shortlisted and invited for an interview does not mean he was automatically deemed suitable for the position. The UNICEF selection procedure is different from that of the United Nations Secretariat. Under the UNICEF selection procedure, “shortlisting is carried out on the basis of the criteria in the vacancy announcement”, but “suitability is only determined following an assessment of shortlisted candidates”. The Applicant was not assessed competitively against the other candidates. Instead, his own skills and experience were assessed to determine if he was suitable for the position. The assessment panel found that he was not suitable based on its assessment of his skills and experience. As the Applicant was not found suitable for the position, he had “no entitlement to be placed in that position”.

Consideration

Legal framework

55. The role of this Tribunal when exercising judicial review is well settled and it is:

... to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker’s administrative decision. This is a misunderstanding of the delicate task of

conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General [*Sanwidi* 2010-UNAT-084, para. 42].

56. Pursuant to this role, the Tribunal must consider whether in arriving at the decision, the Administration considered relevant matters only. The Tribunal will exceed its jurisdiction if it goes beyond this exercise and begins to consider the correctness of the Administration's choice among the various options open to it and substitutes its own decision for that of the Administration (see *Sanwidi*).

57. When reviewing a decision contesting a matter arising directly from organizational restructuring, the general principle is that (internal footnotes omitted):

The Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities. According to the Appeals Tribunal's well-settled jurisprudence, "an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff". This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff [*Timothy* 2018-UNAT-847, para. 25].

58. However, the Appeals Tribunal also noted that:

Even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members [see *Timothy*, para. 25].

59. Acting fairly, justly and transparently involves a review of the circumstances around each case. Therefore, its determination is on a case-by-case basis.

60. In the case at bar, the parties agree that the reorganization of UNICEF and abolition of the Applicant's post were lawful.

61. The disagreement is on whether after the abolition of the post the Respondent met his legal obligations to act fairly, justly and transparently in dealing with the Applicant.

62. The Respondent's legal obligations are expressly provided for in the Staff Regulations and Rules and in UNICEF's subsidiary legislation governing the situations under consideration. These situations are outlined below:

Priority consideration for placement after the abolition of post leading to termination of his permanent appointment

63. The relevant statutory provision is staff rule 9.6 in effect at the time of the contested decision. It states that (emphasis in original):

Termination for abolition of posts and reduction of staff

(e) ... if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

- (i) Staff members holding continuing appointments;
- (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
- (iii) Staff members holding fixed-term appointments.

64. The guiding jurisprudence interpreting this provision is *Timothy*, holding that:

... Staff Rule 9.6(e) specifically sets forth a policy of preference for retaining a staff member with a continuing appointment who is faced with the abolition of a post or reduction of staff and creates an obligation on the Administration to make reasonable efforts to find suitable placements for the redundant staff members whose posts have been abolished. As such, a decision to abolish a post triggers the mechanism and procedures intended to protect the rights of a staff member holding a continuing post, under the Staff Rules and the Comparative Review Policy, to proper, reasonable and good faith efforts to find an alternative post for him or her who would otherwise be without a job. Failure to accord to the displaced staff members the rights conferred under the said provisions will constitute a material irregularity [see, para. 31].

65. Preferential treatment has been interpreted to mean that the displaced staff member is “not required to compete with other applicants in an open market for any roles that [meet] the conditions” of the rule (see *Geegbae* 2021-UNAT-1088, para. 60). After suitable and available positions are identified, the staff member on a continuing appointment ought to be considered on a preferred or non-competitive basis for the position in an effort to retain him. (See, *Fasanella* 2017-UNAT-765, para. 32).

66. Preferential treatment also means that a staff member holding a permanent appointment and sitting on an abolished post, if he or she is suitable for a vacant post, should only be compared against other staff members with permanent appointments—it would be a material irregularity to place them in the same pool as staff members with continuing, fixed-term, or temporary appointments:

The mandatory language of Staff Rule 13.1 [as read in conjunction with staff regulation 9.6 (e)] providing that staff members with permanent appointments “shall be retained in preference to those on all other types of appointments” – requires more than placing them in the same competitive pool as other applicants for a position. [See, *Fasanella*, para 29.]

67. This Tribunal shall interfere with an administrative decision where the Respondent is found not to have complied with the requirement of giving a staff member preferential treatment because this omission constitutes material irregularity.

68. It is for the Administration to prove that the staff member holding a permanent appointment was afforded due and fair consideration, (see *El Kholy* 2017-UNAT-730, para. 31).

69. Compliance with the legal obligation to give a displaced staff member with a permanent appointment preferential treatment is not established by half measures. The Tribunal accepts only genuine measures taken by the Administration to retain the staff member. Relevant factors to consider include whether the Respondent has demonstrated proper, reasonable and good faith efforts to find an alternative post for the staff member who would otherwise be without a job. Consequently,

Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given. [See *Timothy*, para 32, citing *El-Kholy* and *Haimour & Al Mohammad* 2016-UNAT-688, paras. 23 and 24.]

70. The standard of proof is one of a minimal showing that the official function was exercised regularly (see *Lemonier* 2017-UNAT-762).

71. In the case at bar, this Tribunal must find on the facts that the Respondent committed a material irregularity by failing to show that he complied with the legal obligation to accord the Applicant preferential treatment in an effort to ameliorate the effects of termination of his permanent appointment due to abolition of his post. For instance, on 29 May 2022, he applied for the position of Director, Brussels Office, PPD. He was shortlisted and interviewed but found not suitable.

72. It is settled law that shortlisting a staff member under the Applicant's circumstances is a tacit acknowledgement on the part of the Administration that the staff member was suitable for an available post:

Moreover, we agree with the Dispute Tribunal's finding that "by short-listing him, the administration had tacitly acknowledged that he was deemed suitable for the position [see, *Nega* 2023-UNAT-1393, para 48].

73. Therefore, as a staff member with a permanent appointment whose post was abolished, the Applicant was entitled to be offered the position without subjecting him to a competitive selection process.

74. The argument that the UNICEF selection procedure is different from that of the United Nations Secretariat and that, under the UNICEF selection procedure, "shortlisting is carried out on the basis of the criteria in the vacancy announcement", but "suitability is only determined following an assessment of shortlisted candidates", has no merit. The DHR/PROCEDURE/2022/002 defines "suitability" in relation to a post and not an individual. The staff member's core and functional competencies may, in the case of a staff member facing abolition of a post due to operational requirements of the Organization, not be assessed through competitive selection processes.

75. Regarding the position of Director of the Brussels Office, the record shows that the Respondent also acted contrary to UNICEF's DHR/PROCEDURE/2022/002 (Termination of appointment for reasons of abolition of post or reduction of staff) which provides in relevant part that:

46. During the period of notice, staff members are expected to apply for all available posts for which they believe they have the required competencies. HR managers will assist staff in identifying and applying for available and potentially suitable posts at the same grade level (see paragraphs 48 and 49). Every effort will be made to keep affected staff members informed of the posts for which they are being reviewed.

76. It was only on 24 October 2022, that the Applicant learnt of the appointment of another candidate to the position of Director of the PPD Office in Brussels for which he had applied on 29 May 2022. The Human Resources Partner ought to have kept the Applicant informed of developments regarding posts for which he was being reviewed including the Brussels post. This was not done.

77. The Tribunal further finds that the Respondent did not act transparently by his failure during the review process to inform the Applicant how his core and functional competencies did not align with the vacancy announcements in the following instances:

a. On 7 August 2020, the Applicant applied for the position of Deputy Director, Division of Financial and Administrative Management ("DFAM"). He was not shortlisted as his profile did not align with the vacancy announcement.

b. On 18 August 2020, he applied for the position of Deputy Director, Country Relations. He was not deemed suitable and was not selected.

c. On 27 September 2021, he applied for the position of Deputy Regional Director, Middle East and North Africa Regional Office ("MENARO"). He was not selected for the position as his profile did not align with the vacancy announcement.

d. On 7 October 2021, as part of the SSRRE, he expressed an interest in the position of Deputy Director, Supply Division. He was not selected for the position as his profile did not align with the vacancy announcement.

e. On 20 May 2022, he applied for the position of Principal Adviser, PFP Geneva. He was not shortlisted for the position.

f. On 17 August 2022, he applied for the position of Deputy Director, Office of Research—Innocenti. His application received consideration but as his profile did not align with the vacancy announcement, he was not shortlisted.

g. On 23 August 2022, as part of the SSRRE, he expressed an interest in the position of Deputy Representative, Programmes, in Yemen. His profile was specifically identified as a staff member in the Senior Rotation Exercise, but he was not recruited to the position.

h. On 1 September 2022, as part of the SSRRE, he expressed an interest in the position of Deputy Director, Outreach and Engagement, PFP in New York. He was not shortlisted for the position as his profile did not align with the vacancy announcement.

i. On 2 September 2022, as part of the SSRRE, he expressed an interest in the position of Deputy Director, PPD. He was not shortlisted for the position as his profile did not align with the vacancy announcement.

78. The Respondent's DHR/PROCEDURE/2022/002 provides that:

49. A post is "suitable" if the staff member on an abolished post has the core and functional competencies required for the post, as assessed in the respective staff selection process (see CF/AI/2016-005 (as amended) on Staff Selection).

79. Consistent with the requirement to act fairly, justly and transparently, the Respondent bears the burden to show that the Applicant did not possess the core and functional competencies required for the positions. For instance, in *Smith* 2017-UNAT-768, the Respondent demonstrated that the staff member was not offered a

post because he did not “speak Chinese” which was one of the vacancy requirements and that in three vacancy announcements the staff member did not answer “yes” to the required number of pre-screening questions. The Appeals Tribunal found that the Administration had no duty to consider the staff member for these positions under staff rule 9.6.

80. It follows that a blanket statement that the Applicant’s profile did not align with a vacancy announcement does not discharge the burden of proof.

81. Further, the Tribunal finds that the Respondent’s CF/AI/2016-005 (Assessment of candidates - Consideration for staff on abolished post) was not complied with. The relevant parts provide (emphasis in original):

Section 5 - Assessment of candidates
Consideration for staff on abolished post

5.1 In accordance with CF/AI/2010-001 Amend. 2 on Separation from Service, the organization will assist staff members whose posts are abolished in identifying available posts at their grade level. Therefore, hiring managers and selection panels must give due consideration to these staff members.

...

Section 6 – Recommendation
Selection recommendation

6.1 The selection panel shall give due consideration to internal candidates, especially those on abolished post assessed as suitable. The selection panel shall ensure that, in making the recommendation, the panel has taken into account UNICEF’s selection principles and goals in terms of diversity, such as gender parity and wide geographic distribution.

82. The record reveals that these provisions were incorporated in the letter containing the notice of termination as follows:

Your Human Resources Business Partner [“BJ” (name redacted for privacy reason)] will assist you and keep you informed of the posts for which you are applying and being reviewed. However, as selection and appointment to another post in UNICEF cannot be guaranteed, I encourage you to also explore opportunities in other United Nations agencies as well as outside the United Nations system.

83. The Respondent did not adduce any evidence to show that the Human Resources Business Partner (“HRBP”) assisted the Applicant in any form nor that the HRBP kept the Applicant informed of any post for which he had applied and was being reviewed. This omission is an example of lack of transparency in dealing with a staff member, which constitutes a material irregularity.

84. Furthermore, the failure to place the Applicant in an appropriate tier for selection purposes, jeopardized his chances of being given priority consideration as a staff member holding a permanent appointment facing abolition of post, contrary to secs. 5.1 and 6.1, CF/AI/2016-005 cited above.

85. The Respondent conceded to have incorrectly identified the Applicant as a staff member not facing abolition of post. Therefore, his candidature for the position of Deputy Representative, Operations, Kabul, Afghanistan (SSRRE position) was not given full and fair consideration as the provisions meant to protect him were not activated by virtue of the misrepresentation. This omission is a material irregularity.

86. The Tribunal finds that the Respondent has failed to minimally show that the Applicant as a staff member holding a permanent appointment facing abolition of post was accorded proper, reasonable and good-faith consideration to be retained in employment. The Respondent failed to either place the Applicant in a suitable and vacant position in which his services could effectively be utilized or to select him for a post for which he was shortlisted without subjecting him to a competitive selection process.

87. The Applicant has successfully rebutted the presumption of regularity. Accordingly, the Tribunal must allow the application.

Relief

88. The Applicant seeks rescission of the termination decision and that he be reinstated against a suitable available vacant post. Regarding alternative compensation, the Applicant argues that he held a permanent appointment, thus the contractual modality purportedly benefiting from the highest protection in the Organization. The Applicant had worked for UNICEF for just short of two decades

at the time of his separation. It follows that an award of alternative compensation at the highest level would be appropriate.

89. The Respondent filed submissions to show that since separating from the Organization, the Applicant has secured alternative employment hence, the Applicant has mitigated his loss. The Applicant states that he lost his permanent appointment with UNICEF and that although he has secured an alternative employment, the position is less lucrative than the one he held with the Organization and that he has lost several benefits including some of his pension due to the Respondent's unlawful decisions.

90. The Tribunal is guided by art. 10.5(a) of its Statute on the types of relief that it can award. The relevant part of the provision is as follows:

5. As part of its judgement, the Dispute Tribunal may only 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)...

91. Accordingly, the Tribunal orders rescission of the contested decisions not to retain the Applicant in the service of UNICEF and not to select him for the post of Director in the PPD Brussels Office. Pursuant to the statutory provision, the Respondent may elect to pay compensation *in lieu* of rescission.

92. When deciding the amount of *in lieu* compensation, the Tribunal must ensure that the staff member is placed in the same position he or she would have been in, had the Organization complied with its contractual obligations (see *Kilauri* 2022-UNAT-1304 and *Ashour* 2019-UNAT-899, para. 18).

93. *In lieu* compensation is only an alternative to rescission or specific performance which should be as close as possible to what the person concerned

would have received had the illegality not occurred. The yardstick for the period of compensation is equivalent of two years' net base salary. However, the award can be raised or reduced depending on the specific circumstances of a particular case including the nature and the level of post occupied by the staff member (i.e., continuing, provisional, fixed-term appointment), the remaining time, chances of renewal and other factors (see *Nega*, para. 52).

94. The Respondent argued that the Applicant has mitigated his loss by seeking other employment and therefore his *in lieu* compensation should be reduced to factor in that development. Awarding him more would not result in putting him in the same position he was in before the contested decisions but would be enriching him.

95. The Tribunal is not convinced by the Respondent's argument. Compensation *in lieu* is "not related at all to the economic loss suffered" (see *Nega*, para. 62) and there is no duty to mitigate loss as a precondition for receiving *in lieu* compensation (see *Zachariah* 2017-UNAT-764). It is, according to the Tribunal's Statute, an option that the Respondent can take instead of reinstating the Applicant in the service. Therefore, pecuniary loss or gain is not a relevant factor.

96. Relevant factors to consider in the case at bar are that the Applicant held a permanent appointment since 30 June 2009, and he would have retired comfortably in 2028 with full pension and medical benefits. He previously held a senior position at the D-1 level and subsequently held precarious positions of temporary duration since 2014 when he was first notified that his position would be abolished. He accepted lower-level posts in order to remain in service. After almost two decades in the service of UNICEF, it would indeed be difficult for him to secure a new employment that would give him the same level of remuneration or satisfaction.

97. In a distinguishable case of *El Kholy*, the Appeals Tribunal reduced the Dispute Tribunal's award of two years to 18 months net base salary because it was established that the staff member failed to cooperate fully and to express interest in Job Fairs. Contrast that with *Fasanella*, where the Appeals Tribunal was satisfied that the staff member had unsuccessfully applied for posts and was awarded two years' net base salary *in lieu* of reinstatement.

98. The Applicant in the present case has demonstrated that he relentlessly applied for positions and that he was qualified for a number of positions under the SSRRE. According to the record, he applied for at least 11 positions between 2019 and 2022. This and the other factors raised above persuade the Tribunal to award the Applicant two years' net base salary *in lieu* of reinstatement.

Conclusion

99. In view of the foregoing, the Tribunal DECIDES that:

- a. The decision to terminate the Applicant's permanent appointment without applying appropriate priority consideration for suitable available posts in which his services could effectively be utilized is rescinded;
- b. The decision not to select the Applicant for the post of Director, Brussels Office, Public Partnership Division is rescinded;
- c. The Respondent may opt to pay the equivalent of the Applicant's two years' net base salary in lieu of reinstatement for the two violations; and

d. The compensation 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 Rachel Sophie Sikwese

Dated this 2nd day of October 2024

Entered in the Register on this 2nd day of October 2024

(Signed)

Isaac Endeley, Registrar, New York