UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/053/ UNAT/1706
Judgment No.: UNDT/2011/199
Date: 22 November 2011
Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

MISTRAL AL-KIDWA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Tamara Shockley, UNICEF SECRETARY-GENERAllCw

Introduction

1. The Applicant, who held a permanent appointment with the United Nations Children's Fund ("UNICEF"), appeals against the decision to separate her from service. She claims that her permanent appointment was improperly terminated, resulting, in effect, in her constructive dismissal; that UNICEF failed to conduct good faith efforts to assist her with finding alternative placement prior to her separation; and that this was due to bias and discrimination.

2. The application was originally filed with the former United Nations Administrative Tribunal in June 2009 and was subsequently transferred to the United Nations Dispute Tribunal for determination.

3. The Tribunal held a hearing on 13–14 October 2011, during which the Tribunal received testimony from the Applicant and three other witnesses.

Issues

4. The main issues in this case are:

a.

appointment was for a period of one year. The Applicant did not go through the standard recruiting process as the recruitment was done through the emergency decision procedure. Mr. Allen and Mr. Dan Rohrmann, UNICEF Special Representative, OPT, identified posts that would suit the Applicant and decided that the Child Rights position was most suitable for her.

10. The administrative details concerning the transfer of the Applicant were conveyed to her in a letter from a Human Resources Officer dated 22 December 2005, which included the following:

> This appointment will be for a period of one year on a fixed-term basis. This type of appointment has no expectancy of renewal but extension may be granted on mutual agreement and subject to the validity of the post and a satisfactory performance record. Those who have completed a period of service, which is one year less than the normal tour of duty at the duty station, may apply for other posts. At present, the normal tour of duty for East Jerusalem is three years. If your assignment in OPT is extended, you may therefore begin applying for posts at other duty stations by year 2007.

11. The Applicant took up her position in OPT on 5 February 2006. She resided in Ramallah with her husband, traveling each day to Jerusalem.

12. There is a dispute between the parties about the funding of this post. The Applicant believes it was funded through "Regular Resources" funds (i.e., UNICEF's general budget), whereas the Respondent contends that it was funded through "Other Resources" (i.e., project funds). Whatever the source of the initial first-year funding, the Respondent's intention was to identify donors who would fund the post after the first year.

13. Mr. Rohrmann told the Tribunal that when the position of the Child Rights Project Officer was established, there were high hopes for it. It was seen as a sign that UNICEF's activities in OPT were moving on from responding to emergencies to funding development programmes.

14. However, around the time of the Applicant's arrival, the security situation in OPT deteriorated. As described by Mr. Rohrmann, the Hamas victory in the January 2006 elections meant that all funding to the Palestinian Authority, including UNICEF projects, was frozen and all development work by UNICEF was stopped. There were ongoing demonstrations and strike

emergency situation, the availability of non-emergency funding, as well as the security issue … it is highly unlikely that there will be any changed scenario when her current term expires".

18. Mr. Allen replied to the Applicant's 3 July 2006 email on 29 July 2006. He told her that, "as a matter of policy", before she could apply for other posts, she "would be expected to complete at least half [of her] normal tour of duty in [her] present duty station, 2 years in [her] case (unless the post classification change[d])". Mr. Allen noted the inconvenience and hardship to her caused by the particular complications in her present duty station, but said that UNICEF international staff had to deal with inconvenience, pointing out that mobility was part of the terms of service. Mr. Allen stated that he had confirmed with Mr. Rohrmann that there was no programmatic or organizational reason to redeploy her post to Amman, which would be the only basis for UNICEF to consider doing so; that funding for her post was

five vacancies in her email. The Applicant stated that she would prefer to continue working with UNICEF, but was also interested in inter-agency mobility. Mr. Allen replied to the Applicant's email on 23 September 2006, saying "[w]ell noted" and .000nD152 0 0

24. On 24 April 2007, the Applicant sent an email to Mr. Joshi, stating that while she appreciated his positive attitude, not much time was left before June 2007 and she would therefore be grateful for some positive feedback on her job applications. The Applicant further informed Mr. Joshi that she had applied for a P-4 level position in Cairo.

25. Mr. Joshi replied to the Applicant the next day, stressing that she should be selective and only apply to those positions where she would have had the relevant professional experience. Mr. Joshi further stated that he requested one of his DHR colleagues to follow-up on a P-4 level post in New York that the Applicant had applied for.

26. On 1 May 2007, the Applicant wrote to Mr. Toshiku Niwa, Deputy Executive Director, UNICEF, asking for his support. She pointed out that if she did not find a position before June 2007 she might get separated from UNICEF. She listed the positions she had applied for since the beginning of 2007. She said she would prefer to remain with UNICEF but would consider an inter-agency secondment and referred to two posts that would be suitable for her at the Headquarters.

27. In May 2007, the Applicant met with Ms. Avril Slade, Senior Officer, DHR, to discuss her situation. The contemporaneous correspondence between Mr. Allen, Mr. Joshi, and Ms. Slade shows that they had formed the view that the Applicant was "limiting her options" to only three geographical locations—Geneva, New York, and "the immediate neighbourhood of OPT".

28. On 1 June 2007, Mr. Joshi advised the Applicant by email that DHR "continued to maintain a dialogue with the respective offices" and that DHR "had advised [the Applicant] earlier [that she] should have expanded [her] search to a wider geographical area rather than limiting [her] choice to [Headquarters] locations". Mr. Joshi reassured the Applicant that she would remain "an internal candidate for all UNICEF positions, for a full 12 months".

29. On 5 June 2007, the Applicant sent an email to Mr. Joshi and Mr. Allen, stating that although initially she tried to remain in the region as it seemed logical, she later broadened her search by applying to a few vacancies in the Headquarters. The Applicant pointed out that "in the process, DHR did not help in 'identifying suitable available positions', nor did [she] get any assistance with regard to [her] applications to UN vacancies". The Applicant further stated that there was "apparent confusion of the advance notice and the formal notice of termination, [t]he latter of which [she] only received on 18 May [2007]", which was "[a] far cry from the stipulated 3 months".

30. In summarising the efforts taken by the Respondent to place the Applicant, Mr. Allen testified that he maintained close contact with her through his staff, closely monitored her applications, made sure she was short-listed for the posts she applied for and that DHR followed up with hiring managers to try to get a positive result. He was aware that DHR staff had assisted the Applicant with applying for the two Amman-based posts.

31. Mr. Joshi's efforts from December 2006 included flagging the Applicant's applications to the relevant offices. He spoke to the DHR team and raised her name in the weekly meeting where the placement of staff on abolished posts was regularly discussed. According to Mr. Joshi, the role of DHR was to ensure that the Applicant was short-listed for posts for which she applied and follow-up with country offices. In his view, DHR complied with these obligations. Mr. Joshi testified, in effect, that every reasonable effort was made by DHR managers to find a position that was the best fit for the Applicant. Mr. Joshi said that DHR facilitated the process but had no authority to select a candidate on behalf of office managers. He said that DHR short-listed the Applicant in relation to UNICEF posts for which she applied and also ensured that she was treated as an internal candidate. Internal candidates are given preferential treatment over external candidates. He did not think there was an obligation on UNICEF to select vacancies and send them to a candidate as there was a regular bulletin of vacancies which staff members could look at.

32. The evidence established that the Applicant submitted four applications for UNICEF vacancies in 2006, seven in 2007, and three in 2008. She also applied for other positions outside of UNICEF but within the United Nations system, including three positions in 2006, two in 2007, and nine in 2008. None of her

that this termination indemnity came from a separate budget allocation provided for such expenses. For the purposes of vacancy applications, she was treated as an internal candidate for a year following her separation, and since then has been treated as an external candidate.

37. The Applicant filed a request for administrative review and subsequently a statement of appeal with the JAB. The JAB concluded that the Respondent had not wrongfully terminated the Applicant's appointment in abolishing her post, but that the Respondent violated her rights as a permanent appointee by failing to conduct good faith efforts to assist her prior to her separation. It recommended her reinstatement or, alternatively, payment of one year's net base salary.

38. On 11 May 2009, the Deputy Secretary-General sent a copy of the JAB report to the Applicant, stating that the Secretary-General had decided to accept the findings and conclusions of the JAB, but that he decided to award the Applicant compensation in the amount of three months' net base salary at the rate in effect at the time of her separation as compensation for the violation of her rights.

Applicant's submissions

39. The Applicant's principal contentions may be summarised as follows:

a. In relation to the ending of her appointment, the Applicant submits that she was, in effect, wrongfully dismissed. Contrary to UNICEF's assertion that her post had been abolished because of no guarantee of funding, the post

notice was provided to her. The next letter, advising her of separation formalities, was provided to her shortly before her separation;

c. The Respondent violated the letter and spirit of former staff regulation 9.1(a) and former staff rule 109.1(c), in effect at the time, and the established policies for placement of staff in abolished posts. The Respondent was required to make good faith efforts to find appropriate alternative posts and to honour the obligations under Chapter 18 of the Manual. However, there were no concrete efforts by UNICEF to assist in her placement prior to her separation. UNICEF did not offer her a post or identify suitable posts or provide references to the UN Secretariat or other UN agencies. This indicates prejudice towards the Applicant, who was a permanent staff member in need of placement. All correspondence with DHR was initiated by the Applicant. The only post that was arguably identified by the Respondent for the Applicant is the post in Beijing that was identified as a follow-up to the Applicant's actions rather than at the initiative of UNICEF;

d. The Applicant applied to vacancies in various locations, commensurate with her qualifications, but there is no indication that she was provided with priority consideration for all available vacancies for which she was qualified, or even for those for which she herself applied. She was never interviewed for any of these vacancies and the recruitment process for some of the vacancies for which she had the best change of being selected was put on hold or even withdrawn. There is no reference in the records of UNICEF, including in the records of the selection advisory panels, to the Applicant being a permanent staff member on abolished post. As a permanent staff member on abolished post, for the Applicant not to be selected for a suitable post, there should be a finding, in accordance with *Tolstopiatov* UNDT/2010/147, that there were better qualified staff members in similar situation competing for the same post;

interested in other regions, it would have expanded its efforts to locate other suitable posts;

e. UNICEF is required to assist the Applicant in identifying suitable posts, not to identify them for her. It would place too much administrative burden on UNICEF to interpret the relevant rules differently. The role of DHR is to check whether any of the staff on abolished posts have applied for advertised posts and then to ensure they are short-listed;

f. *Tolstopiatov* may be distinguished on the facts. Unlike in *Tolstopiatov*, in the present case UNICEF assisted the Applicant with identifying suitable posts and ensured that she was short-listed for three posts. Regrettably, the

not dispute the findings of the JAB, instead submitting that the amount awarded was sufficient.

42. However, following the filing of the reply to the present application, the Respondent amended his position by, effectively, retracting his admission of liability.

43. On enquiry from the Tribunal about the reasons for this significant change, Counsel for the Respondent advised that, although the Secretary-General accepted the findings of the JAB that UNICEF failed to conduct good faith efforts in assisting the Applicant prior to her separation, it was not too late for the Secretary-General to amend his position. The Respondent stated that this case was being considered under the new system of administration of justice and the Applicant opened up the matter by filing the present appeal. Further, the Respondent submitted that, at the time of the consideration of the matter by the JAB and of the Secretary-General's consideration of the JAB report, the JAB and the Secretary-General did not have all the evidence presently available, nor did the JAB ask the Respondent to produce the relevant documentation.

44. However, after an extensive hearing, which covered all aspects of the case, the Tribunal finds that all material presented at the hearing was reasonably available at all times to the Respondent. The Tribunal finds that, considering the circumstances and the procedural history of this case, the Respondent's amended position was, in effect, a withdrawal of its admission of liability, which had been previously relied upon by both parties. This resulted in an unnecessarily longer hearing, which caused additional use of resources and costs (*Beaudry* 2011-UNAT-129).

45. The Respondent's conduct and submissions with respect to the admitted liability will be addressed further below in relation to costs.

Were the decision to end the Applicant's assignment and her subsequent separation lawful?

46. It was always made clear to the Applicant that the post was initially for one year and was dependant on funding. It appears that the funding for the post was in jeopardy from the start, when funding arrangements beyond the first year were not able to be secured. Mr. Rohrmann gave convincing account of the situation in the Middle East at that time that led to potential funding sources for the post to dry up. The intention to find donors

60. Paragraph 18.2.21 states that, if a suitable post is found, UNICEF must offer this post to the affected staff member. However, if the staff member does not accept the offer, UNICEF will not initiate any other action. This indicates that there is a limit to the efforts the Organisation is obliged to take.

61. Paragraph 18.2.25 refers to staff rule 109.1(c) and sets out additional measures that should be taken in respect of staff members who hold permanent appointments. Firstly, the human resources office will send the staff member's curriculum vitae or personal history form and performance evaluation reports to the office/division/section concerned, drawing their attention to staff rule 109.1(c). Secondly, the human resources office will request the head of office/division/ section, when preparing the written recommendation, to include an assessment of the staff member's suitability for the post. Thirdly, if the staff member on abolished post is not recommended, the human resources office "will always submit their cases" to the Appointment and Promotion Committee ("APC") for final review drawing the APC's attention to the terms of staff rule 109.1(c).

62. The language in the Manual indicates that "organization" within the meaning of the Manual is used to describe UNICEF as a distinct part of the UN Common System (see paras. 18.1.1, 18.2.16, 18.2.19, 18.2.21, 18.2.31, 18.2.35). Therefore, it appears that the obligations of UNICEF with respect to identifying suitable posts for the Applicant and assisting her in applying for them extend primarily to UNICEF posts.

63. The plain meaning of para. 18.2.21 is that a staff member on abolished post is entitled to a UNICEF post, insofar as such post was identified and deemed "suitable" for her or him and the staff member accepted the offer. The Respondent must show that the staff member was informed and considered for suitable posts and was not found suitable for any of them (see, e.g., United Nations Administrative Tribunal Judgment No. 910, *Soares* (1998), sec. IV).

64. The onus is on the Respondent to show that the Organization acted correctly towards the Applicant as a permanent appointee on an abolished post, in accordance with the letter and spirit of Chapter 18 of the Manual, and to demonstrate what good faith steps it took, in accordance with its legal and policy obligations, to assist her with finding alternative employment.

Did UNICEF comply with its obligations?

65. The documentary and oral evidence given at the hearing established that, while the Applicant made considerable efforts to locate vacancies within a reasonable range of suitability and apply for them, she was not actively assisted in this by the Respondent. Contrary to the views expressed by the witnesses for the Respondent, the Tribunal finds that the Applicant did not impose any strict restrictions on UNICEF with respect to the geographical areas of interest to her. She indicated some reasonable preferences (Middle East, Geneva, and New York), but there is no record of her refusing to consider positions in other areas. The Respondent's submission that DHR understood that the Applicant strictly limited her geographical preferences is not supported by the evidence. Indeed, it appears that this is not how DHR understood the situation at the time, as it short-listed the Applicant for the Beijing post.

66. Chapter 18 of the Manual expressly provides certain protections to staff members on abolished posts above the protections afforded to other staff members. The Manual should be interpreted to give practical effect to those provisions.

67. UNICEF had an obligation under the Manual to properly assist the Applicant in identifying suitable vacancies and in "applying for" suitable posts (see paras. 18.2.16–19 of the Manual). As stated in *Tolstopiatov* (para. 54), under para. 18.2.17, as soon as a staff member on abolished post received notice of her or his post being abolished, UNICEF was required to "automatically put forward" her or him as a candidate to be reviewed for "suitable core and non-core posts" that have been so identified. UNICEF was required to review all posts against potential suitability of

the Applicant and advance her name with respect to all suitable posts. It was also obliged to review all of the suitability requirements contained in 18.2.17 and 18.2.20 for each and every job application the staff member in question submitted, as well as for any other post UNICEF identified as potentially suitable.

68. This full assistance, which was required to be given during the notice period—i.e., after 6 December 2006—was not forthcoming for the Applicant.

69. Taking the Respondent's case at its best, of the 14 UNICEF posts against which the Applicant was considered in 2006–2007, it appears that all posts, with the possible exception of the Beijing post, were identified by the Applicant. At the same time, DHR was advertising hundreds of P-4 and P-5 level posts.

70. Instead, UNICEF placed the onus on the Applicant to find suitable posts and to apply for them entirely on her own. DHR took the initiative to short-list her only with respect to, at most, the posts for which she had applied on her own (with the possible exception of the Beijing post). The evidence indicates that UNICEF assessed the Applicant for posts for which she applied on the same basis as other applicants and she was not given any priority as required by the Manual with respect to permanent staff members on abolished posts.

71. Finally, DHR failed to properly inform the Applicant of its actions in relation to the posts for which DHR short-listed the Applicant, in breach of para. 18.2.19, which required it to make "[e]very effort. to keep affected staff members informed of the suitable vacant posts against which their name is included for review".

72. Under these circumstances, the Tribunal finds that UNICEF did not meet the requirements under paras. 18.2.16–18.2.21 of identifying "suitable posts" for the Applicant, in providing the required level of assistance to her in applying for these posts, and ensuring that she was properly considered for available suitable posts.

73. Further, the Respondent did not provide any evidence of compliance with para. 18.2.25 of the Manual, which sets out specific obligations with respect to special placement measures for staff holding permanent appointments.

74. Accordingly, the Tribunal finds that UNICEF failed to comply with its obligations to the Applicant as a permanent staff member on an abolished post. These failures to provide the Applicant with proper support were in breach of her rights and had a significant negative effect on the Applicant, in particular on her opportunity to continue further employment with the Organization.

Notices

75. As the Applicant was treated as a staff member on abolished post, UNICEF was required to give the Applicant two written notices – an advance written notice six months prior to her separation (para. 18.2.5 of the Manual) and formal written notice three months prior to her separation (para. 18.2.10 of the Manual).

76. On the Applicant's submission, the post was not formally abolished by PRB until 27–30 May 2007. Under para. 18.2.5, the advance written notice would, in normal situation, run from the time PBR endorsed the recommendation to abolish the post. However, in the unusual circumstances of this case, as explained above, the fate of this post was determined long before the abolition was formally finalised by PBR and UNICEF undertook to treat her as a staff member on abolished post.

77. UNICEF submitted, in effect, that the six-month notice, communicated by letter of 6 December 2006, constituted sufficient compliance with the requirements of the Manual. The Applicant testified that the only other communication regarding her separation was a letter informing her of separation arrangements, received by her on the last week of May 2007, approximately one week prior to her separation.

78. In light of the evidence in this case, the Tribunal finds that UNICEF did not provide the Applicant with a formal three-month notice. Accordingly, UNICEF failed to comply with para. 18.2.10 of the Manual.

Appropriate remedy

79. The Applicant requests the Tribunal to rescind the contested administrative decision; order her retroactive reinstatement, fixing the amount of compensation to be paid in lieu of specific performance at three years' net base salary; and award "appropriate and adequate compensation for the actual, consequential and moral damages", as well as costs in the amount of USD15,500.

80. As the Appeal Tribunal stated in *Solanki* 2010-UNAT-044 and *Ardisson* 2010-UNAT-052, compensation must be set by the Dispute Tribunal following a principled approach and on a case-by-case basis. In cases such as this, the Dispute Tribunal should be guided by two considerations. The first is the nature of the irregularity that led to the unlawfulness of the contested administrative decision. The second is the assessment of the staff member's genuine prospect of the positive career change had the correct procedure been followed. Damages may only be awarded to compensate for negative effects of a proven breach and the award should be proportionate to the established harm suffered by the Applicant (*Crichlow* UNDT/2009/028, affirmed in *Crichlow* 2010-UNAT-035).

81. In the circumstances of this case, the Tribunal is unable to make a definite finding that the Applicant would have been offered a new contract had UNICEF complied with its obligations. However, in the light of the Applicant's accepted good performance, experience, and willingness to serve in a variety of posts, the Tribunal finds that the likelihood that she would have received a new contract is sufficiently high to award the amount of nine months' net base salary as compensation for the loss of chance of continuing her employment and loss of career opportunities.

82. This compensation is based on an award of 12 months' net base salary, less the three months' net base salary already paid to the Applicant by the Respondent for the admitted breach of her rights. This award also includes compensation for the failure to give three months' notice. In making this award, the Tribunal was also

mindful of the termination indemnity of 12

b. three months' net base salary in effect at the time of her separation, as compensation for the emotional distress experienced by the Applicant; and

c. the sum of USD1,500 as a portion of the Applicant's costs that was the direct result of the Respondent's conduct.

87. The total sum of compensation as detailed in para. 86 above is to be paid within 60 days from the date the Judgment becomes executable, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Coral Shaw

Dated this 22nd day of November 2011

Entered in the Register on this 22nd day of November 2011

(*Signed*)

Hafida Lahiouel, Registrar, New York