UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/060
Judgment No.: UNDT/2018/070
Date: 26 June 2018
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

NOUINOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Stephan Flaetgen

Counsel for Respondent:
Alan Gutman , ALS , OHRM,
Alister Cumming, ALS, OHRM

- Misrepresentation by OIOS
- Complicty between OIOS and ALS
- Ongoing hostile working environment in OIOS/ID
- Unethical bias/prejudice in OIOS/ID
- Withholding of evidence from the Tribunal

Annotations and Commentary added by Peter A Gallo

Who cares? Does any of this really matter to anyone?

At one level, this judgement relates to one G-4 level UN staff member in the UN who was made redundant when her post was abolished.

The ruling in this case may only be relevant to staff members who (for whatever reason) fear finding themselves in the same position, but what is more significant, and what should be of concern to *all* staff members in the UN, are the underlying facts in the case and the misrepresentation by the Investigation Division/OIOS, who play fast and loose with UN Regulations to suit their own unethical purposes.

It demonstrates how the Administrative Law Section was either complicit in this malfeasance or was negligent in failing to carry out their own assessment of the information provided to them by OIOS.

The withholding of documentary evidence in violation of UNDT Order No. 33 (NY/2017) [see para 163] is not a trivial matter, it implicates the Administrative Law Section in professional misconduct and begs the question of why the Respondent should not be considered in contempt of the Tribunal.

Even worse, *Nouinou* is far from an isolated case. There have been other examples of the Tribunal knowing that OIOS/ID has withheld evidence; they did so in *Nguyen-Kropp & Postica*[1], in *Gallo*[2], in *Wilson*[3] and tried to do so in *Sirohi* (unpublished). This is clearly a pattern of behavior.

All of those cases involved OIOS staff members, which explains why some OIOS/ID staff members were present at the hearings, it is inconceivable that the same was not done in many other cases where the unfortunate staff member did not have any way of knowing what was missing.

This pattern also shows clear collusion between the Administrative Law Section (who act as legal counsel representing the Secretary-General) and OIOS/ID, and that collusion serves to suppress all and any evidence that could be detrimental to them or be favorable to the staff member.

This is not an equitable system of justice. As long as the Member States are unwilling to act to stop this unethical conduct by ALS and (at the very least) sanction the Legal Officers responsible, staff members will remain at a distinct and grossly unjust disadvantage; unlikely to prevail before the UNDT.

The UN expects *and requires* Staff Members to report "misconduct" and the Secretary-General relies on OIOS/ID to investigate those complaints. If that misconduct was limited to complaints of parking in the wrong parking space or use of the incorrect stationery, this would be all be trivial and unimportant, but the Secretary-General relies on OIOS/ID to investigate serious criminal allegations, such as child rape, financial fraud and other criminal activities.

More recently, in an attempt to appease demands for accountability from the growing *#metoo* movement within the UN, has also referred all sexual *harassment* investigations to OIOS/ID.

The credibility of an investigation cannot be divorced from the credibility of the investigators who carry it out, so anything that impugns the integrity of OIOS?ID detracts from public confidence in any

1 UNDT/NY/2010/107 & UNDT/NY/2011/004
2 UNDT/NY/2014/027 (The author.)
3 UNDT/NY/2013/112

investigation carried out by that office.

The Administrative Law Section, who represent the Secretary-General in litigation before the UN Dispute Tribunal do not believe there is any difference between the interests of the Secretary-General and the interests of the (nominally) "independent" OIOS. That means - as far as the UN is concerned - they are one and the same, and that puts the Secretary-General in the patently bipolar position of relying on investigations he knows to be carried out under the supervision of staff tainted by very credible allegations of bias and prejudice.

So who cares?

If you happen to be a UN Staff Member, you are required to co-operate with OIOS investigations. It is mandatory. You have no right against self-incrimination, you have no right to remain silent, you have no right to have legal counsel present when you are interviewed.

You have an obligation to report misconduct, but no right to protection should you then suffer retaliation for doing so, and if you fail to co-operate with an OIOS investigation, you risk action being taken against you immediately – by the very managers involved in the misconduct you were foolhardy enough to report!

Staff who are accused of wrongful conduct are at the mercy of OIOS, and even if they are only a witness in the investigation, if they fail to co-operate with OIOS, they can be held accountable for their reluctance.

When the boot is on the other foot, however, and staff of OIOS/ID engage in 'wrongful conduct' or worse, they clearly do so with impunity and have the active assistance of the Administrative Law Section in withholding evidence that a Judge has ordered to be disclosed.

Collusion between OIOS and ALS not only minimizes the chances of a staff member prevailing, it raises the very real concern that the OIOS investigation is not interested in the truth of the matter as much as justifying the actions taken by their manager, so the Department of Management can uphold it.

To uphold the Rule of Law, investigations into wrongdoing would require to be conducted *without fear or favour*, but evidence of unethical behavior on the part of the Investigations Director confirms the suspicions that many ordinary UN staff members have; that OIOS is not independent, cannot be relied upon to find wrongdoing if they should report their boss for misconduct and cannot be relied upon to clear them if they are falsely accused.

So who cares?

If you are a representative of a UN Member State - particularly if sitting on the Fifth Committee - this judgement illustrates the contempt that OIOS (and indeed, ALS) show towards the Tribunal.

It also makes a mockery of the assurances that OIOS has tried to offer since Ms. Heidi Mendoza took over as Under-Secretary-General of OIOS in December 2015 that the 'hostile working environment' in OIOS/ID is somehow a thing of the past. It is clearly nothing of the sort.

The Applicant in this case worked for the previous Investigations Director, Michael Stefanovic, and in this course of this case, Counsel for the Respondent manifestly failed to rebut her evidence that she was targeted simply for having worked for Mr. Stefanovic. The very notion of such a thing may be childish

and hard to believe, but senior officials of OIOS/ID have a long history of behaving in a strangely childish manner.

UNDT Order 185 (NY/2015) is a public document.[4] It reveals how, in June 2015, Mr. Stefanovic filed case number UNDT/NY/2015/036 in which he challenged the Organization's refusal to refer a formal complaint that he had made against (1) Ms. Catherine Pollard, then the Assistant Secretary-General, Office of Human Resources Management (ASG/OHRM) (and now Under-Secretary-General for General Assembly and Conference Management); (2) Ms. Roberta Baldini, a former staff member of ID/OIOS; and (3) an (unnamed) legal officer in the Administrative Law Section.

This was after after a complaint he claimed was made in bad faith by Ms. Baldini, and an investigation he claimed was unlawful was conducted by an external investigation body, carried out with the complicity of the ASG/OHRM and the Administrative Law Section

UNDT/NY/2015/036 came to an abrupt if private end, and two possible hypotheses explain why ; either (a) Mr. Stefanovic was delusional and absolutely nothing in UNDT/NY/2015/036 had a shred of truth in it, or (b) the evidence in UNDT/NY/2015/036 was solid and so damaging that the Organization had to cover it up at any cost *to protect the individuals concerned.*

All that exists in the public domain is ***UNDT Order 276 (NY/2015)***[5] and this begs the question: if Stefanovic had no case; why would he settle the case and leave so abruptly before the end of his contract?

The mistreatment of the Applicant in this case echoes the prejudicial mistreatment of other OIOS staff members who were in Applicants in ***Nguyen-Kropp and Postica (UNDT/2013/176)***[6] which resulted in all of the malefactors being completely excused their unethical conduct and left to continue their careers in the UN unimpeded.

Complaints of misconduct being made by no less a figure that the Investigations Director should not be dismissed lightly, particularly when the parties implicated in wrongdoing are such senior figures as the ASG/OHRM and an (unnamed) legal officer in the section who provide legal representation for the Secretary-General in cases such as this one.

In terms of the factionalism, the in-fighting and politics that have made OIOS/ID possibly the longest running and best documented 'hostile working environment' in the UN; the underlying facts in this case should be of great concern.

The Applicant, a staff member with a good professional record, made credible allegations that she was targeted because she worked for the former investigations director.

The Tribunal found evidence of bad faith and duplicity on the part of his successor, who has clearly continued the factionalism and aligned himself with the parties who were so vehemently opposed to Michael Stefanovic's directorship of OIOS/ID. OIOS was not only deceitful in the manner in which they sought to harm the Applicant's career, they refused to entertain a solution that would not have cost them any money. It is apparent that OIOS was not going to be satisfied with getting the Applicant out of OIOS, but there was a concerted effort to force her out of the UN altogether.

4 https://www.un.org/en/oaj/files/undt/orders/ny-2015-185.pdf
5 https://www.un.org/en/oaj/files/undt/orders/ny-2015-276.pdf
6 http://www.un.org/en/oaj/files/undt/judgments/undt-2013-176.pdf

Whatever else is going on, the senior staff of OIOS/ID cannot seriously be described as conducting themselves with '*the highest standards of efficiency, competence, and integrity*' and because of that, the ordinary UN Staff Member cannot be blamed for preferring to just keep their mouth shut when they see patent criminality in their own departments.

So who cares?

If you happen to be a journalist, an academic or just a regular taxpayer, this judgement gives an insight into how the UN acts without regard for the careers or the wellbeing of their staff.

The *Nouinou* case was unnecessary. OIOS brought it upon themselves through their malicious insistence on obstructing the staff member's efforts to find another job in another department, if she had been treated as fairly or as favourably as the staff members 'SD' and 'NGK' (see page 25), the Applicant would not have had a grievance to complaint about – but even when they were offered a solution that would cost them nothing, OIOS still insisted on putting obstacles in her way.

The result is a further public example of the ongoing 'hostile working environment' in OIOS/ID. It is further public exposure of the mismanagement in OIOS and an insight into how OIOS/ID will devote a considerable amount of time and unnecessary expense in pursuing a petty personal vendettas against innocent staff members guilty of nothing more than working with diligence and loyalty for a former Director, without regard for the financial implications of their decisions or the consequences that such malevolence might have on their own credibility.

If the Secretary-General is seriously committed to addressing sexual exploitation and abuse cases, he cannot do so by relying on OIOS when there are such serious questions about whether or not the management of the OIOS Investigation Division are really fit and proper persons to carry out the roles they are charged with.

As for anyone concerned about the welfare or the working conditions of staff in the UN, the questions that only an external and genuinely independent enquiry can properly address is how many staff members have been unfairly disciplined, or dismissed from the UN as a consequence of an inept or biased investigation carried out under the supervision of OIOS managers who are themselves guilty of wrongdoing, and to what extent has the Administrative Law Section protected those OIOS managers?

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6 July 2018

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Introduction

1. The Applicant, a former staff member of the Investigations Division in the Office of Internal Oversight Services ("ID/OIOS"), is contesting the following decisions to:

a. "Take away [her] Major Duties";

b. "Cancel [her] full access to the Case Management System Database (goCase)";

c. "Change [her] Reporting Line;

d. "Abolish [her] Post";

e. "Decide not to Renew [her] two-year fixed-term contract ending on 28 October 2016 […]";

f. "Refusing to Re-assign [her] under zero incumbency for Two Months to [the Counter Terrorism Executive Directorate, ("CTED")], where [she has] been selected for a Short-Term Position until 31 December 2016"; and

Did OIOS actually provide a negative reference? If so, this would be (further) evidence of OIOS acting in bad faith.

g. "Possibility of Providing a Negative Reference about [her] to [the Office of Legal Affairs, ("OLA")]], where [she has] been interviewed and considered for a Short-Term position of Six Months.

If the Tribunal does not look into the allegation, the staff member has no recourse against such malicious actions.

2. The Applicant requests the Tribunal to rescind the decision not to extend her two-year fixed-term contract, to order ID/OIOS to extend her contract for an additional period of two years and to be reassigned to another department in order to avoid further harm and retaliation, and to be compensated for the violations of her due process rights and for the moral damage caused by managers in ID/OIOS, the Department of Field Support ("DFS") and the Department of Peacekeeping Operations ("DPKO").

3. The Respondent submits that a number of additional decisions referred to in the application, such as decisions concerning the Applicant's duties, access to goCase and reporting line, are not receivable *ratione temporis*. The Respondent also contends that the re-assignment decision is not receivable *ratione temporis*, that the alleged decisions to abolish a post and to provide a reference to OLA are not receivable *ratione materiae*, and that the decision not to renew the Applicant's post was lawful.

Relevant factual and procedural background

4. The Applicant has been working for the United Nations since 2001 and has served in several departments before joining ID/OIOS.

5. On 18 January 2013, the Applicant was appointed as Administrative Assistant, G-4, with the Inspection and Evaluation Division in OIOS ("IED/OIOS"), on a temporary appointment. On 15 May 2013, she was reassigned to ID/OIOS. The Applicant's Personnel Action ("PA") issued in connection with her reassignment indicates that the source of funding of her reassignment was extra-budgetary (or from the OIOS's Reimbursement Support Account (hereafter referred to as "OIA account").

6. On 29 October 2013, the Applicant was granted a fixed-term appointment for one year. On 29 October 2014, her appointment was renewed for two years, until 28 October 2016.

7. On 23 July 2014, OIOS received funds for four years to be placed in the OIOS Trust Fund for Enhancing Professional Capacity ("the Trust Fund"), to cover the existing posts and that it was confirmed with the Executive Office that "the existing staff members [would] get two-year appointments and the new staff [would] get one-year appointments".

8. In December 2014, the Office of Programme Planning, Budget and Accounts ("OPPBA") advised the Executive Office of OIOS ("EO/OIOS") that there were insufficient resources in the OIA Trust Fund to fund all planned activities. OPPBA

issued allotment advice that would allow ID/OIOS to fund the Applicant's salary and that of another General Service ("GS") staff member, which was funded by the same trust fund only through 31 August 2015. In March 2015, ID/OIOS identified some unused funds which could be used to fund the two appointments through December 2015.

Former ID Director Mick Stefanovic also separated from the UN in October 2015. (See Stefanovic (UNDT Order 276 (NY/2015))

9. In October 2015, ID/OIOS submitted its 2016 cost plan to OPPBA. In this cost plan, ID/OIOS identified additional unused resources which would allow OIOS to fund the Applicant's position through June 2016.

10. In November 2015, the Applicant had a discussion with the Deputy Director of ID/OIOS ("DD, ID/OIOS") in Vienna, then Officer-in-Charge ("OiC") of ID/OIOS. Following the meeting, she wrote separately to the EO/OIOS and the DD, ID/OIOS/Vienna, alleging that the latter had stated that he had approved her contract extension for a further six months when her appointment was valid until 28 October 2016. On 19 November 2015, the then Executive Officer of OIOS, as requested by the DD, ID/OIOS/Vienna, informed the Applicant that ID/OIOS would honor her appointment until 28 October 2016 but that any further extensions would be subject to available funding.

James Finniss

Ben Swanson

11. In March 2016, the Deputy Director of the Nairobi Office ("DD, ID/OIOS/Nairobi"), then OiC of ID/OIOS, reassigned some of the Applicant's responsibilities to other ID/OIOS staff.

If she was employed through to the end of October, why were some of her duties re-assigned in March?

James Finniss

12. On 30 March 2016, the Applicant submitted a request for protection against retaliation to the Ethics Office. She alleged therein that the DD, ID/OIOS/Vienna and

Ben Swanson

the DD, ID/OIOS/Nairobi had retaliated against her. Specifically, the Applicant alleged that the DD, ID/OIOS/Vienna had attempted to terminate her appointment and that he was operating through the DD, ID/OIOS/Nairobi to remove her work responsibilities.

If she was employed through to the end of October, and there were no issues with her performance, why was OIOS attempting to terminate her employment seven months early?

https://foreignpolicy.com/2015/06/22/un-france-child-sex-abuse-central-african-republic-obama-whitehouse-ban/

https://foreignpolicy.com/2015/08/26/the-u-n-s-investigation-wars/

https://www.whistleblower.org/blog/121407-un-staff-survey-shows-shortcomings-oversight-office

The MEU has degenerated to the point where is is of no practical value whatsoever. In another case involving "irregularities" in OIOS recruitment practices, the MEU simply failed to respond altogether, and the UNAT held that they were under no obligation to do so. (Kalashnik (2017-UNAT-803))

13. On 18 April 2016, the Applicant requested a management evaluation with the Management Evaluation Unit ("MEU") of several decisions taken by the DD, ID/OIOS/Nairobi, as OiC of ID/OIOS, in relation to the reassignment of her functions. The Applicant alleged therein that the DD, ID/OIOS/Vienna and DD, ID/OIOS/Nairobi were retaliating against her for having made a previous complaint against the DD, ID/OIOS/Vienna.

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James Finniss

14. On 26 May 2016, the Applicant submitted a complaint to the Assistant Secretary-General for Human Resources Management ("ASG/OHRM"), alleging that the DD, ID/OIOS/Vienna had attempted to manipulate her contract and that the DD, ID/OIOS/Nairobi had retaliated against her.

What was the outcome of this complaint?

15. On 2 June 2016, the Under-Secretary-General for Management ("USG/DM") informed the Applicant that, following the management evaluation, the Secretary-General had decided to uphold the contested decisions in relation to the reassignment of her functions.

MEU

16. On 22 June 2016, the Director of the Ethics Office in the United Nations Secretariat informed the Applicant that the Ethics Office had determined that there was no *prima facie* case that her engaging in protected activities had been a contributing factor in causing alleged retaliation.

17. On 3 August 2016, the EO/OIOS requested the newly appointed Director of ID/OIOS (formerly the DD, ID/OIOS/Nairobi) to advise as to whether he would recommend the extension of the Applicant's appointment beyond 28 October 2016. On 4 August 2016, the Director of ID/OIOS advised the EO/OIOS that there was no funding available to renew the Applicant's appointment and that this should be communicated to her.

Ben Swanson

Note: Swanson had earlier reassigned some of her duties to ther staff members. (see para 11 above)

The Applicant was first employed by OIOS/ID when Mick Stefanovic was Director, he left in October 2015 and Swanson was promoted to replace him.The Applicant's job title was (and remained) "Assistant to Director" so *why did Swanson not tell her himself?*

18. On 30 August 2016, the Applicant wrote to the OiC of the EO/OIOS, requesting him to confirm that her appointment would be renewed in order for her to register for Russian language classes.

19. The Applicant's last two-year fixed-term contract as Assistant to the Director of ID/OIOS was effective from 29 October 2014 until 28 October 2016 as results from the letter of appointment issued on 13 August 2014 and signed by the Applicant on 8 September 2014.

20. On 7 September 2016, the OiC of the EO/OIOS and the Director of ID/OIOS met with the Applicant and informed her that her fixed-term contract with ID/OIOS would not be extended and, on the same day, she received an official notification from the EO/OIOS, referring to the procedures concerning her separation from ID/OIOS upon expiration of her fixed-term appointment, effective at close of business on 28 October 2016.

21. On 7 September 2016, the Applicant filed a request for management evaluation with MEU. She also filed on the same day (7 September 2016) a second request for protection against retaliation to the Ethics Office in relation to the decision not to renew her appointment.

22. On 8 September 2016, the Applicant filed an application for suspension of action with the Dispute Tribunal regarding the non-renewal decision.

23. On 9 September 2016, the Dispute Tribunal (Judge Alexander W. Hunter, Jr.) rendered its decision regarding the 8 September 2016 application for suspension of action regarding the decision not to renew her fixed-term appointment and rejected the application. http://www.un.org/en/oaj/files/undt/orders/ny-2016-214.pdf

24. On 16 September 2016, the Director of the Ethics Office informed the Applicant that the Ethics Office did not find any *prima facie* case of retaliation.

25. On 3 October 2016, at 9:50 a.m., CTED informed the Applicant that she was selected for a temporary position at the G-4 level. On the same day, at 11:42 a.m., the Applicant informed CTED that she was "thrilled" to join CTED and be part of the team. Later the same day, at 5:22 p.m., the Applicant was informed by CTED that, according to the information available in UMOJA, she had a fixed-term appointment

through 28 October 2016 and that CTED would request ID/OIOS "to release her on assignment from the [EO]/OIOS to CTED" until 31 December 2016.

26. On 4 October 2016, the Applicant received the management evaluation decision informing her that the Secretary-General had decided to uphold the decision not to renew her contract beyond 28 October 2016 due to a lack of funding. *See para 165 below*

27. On 5 October 2016, at 1:07 p.m., CTED informed the Applicant that the EO/OIOS had stated that her "fixed-term appointment expiring on 28 October 2016 [would] not be extended" and that CTED would have "to re-appoint her on a temporary contract, since [she was] selected against a [temporary job opening]". Later the same day, at 1:15 p.m., the Applicant informed the Under-Secretary-General of OIOS ("USG/OIOS"), the Assistant Secretary-General of OIOS ("ASG/OIOS") and the EO/OIOS that CTED had selected her for a G-4 level position, that she accepted the offer and that CTED would contact OIOS to request her release on assignment as she had a fixed-term appointment and since the CTED position was temporary. At 6:08 p.m. on the same date, the Applicant wrote to the USG/OIOS that "since [she] had been informed that the reason for not renewing [her] contract with ID/OIOS was a lack of funds, she would highly appreciate [it] if [the USG/OIOS] could consider granting CTED's request since this could be helpful for [her] protecting [her] fixed-term contract by extending it to at least the end of the period of the short-term CTED [contract until] 31 December 2016 especially [since] that [would] cost OIOS nothing because [she would] be paid by CTED".

Why should OIOS be unwilling to simply release her to take up another position if that would be done in a way that did NOT cost OIOS anything?

28. On 12 October 2016, at 11:13 a.m., CTED informed the Applicant that, since she could not be released on assignment, it had no other option than to rescind the offer for the position. At 11:30 a.m. on the same date, the Applicant informed CTED that she was prepared to terminate her fixed-term appointment with ID/OIOS to work with CTED on a temporary basis and that she "really want[ed] the position". Later the same day, at 1:05 p.m., she requested the USG/OIOS to extend her contract under zero-dollar incumbency. On the same day, at 3:09 p.m., the Applicant informed CTED that she had contacted OHRM and was told that, in relation to sec. 5.1 of

ST/AI/2010/4/Rev.1 (Administration of temporary appointments) and the 31-day break-in-service rule, the hiring department or office can request, if needed, a shorter break-in-service or a waiver of the break-in-service between the fixed-term and the temporary appointment and that CTED could hire her on assignment if OIOS would extend her fixed-term appointment. Later the same date, at 4:07 p.m., CTED informed the Applicant that it would not accept staff members on fixed-term, continuing or permanent appointments on assignment for this position as it only lasted through 31 December 2016, at which time the Applicant would have to be re-absorbed by OIOS, and recommended for her to discuss with USG/OIOS to have her appointment extended accordingly.

(on zero salary)

29. On 13 October 2016, on behalf of the USG/OIOS, her Special Assistant forwarded the Applicant a response to her 12 October 2016 request, stating that the office was not in a position to extend her appointment beyond 28 October 2016. On the same day, the Applicant asked the USG/OIOS to reconsider her decision. The Applicant also wrote to CTED to inform them that her contract would not be extended beyond 28 October 2016 and that OIOS therefore could not release her on assignment. Later on the same day, the Administration and Information Office of CTED informed the Applicant that "[…] decisions are made by CTED's senior management and it is [the Office's] responsibility to allow them to have a further discussion and [that the Office would] revert".

Intransigence by OIOS caused the staff member to lose the opportunity to take up the job.

30. On 14 October 2016, the Applicant filed a request for management evaluation of the decision of the USG/OIOS to refuse "to extend [her] two-year fixed-term contract for two months—under a zero-dollar incumbency—to reassign [her] on a short-term position with the CTED until 31 December 2016".

31. On 19 October 2016, the Applicant filed an application for suspension of action registered under Case No. UNDT/NY/2016/054. By Order No. 251 (NY/2016) issued on 26 October 2016, the Tribunal rejected the application for suspension of action, noting that the contested decision was implemented, since the CTED selected another candidate and that the Applicant's contract with ID/OIOS was extended from

http://www.un.org/en/oaj/files/undt/orders/ny-2016-251.pdf

29 October 2016 until 11 November 2016 pursuant to sec. 4.9 of ST/AI/2013/1 (Administration of fixed-term appointments) related to certified sick leave. The Applicant's fixed-term contract continued to be extended pursuant to sec. 4.9 of ST/AI/2013/1 until 1 September 2017 when the Applicant effectively separated from the Organization.

32. On 10 November 2016, the Applicant filed the present application and the Respondent's reply was filed on 14 December 2016.

33. By Order No. 277 (NY/2016) dated 19 December 2016, the Dispute Tribunal granted the Applicant's motion of 19 December 2016 and ordered the parties to file a joint submission, informing the Tribunal whether they were amenable to an informal resolution of the case either through the Office of the Ombudsman or through *inter partes* discussions by 30 December 2016. If not, the Applicant was to file a submission addressing the receivability issues raised in the Respondent's reply by 11 January 2017.

Note:

The Staff Member was willing to compromise but . The Organization insisted there was NO scope for informal resolution.

34. On 30 December 2016, the Applicant filed two separate submissions (one by regular email and another through the eFiling portal) in which she stated that she would remain open to any proposal for an alternative dispute resolution in the present case, while the Respondent filed a separate submission in which he stated that "there [was] no scope for informal resolution of this case".

35. On 4 January 2017, the Applicant filed a submission in reply to the Respondent's submission of 30 December 2016.

36. On 11 January 2017, pursuant to Order No. 277 (NY/2016), the Applicant filed a submission in response to the receivability issues raised by the Respondent in his reply.

37. On 23 January 2017, by Order No. 18 (NY/2017), the parties were instructed to attend a Case Management Discussion ("CMD") on 9 February 2017. Due to

inclement weather and the resulting closure of the United Nations Headquarters, the CMD was rescheduled for 13 February 2017.

38. On 10 February 2017, the Applicant emailed the New York Registry providing the information that she intended to bring with her to the CMD "Mr. Stephen Flaetgen, the 1st Vice Chairperson, Staff Counsel, UNDP, UNFPA, UNOPS, and UN Women", as an adviser.

39. On 13 February 2017, the parties attended a CMD. The Applicant represented herself and the Respondent was represented by Mr. Alister Cumming.

Why should Counsel for the Respondent insist that there was no scope to settle this case?

40. On 17 February 2017, the Respondent informed the Tribunal that he remained of the view that there is no scope for informal resolution of the case.

41. On 17 February 2017, the Applicant filed two separate submissions indicating that, although she received an email from the Respondent stating there was no scope for informal resolution, she remained open to informal resolution. The Applicant further confirmed that Mr. Steven Flaetgen would be her representative and attached a representative authorization form, signed by both of them.

42. Also on 20 February 2017, the Tribunal issued Order No. 33 (NY/2017), (Not published) instructing the parties to, *inter alia*, make further submissions and produce additional documents.

43. On 27 February 2017, the Applicant filed one submission titled "Submission on Recurring Incident Related to Late Salary During Sick Leave". On 28 February 2017, she filed another submission titled "Submission on Negative References Provided to [the Department of Economic and Social Affairs, ("DESA")] by OIOS about the Applicant".

Further to para 1(g) above: it appears that OIOS was providing negative references to prevent the staff member from finding another post.

44. On 20 March 2017, the Respondent and the Applicant filed their respective submissions in response to Order No. 33 (NY/2017).

UN Code of Conduct for Legal Representatives and Litigants in Person Article 4(3):
"Legal representatives should encourage and facilitate dialogue between the parties with a view to settling disputes in appropriate cases."

45. On 21 March 2017, the Applicant filed a submission titled "Applicant's Comments and Objections on Respondent's Submission Pursuant to Order [No.] 33 (NY/2017)".

46. On 27 March 2017, the Applicant filed a submission titled "Applicant's Corrections to Respondent's Submission Pursuant to Order [No.] 33 (NY/2017)".

47. On 30 March 2017, by Order No. 64 (NY/2017), the Tribunal instructed the parties to attend a CMD in the courtroom of the Tribunal in New York on 3 May 2017.

48. On 7 April 2017, the Applicant filed a submission titled "Applicant's [s]ubmission in relation to the [d]ifficulties surrounding her [s]election for [t]wo [t]emporary [p]osts: [o]ne in OPPBA and one in [the Office of Central Support Services, ("OCSS")]".

49. On 11 April 2017, the Applicant filed a motion titled, "Motion to [r]equest [i]mmediate [a]ction on OIOS [r]etaliation [a]ffecting the Applicant's [h]ealth and [r]uining [h]er United Nations [l]ong-[t]erm [c]areer".

(Not published)

50. On 17 April 2017, by Order No. 76 (NY/2017), the Tribunal instructed the Respondent to file a response to the Applicant's motion by 21 April 2017.

51. On 21 April 2017, the Respondent filed a response to the Applicant's motion, as instructed by Order No. 76 (NY/2017).

52. On 24 April 2017, the Applicant filed a "Motion for an [o]rder to require OIOS to commit the Applicant to accept offered posts she had been selected for in OPPBA and OCSS".

53. On 1 May 2017, the Applicant filed an objection to the Respondent's submission filed pursuant to Order No. 76 (NY/2017).

54. On 3 May 2017, the Tribunal conducted a CMD, at which the Applicant was present in person and assisted by her representative, Mr. Steven Flaetgen. The Respondent was represented at the CMD by Mr. Steven Dietrich, who replaced Mr. Alan Gutman, one of the assigned Counsel for the Respondent in the case. The Tribunal requested the Respondent to inform the Tribunal by 5 May 2017, if he would consent to enter into discussions for an informal resolution of the case.

55. On 5 May 2017, the Respondent filed a submission informing the Dispute Tribunal that "[…] The Respondent ha[d] again carefully considered the recommendation of the […] Tribunal. However, the Respondent remain[ed] of the view that there [was] no scope for informal resolution of this case".

56. On 5 May 2017, the Applicant filed a submission titled, "Applicant's [s]ubmission on [i]nformal [r]esolution per Case Management Discussion on 3 May 2017". Therein, the Applicant indicated that she has been open to informal resolution but that "[…] [she] did not receive correspondence request from the Respondent to attempt informal resolution and no discussion or meeting took place in this regard […]" and that "[…] [she] would like to bring to the attention of the Tribunal the Respondent's extended bad faith for the third time […]".

57. The Applicant further indicated, in her submission of 5 May 2017, that she had submitted a letter to the USG/OIOS seeking approval of "[…] her request to convert her [a]nnual [l]eave [d]ays to [s]ick [l]eave [d]ays […] to allow her [f]ull [p]ay [s]ick [l]eave starting 12 May 2017 as she will exhaust her [f]ull [p]ay [s]ick [l]eave [d]ays on 11 May 2017". In addition, the Applicant informed the Dispute Tribunal as follows:

> The Applicant's Counsel approached [the] Ethics Office to highlight the existence of retaliation against the Applicant and requested information about the conversion of her [annual leave] to [sick leave] [d]ays to allow for her [f]ull [p]ay [sick leave]. He also asked [the] Ethics Office for advice about the [r]elease on [a]ssignment. In the meantime, he took [the] initiative to inquire [with the] Ethics Office to consider [i]nformal [r]esolution as [w]histleblower [p]rotection […].

58. On 8 May 2017, by Order No. 90 (NY/2017), corrected by Order No. 92 (NY/2017), the Tribunal instructed the Respondent to produce the following by 19 May 2017: (Neither Order published)

> a. All of the Applicant's letters of appointment, including the one for the initial appointment to Timor [L]este, as requested per Order No. 33 (NY/2017);
>
> b. An explanation as to whether the Applicant was internationally recruited for any of the posts she occupied until the present date together with the supporting documents;
>
> c. An explanation of the meaning of "GS (PL)" and "GS (OL)" included in the OIOS organizational structure and post distribution for the biennium 2014-2015 and for the biennium 2016-2017; and
>
> d. The Respondent's position regarding the content of ST/SGB/273 of 7 September 1994 regarding the discretion of OIOS to release staff members to other units.

i.e. in May 2017, Orders 90 or 92 called for Organization to hand over documents that had already been requested in Order 33 back in February!

59. Also by Order No. 90 (NY/2017), the Applicant was instructed to file a response, if any, by 26 May 2017, to the Respondent's submissions and to inform the Tribunal if she is to adduce additional written and/or oral evidence regarding the moral damages requested as part of the remedies.

60. On 19 May 2017, the Respondent filed his submission pursuant to Order No. 90 (NY/2017).

61. On 26 May 2017 the Applicant filed a submission requesting an extension of time to file her response pursuant to Order No. 90 (NY/2017) until 30 May 2017. In her submission, she informed the Tribunal that she would like to adduce additional oral evidence regarding her requests for moral damages.

62. On 26 May 2017, upon instruction from the undersigned Judge, the Registry transmitted an email to the parties informing the Applicant that her request for an extension of time was granted and that her submission shall be filed by 30 May 2017. The Registry further advised that a formal Order would be forthcoming. On 30 May 2017, the Tribunal issued Order No. 100 (NY/2017) in which it formalized the instruction mentioned above.

63. On 30 May 2017, the Applicant submitted her response, together with annexes, to Order No. 90 (NY/2017).

64. By Order No. 102 (NY/2017) of 2 June 2017, the Tribunal, taking into consideration the Applicant's submission of 26 May 2017 that she would like to adduce oral evidence on the issue of her alleged moral damages, and considering, pursuant to art. 18.2 of the Dispute Tribunal's Rules of Procedure, that the Applicant's testimony would be relevant and in the interest of justice and fair disposal of the case, instructed the parties to attend a half-day hearing at the Tribunal's courtroom in New York on 14 June 2017 on the limited issue of moral damages. i.e. there was to be no hearing on the MERITS of the case.

65. On 12 June 2017, as instructed by Order No. 102 (NY/2017), Counsel of the parties and the Applicant confirmed their attendance at the scheduled hearing.

66. On 14 June 2017, approximately one hour prior to the hearing, the Applicant filed a submission informing the Tribunal that her Counsel was "travelling and might attend [the hearing] via telephone or skype if possible". At the hearing, the Applicant informed the Tribunal that, due to an urgent travel requirement, her Counsel would not be able to participate at the hearing and requested the hearing to be postponed until 2:00 p.m. that day to allow her time to contact and verify if her Counsel would be available to participate via telephone or via skype. At 2:00 p.m. on the same date, the Applicant informed the Tribunal that her Counsel would not be available to participate and requested the hearing to be postponed to a date after 26 June 2017 to allow the presence of her Counsel. The Respondent's Counsel had no objection to the Applicant's request.

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67. The Tribunal, taking note that (name redacted, Mr. BS), Director of ID/OIOS, was present in the court to assist at the hearing, advised both parties to further consider the possibility of entering into discussions for an informal resolution of the case.

68. On 15 June 2017, the Respondent sent an email to the Applicant requesting her to provide him with a settlement proposal.

69. On 19 June 2017, the Applicant sent the requested settlement proposal to the Respondent.

70. On 20 June 2017, the Applicant filed a motion informing the Tribunal that she had submitted a settlement proposal to the Respondent at his request following the 14 June 2017 hearing. The Applicant requested the Tribunal to refer the case to the Office of the United Nations Ombudsman and Mediation Services ("UNOMS") for further discussions on the settlement terms.

71. On 21 June 2017, the Tribunal sent an email to the Respondent requesting him to indicate whether he would consent to have the case referred to UNOMS. The Respondent filed a submission on the same day informing of his refusal to have UNOMS involved in the mediation of the case.

What is the justification for OIOS's refusal to compromise?

OIOS could have settled this case at no financial cost, but were obviously intent on forcing the Applicant out of the UN altogether.

72. On 22 June 2017, the Tribunal instructed the parties via email to indicate if there were any pending *inter partes* discussions taking place for an informal resolution of the case. The parties responded on the same day indicating that no such discussions were on-going.

73. By Order No. 121 (NY/2017) of 23 June 2017, the Tribunal instructed the parties to provide the information on whether they would be available for a half-day hearing on 28 June 2017 for the Applicant to provide her testimony on the issue of moral damages.

74. On 26 June 2017, the Applicant filed a response, including, *inter alia*, a list of proposed witnesses, as previously indicated in her submission filed on 20 June 2017.

75. On 27 June 2017, the Respondent confirmed his participation at the hearing on 28 June 2017.

76. On 27 June 2017, at 5:53 p.m., the Applicant filed a motion to postpone the hearing to September 2017 due to health issues as she was on sick leave.

77. On 28 June 2017, at 9:48 a.m., as instructed via email by the Tribunal on the same day, the Respondent filed his views regarding the Applicant's request to postpone the hearing. On the same day, the Tribunal informed the parties via email that the motion to postpone the hearing was granted and that an order would follow.

78. By Order No. 125 (NY/2017) dated 29 June 2017, the Tribunal granted the Applicant's request to postpone the hearing and instructed the parties to file a joint submission by 15 September 2017 informing the Tribunal of an agreed date for the half-day hearing.

79. On 1 September 2017, the Applicant was separated from the Organization. Between 12 September 2017 and 8 October 2017, she was appointed on a temporary contract in the Executive Office of the Secretary-General.

80. By submission dated 15 September 2017, in response to Order No. 125 (NY/2017), the Respondent provided the information that the parties agreed to the half-day hearing on alleged moral damages to take place on 3 October 2017.

81. By Order No. 200 (NY/2017) issued on 21 September 2017, the Tribunal instructed the parties to attend a half-day hearing on moral damages on 3 October 2017.

82. By emails dated 29 September 2017 and 2 October 2017, the Applicant requested that the hearing be closed to the public.

83. On 3 October 2017, as per Order No. 200 (NY/2017), the Tribunal conducted the hearing at which the Applicant was present in person and assisted by her representative, Mr. Steven Flaetgen, and the Respondent was represented by Mr. Alister Cumming. The following matters ensued during the hearing:

a. At the beginning of the hearing, the Applicant's motions for a closed hearing and for additional oral evidence (witnesses) filed were discussed. The Respondent's Counsel objected to the request for a closed hearing stating that, based on the principle of transparency, a hearing should be open to the public, and, in the present case, no exceptional circumstances justified a closed hearing. The Tribunal took note that only the parties were present and in attendance, and decided to rule on the Applicant's motion for a closed hearing only if necessary. Further, the Tribunal informed the parties that the Applicant's motion for additional oral evidence would be determined at the end of the Applicant's testimony.

b. After the Applicant's testimony, noting that only the parties had attended the hearing, the Tribunal found that it was no longer necessary to rule on the Applicant's motion for a closed hearing.

c. The Applicant reiterated her request for calling additional witnesses to which the Respondent objected. Taking into consideration the scope of the judicial review of the present case together with the evidence already on the record, including the Applicant's testimony, the Tribunal found that the requested additional oral evidence appeared not to be ??? relevant and rejected this request. This is one of the many peculiarities of "justice" in the UN that puts staff member at a disadvantage; evidence can be excluded on grounds of "relevance" WITHOUT the judge actually hearing the evidence first in order to decide whether it was or was not relevant.

d. Further, the Applicant's Counsel, indicating that, during her testimony, the Applicant had stated, *inter alia*, that she was rostered at the G-5 level on 27 April 2017, requested to file the relevant written documentation together with other documents to which she referred. The Respondent's Counsel had no objection.

e. The Tribunal granted the request for additional written evidence instructing the Applicant to file these documents by 6 October 2017, and informed the parties that, for a fair disposal of the case, the Respondent may file his comments and/or relevant documentation, if any, by 13 October 2017.

f. The Tribunal considered it relevant for the Respondent to file some additional documentation related to the available suitable posts, as subsequently stated in Order No. 225 (NY/2017). (Not Published)

g. The Tribunal informed the parties that the Registry would make all the necessary arrangements for the transcript of the hearing to be prepared, which, after being received, would be uploaded in the eFiling portal and would be made available to the parties immediately thereafter. The parties were instructed to file their closing submissions based on the evidence on the record within three weeks after the date of the Registry notifying them of the transcript being uploaded in the eFiling portal.

h. The Tribunal recommended the parties, while reviewing the entire evidence in the present case, to explore the possibility of an informal resolution of the case. Again!!!

84. As instructed at the hearing, on 9 October 2017, the Applicant filed the documents she had made reference to during her testimony, including the 27 April 2017 document related to her inclusion in a roster at the G-5 level and a list of all posts that she had applied to between September 2016 and August 2017.

85. By Order No. 225 (NY/2017) issued on 11 October 2017, the Tribunal provided the following orders:

> … The Applicant's request for calling additional witnesses [was] rejected;
>
> … By […] 13 October 2017, the Respondent [was] to file his comments and additional written documentation, if any, to the documents to which the Applicant made reference during her testimony filed on 9 October 2017;
>
> … By […] 3 November 2017, the Respondent [was] to file an updated list of:
>
> a. All vacant available suitable posts at the Applicant's duty station (New York) at the G-4 level and lower levels, starting from 1 November 2016 until 31 October 2017

> corresponding to the Applicant's competencies as described during her testimony including but not limited to those competencies she had in her previous posts;
>
> b. All available suitable posts at the Applicant's duty station (New York) at the G-4 level occupied by staff members with temporary contracts, starting from 1 November 2016 until 31 October 2017, corresponding to the Applicant's competencies as described during her testimony including but not limited to those competencies she had in her previous posts;
>
> c. All available suitable posts at the Applicant's duty station (New York) at the G-3 or lower level occupied by staff members with fixed-term contracts and temporary contracts starting from 1 November 2016 until 31 October 2017, corresponding to the Applicant's competencies as described during her testimony including but not limited to those competencies she had in her previous posts;
>
> d. All available suitable posts at the Applicant's duty station (New York) at the G-5 level starting from 27 April 2017 until 31 October 2017 corresponding to the Applicant's competencies as described during her testimony including but not limited to those competencies she had in her previous posts;
>
> … The Registry [was] to request that a transcript of [the] hearing [would be] provided for, and subsequently [would] upload it in the eFiling portal and grant the parties access to it.

86. On 31 October 2017, the Respondent filed a motion for extension of time of one week to file the information the Tribunal had instructed him to provide in Order No. 225 (NY/2017). By email sent on the same date, the Applicant provided the information that she did not object to the request.

87. By Order No. 242 (NY/2017) issued on 31 October 2017, the Tribunal granted the motion for extension of time for the Respondent to file the requested information.

88. On 1 November 2017, the Registry was with provided the transcript of the hearing and a corrected version was made available to the parties on 8 November 2017.

89. On 10 November 2017, the Respondent filed his submission in response to Order No. 225 (NY/2017) and, on 22 November 2017, the Applicant filed her comments to the response.

90. On 24 November 2017, the Respondent was instructed via email to file a response and additional documents to the Applicant's comments filed on 23 November 2017.

91. On 29 November 2017, the Respondent filed his closing submissions.

92. On 1 December 2017, the Applicant filed her corrections to the transcript of the hearing.

93. On 1 December 2017, the Respondent filed a submission on vacant posts.

94. On the same day (1 December 2017), the Applicant filed her closing submissions.

95. On 8 December 2017, the Applicant filed her comments to the Respondent's closing submissions.

96. On 2 March 2018, the Applicant filed a submission to inquire about the status of her case.

97. On 12 March 2018, the Applicant filed an "[u]rgent [m]otion [c]oncerning [p]otential [Administrative Law Section, ("ALS")]/OIOS [n]egative [i]nterference in [r]ecruiting the Applicant in [the Office of Counter-Terrorism, ("OCT")]".

A further indication of OIOS actively trying to harm the staff member's career.

98. By email of 12 March 2018, the New York Registry requested the Applicant to inform the Tribunal whether she sought to file an application for suspension of action pending management evaluation, and if so, instructed her to file this as a new and separate case. On 13 March 2018, the New York Registry sent another email to the Applicant asking her to indicate whether her motion of 12 March 2018 was to be considered as part of the present case or as a new case. On 15 March 2018, the

Applicant sent an email informing the Tribunal that her motion was to be considered as separate from the present case.

99. On 19 March 2018, the Applicant filed a motion on "[r]ecurring [e]vent to be [c]onsidered for [f]inal [j]udgment".

Further obstruction?

Applicant's submissions

100. The Applicant's principal contentions are as follows (emphasis in the original and footnotes omitted):

> … OIOS management claimed that the Applicant's contract was not extended due to the lack of funds, but the Applicant submits that this is an erroneous claim, as OIOS has diverted the funds allotted by the General Assembly to posts in the [ID/OIOS] to pay for the salary of staff members employment in the Internal Audits Division ["IAD")] and [IED][…]/OIOS. These funds have also been used for trainings led by [name redacted, Mr. JF]. This further demonstrates that the senior management in OIOS has acted and continues to act in bad faith.
>
> … [Name redacted, Ms. HM] refused to extend the Applicant's contract until 31 December 2016 at no cost for OIOS when CTED offered a temporary job to the Applicant until 31 December 2016. This is yet an example of bad faith shown by OIOS senior management.
>
> … Moreover, [Mr. BS] decided on 30 June 2016 to abolish the Applicant's post, but he never told the Applicant of his decision. Instead, during the meeting of 7 September 2016, it was [name redacted, Mr. GB] who informed the Applicant of the decision; [Mr. BS] attended the meeting, but remained silent about the decision. This prevented the Applicant […] from having an early start in her job search. By the time she learned about the decision, there was about six weeks left in her contract.
>
> … It is worth noting that whenever the Applicant made a specific request to [Ms. HM] and [Mr. BS], they did not respond to her request, but instead delegated the communication of bad news to [Mr. GB], [name redacted, Mr. DK] and [name redacted, Mr. BKM], thing which undermines any claim of good faith on their part.
>
> … The Applicant questions the credibility of OIOS in stating that the reason for not renewing her contract is the lack of funds because OIOS refused to extend the Applicant's contract under zero [dollar]

Deputy Director OIOS/ID, Vienna

(See paras 11 & 12 above)

USG/OIOS Heidi Mendoza

Investigations Director Ben Swanson

ASG/OIOS David Kanja

Gilles Baltrusaitis

Byung-Kun Min

incumbency for her to be paid by CTED, while accepting to pay for her extension of contract with OIOS due to her sick leave. If there were no funds to extend the applicant's contract, where did the funds for this [at the time] current extension until 11 November 2016 come from?

… The Applicant submits that bad faith taints the decision not to extend her two years fixed-term contract, thus rendering it unlawful. The Applicant further submits that the senior management of OIOS have denied her due process because they have repeatedly refused to give her full disclosure about her contractual status, until obliged to comply when directed to do so by the MEU and when the Secretary-General was required to reply to the applications she ha[d] filed with the United Nations Dispute Tribunal.

... The Applicant is confident that she has been used as a valuable asset, being recruited under G-4 level in order to perform the functions of either G-5 or G-6, for the period of almost three years as she has been assisting the former director [D-2 manager] […].

... Finally, the Applicant submits that the decision for not renewing her contract is retaliation against her because she has shown loyalty to the former director, [Mr. MS]. Evidence can be found in the fact that the Applicant was never thanked or rewarded for her hard and overtime work in the [ID/OIOS]; instead she was treated with utmost lack of respect by [Ms. HM] and [Mr. BS].

What would be a legitimate reason for withholding information about a staff member's contract status?

Information in para 83d states that she was rostered for G5 posts. If she as employed at the G4 level, she could never have need rostered at the G5 level if her work performance was inadequate; so what is the reason for OIOS giving hee negative references when she applied for other positions?

Michael Stefanovic

USG/OIOS Heidi Mendoza & Investigations Director Ben Swanson

101. Applicant's submissions to the receivability issues raised in the Respondent's reply are as follows (emphasis and footnotes in the original omitted):

[…]

... [Paragraphs] 6, 7 and 8 of the Respondent's Reply conclude that the Applicant's challenges to the decisions concerning the change of her major duties, the cancellation of her full access to GoCase and the change of her reporting line, are all not receivable.

... The Applicant unfortunately finds the Respondent's statement irrelevant and a way to avoid revealing the abuse of power and authority by OIOS Senior Management.

Question: Is Counsel for the Respondent covering up misconduct by senior OIOS officials?

... The Applicant seeks a waiver from the Tribunal to the time limit brought as an issue by the Respondent, and pleads the Tribunal to consider her challenges to the decisions due to the fact that the hostile working environment in ID/OIOS, the deliberate abuse of power exercised on her by OIOS Senior Management and the intentional retaliation against her—right after the departure of the Director of

Michael Stefanovic

[ID/OIOS] [Mr. MS]— all caused the Applicant tremendous stress, damaged her moral and affected her health as she is on sick leave while she has just formed a family after devoting her life to her [United Nations] career for 15 years and has been taking care of her disabled husband since July 2015, meanwhile receiving continuous harm from OIOS Senior Management.

... The Respondent relies on the fiction that there is a lack of budget. If this were the case there would be no reason for OIOS to delay intimation of this fact. Moreover, the Respondent's argument about a lack of budget is duplicitous; as is evidenced by the irregular employment of [name redacted, Ms. AE] who was a colleague of the USG OIOS [Ms. HM] when both worked in the Commission for Audit in the Philippines, and who has recently been appointed to a vacancy in OIOS that was never advertised.

Aerlyn Encarnation

Heidi Mendoza

Question: Do the UN Staff Rules actually apply in OIOS or have they been replaced by something commonly known in the Philippines as "cronyism"?

... Evidence of the funding arrangement for the Applicant's post, and the possibility that that funding might be withdrawn is not intimation that the Applicant's two years fixed-term contract will be terminated. [United Nations] staff members are routinely employed on contracts of two years duration, which contracts state that there is no expectation of renewal, yet a large percentage of cases heard by the [Dispute Tribunal] address the expectation of renewal which, in the absence of evidence of poor performance, is recognized to exist.

... In the case of the Applicant, she neither has had poor performance nor has she committed misconduct or has she been under an ongoing investigation for wrongdoing.

[…]

… [Paragraph] 9 of the Respondent's Reply states that the decision to re-assign the Applicant under zero-incumbency with CTED where the Applicant was selected, is not receivable.

... The Applicant seeks the consideration of the Tribunal to her challenge to the decision to re-assign her to CTED under zero-incumbency and requires the testimony of [name redacted, Mr. VK] [OIC of OHRM] during the [h]earing that the Applicant asked for.

... [Paragraph] 10 of the Respondent's Reply states that the decision to abolish the Applicant's post is not receivable. The Applicant brings to the attention of the [T]ribunal that the abolishment of her post took place in June 2016 without informing her and that she only found out in October during her suspension of action submitted to [the Dispute Tribunal]—four months afterwards. The Applicant therefore requests clarification from the Tribunal whether the decision to abolish her post should be considered June or October 2016 for the

Applicant to follow, and submit her request for management evaluation accordingly.

... [Paragraph] 10 of the Respondent's Reply also states that the provision of ID/OIOS negative reference to OLA about the Applicant's application for the job, is not receivable.

Investigations Director Ben Swanson

... The Applicant will submit a management evaluation in regards to the provision [by] [Mr. BS] [of] a negative reference to OLA about her application for a job in OLA, should the Tribunal consider that the [m]anagement [e]valuation is deemed necessary.

... [Paragraph] 18 of the Respondent's Reply states that the [EO/OIOS] informed the Applicant on 7 September 2016 that OIOS would honour her appointment until 28 October 2016. This statement is correct but it is made incomplete in order to protect OIOS [l]ies and [b]ad [f]aith. ID and [the] [EO/OIOS] kept quiet about the Applicant's [c]ontract. The Applicant herself was in constant correspondence with ID/OIOS and [the] [EO/OIOS] in August in order to find out information about her contract extension so that she could register for her Russian [c]lass. The Applicant in fact approached [the] EO/OIOS on her own; neither ID/OIOS nor [the] EO/OIOS approached the Applicant to inform her. […].

... [Paragraphs] 19 and 20 of the Respondent's Reply state that OIOS [f]unds were depleted as of 30 June 2016 and that as an exception at the request of ID[/OIOS], the [EO/OIOS] used temporary funding for the Applicant's position. This is a contradictory statement and a manipulating proof to show that ID[/OIOS] and [the] [EO/OIOS] made efforts to help the Applicant as if she were [a] valuable staff.

... If the statements of the Respondent are true, then the [Applicant] would like to bring to the attention of the Tribunal the following:

a. If OIA Funds were depleted on 30 June 2016, why did ID and/or [the] [EO/OIOS] not inform the Applicant who occupies the post that became abolished?

b. The Applicant's major duties were already taken by June 2016, so what makes the Applicant special for ID[/OIOS] and [the] [EO/OIOS] to make an exception to provide funds for her post?

c. Did OIOS protect the [United Nations] Funds by keeping the Applicant from July to October 2016 doing nothing and deciding not to inform her of anything related to her contract?

Shaundelle Douglas

James Finniss

... […] [T]wo [other] staff members have been paid from OIA Funds: [name redacted, Ms. HC] who was forced to leave OIOS by [Mr. JF] and [name redacted, Ms. SD] who has been promoted and re-assigned to another post that is not under OIA Budget. In addition a new staff member [name redacted, Mr. NGK] has recently been hired by ID/OIOS and her contract has been extended. The Applicant therefore requests the testimony of [Ms. HC] during the [h]earing that the Applicant asked for.

Is there a legitimate explanation for this disparate treatment?

Ms. Nunwin George-Kamara (recruited externally)

[…]

... [Parapraph] 21 of the Respondent's [r]eply states that the contested decision was motivated by improper merit. The Applicant has worked in a severe, toxic, unhealthy and hostile working environment, which has been particularly acute since the separation of [Mr. MS] following [the Dispute Tribunal's] Order 276 (NY /2015) on 27 October 2015.

See also UNDT judgement Nguyen-Kropp & Postica (UNDT/2013/176) below

http://www.un.org/en/oaj/files/undt/orders/ny-2015-276.pdf

... [Paragraphs] 22 and 23 of the Respondent's Reply states that the Applicant's claims for compensation are without merit and that her request to extend her contract is baseless.

... The Respondent made no mention to the current status of fear of the Applicant as a threatened staff member by a member state; thing which is a result of her dedication working with pride and dignity as a long-serving staff member who has integrity and accountability. Yet, because of the Applicant's integrity and accountability, she has been abused and retaliated against in OIOS and might end up jobless and her life [is] in danger.

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... The departing Secretary-General ignored the Applicant's letters about this matter and took no action to protect the Applicant and other staff that might be in her situation.

[…]

... The Applicant was employed as the Assistant to the then Director of [ID/OIOS] [Mr. MS].

Question: Why should Swanson be so desperate to get rid of his predecessor's Personal Assistant?

http://www.un.org/en/oaj/files/undt/orders/ny-2015-185.pdf

... The Respondent is seeking to have the Tribunal declare that (1) taking away a major part of the Applicant['s] duties, (2) cancelling the Applicant's access to GoCase, (3) changing the Applicant's reporting line, (4) refusing to assign the Applicant under zero- incumbency for two months, and (5) providing a negative reference to OLA, are "not receivable" and should therefore not be considered by the Tribunal.

... As the Respondent will be aware from ST/SGB/2008/5 [Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority] para. 1.2, acts of harassment

https://foreignpolicy.com/2015/08/26/the-u-n-s-investigation-wars/

creating (or fostering) an intimidating, hostile or offensive work environment normally implies a series of incidents. All of the foregoing consists of examples indicative of an improper motive, which the Applicant has to prove under the *Jennings* and *Hepworth* precedents cited by the Respondent. The Applicant cannot meet the burden of proof if the Respondent is permitted to determine which specific incidents in that series of incidents may or may not be included in the Applicant's evidence.

... The Applicant is a victim of retaliation by OIOS–not under the narrow legal definition of [retaliation] under ST/SGB/2005/21 [Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits and investigations]—but as a consequence of her diligence in working for the former director [Mr. MS]. The Applicant will, when given the opportunity, lead evidence of how those staff who were considered critical of the Deputy Director [name redacted, Mr. MD] following the [Dispute Tribunal's Judgment] in *Nguyen-Kropp & Postica* 2013/UNDT 176 […] have all suffered some degree of vengeance following [Mr. MS's] premature departure and [Mr. MD's] return to a position of authority in ID[/OIOS].

... ST/AI/2003/4 [Administrative instruction amending administrative instruction ST/AI/401 – Personnel arrangements for the OIOS] states: ["To this end, the Secretary-General, in consultation with the USG/OIOS, shall establish anOIOS Review Body to advise the USG/OIOS on the appointment, promotion and termination of all staff members up to and including the D-2 level. The OIOS Review Body shall consist of a) A chairperson and three alternate chairpersons selected by the Secretary-General on the nomination of the USG for OIOS after consultation with the staff of the Office; b) A member and three alternate members elected by the staff of the Office; c) A member and three alternate members nominated by the USG/DM from his/her Department.

A representative of [t]he [OHRM] shall serve as an ex officio non-voting member of OIOS Review Body.

A representative of the Office of the Special Adviser on Gender Issues and Advancement of Women shall be invited to participate in all meetings of the OIOS Review Body in an advisory capacity].

... Nothing from the above has been applied in the case of the Applicant when the new Director of [ID/OIOS] [Mr. BS] decided to terminate her two years fixed-term contract. In fact, he abolished her post, decided not to renew her contract, changed her major responsibilities and cancelled her access to the database system, all

The UN relies on a very narrow definition of "retaliation" under ST/SGB/ 2005/21 - and thus overlooks other vindictive actions, such as retaliation against the Applicant here simply because she worked for former Investigations Director Michael Stefanovic...

Michael Dudley

Michael Dudley

http://www.un.org/en/oaj/files/undt/judgments/undt-2013-176.pdf

Ben Swanson

during her leaves and without letting her know; she only found out afterwards on her own.

[…]

Respondent's submissions

102. The Respondent's principal contentions are as follows (footnotes in the original omitted):

[…]

... The jurisdiction of the Dispute Tribunal is limited to the decision listed at (e) [see above in para. 1], the decision not to renew the Applicant's fixed-term appointment. The Applicant's challenges to additional decisions are not receivable *ratione temporis* and *ratione materiae*.

... The Applicant's challenge to decisions (a) to (c) [see above in para. 1] are time-barred because she did not meet the deadline under [art.] 8(1)(i)(a) of the Statute. [Article] 8(1)(i)(a) provides that an application is receivable if filed within 90 calendar days of the applicant's receipt of the response to his or her request for management evaluation of the contested decision.

... The Applicant filed a request for management evaluation of decisions (a) to (c) on 28 April 2016. By letter dated 2 June 2016, the [MEU] notified the Applicant that the Secretary-General decided to uphold the contested decisions. The deadline for filing an application before the Dispute Tribunal was 90 calendar days after this date, on 31 August 2016. The Applicant did not meet this deadline. Her challenge is, therefore, time-barred.

... The Tribunals have held that time limits should be strictly enforced (*Al Mulla* 2013-UNAT-394). The Applicant did not make a written request for an extension or waiver of the deadline, in accordance with [art.] 8(3). Therefore, the Dispute Tribunal may not waive the deadline on its own motion (*Cooke* 2012-UNAT-275).

... The Applicant's challenge to decision (f) [see above in para. 1] is premature under [s]taff [r]ule 11.4(a). The Applicant has not received the outcome of her request for management evaluation dated 14 October 2016, and the requisite response period had not passed. Staff [r]ule 11.4(a) provides that a staff member may only file an application following receipt of response from the [MEU], or upon expiry of the requisite 30 or 45 day period for a response. The time-period for filing an application with the Dispute Tribunal started on 13

Note that the Respondent's argument is based almost entirely on the LAW, and relies on the assertion that the Applicant's post had to be abolished because there was no budget to fund it.

The Respondent simply avoids addressing the Applicant's evidence about the prejudicial manner in which she was treated by OIOS.

November 2016. The Applicant's challenge in her Application dated 10 November 2016 is, therefore, not receivable.

... The Applicant's challenge to decisions (d) and (g) [see above in para. 1] are not receivable because she has not requested management evaluation of those decisions. The Applicant is required to do so under [s]taff [r]ule 11.2(a). The submission of a request for management evaluation is a mandatory first step that must be followed before an applicant may have recourse to the Dispute Tribunal (*Planas* 2010-UNAT-049; *Gehr* 2013-UNAT-293; *Wamalala* 2013-UNAT-300). In the absence of the Applicant's request for management evaluation of the decisions, the Dispute Tribunal does not have jurisdiction over the claims under [art.] 8(1)(c) of the Statute.

[…]

... The decision not to renew the Applicant's fixed-term appointment was lawful. The Applicant's fixed-term appointment was not renewed because there was insufficient funding to continue to finance her position.

... A fixed-term appointment does not carry any expectancy of renewal, irrespective of length of service and any prior renewal of the appointment ([s]taff [r]egulation 4.5(c); [s]taff [r]ule 4.13(c); *Ahmed* 2011-UNAT-153). Where the Organization gives a reason for the exercise of its discretion, it must be supported by the facts (*Islam* 2011-UNAT-115). The Secretary-General has broad discretion in assessing the operational needs of the Organization, and to organize and restructure the work of the Organization accordingly (*Gehr* 2012-UNAT-236; *Pacheco* UNDT/2012/008; *Rosenberg* UNDT/2011/045). In *Rosenberg*, the Dispute Tribunal stated as follows:

> It is not for the labour court or tribunal to dictate to an employer how the employer should run the business or undertaking. The court will not interfere with a genuine organisational restructuring even though it may have resulted in loss of employment for the [Applicant]. […]

... The Appeals Tribunal has held that any decision to not […] renew an appointment must be based on valid reasons supported by the facts and not vitiated by bias or improper motivation (*Hepworth* 2015-UNAT-503). The burden of proving that the non-renewal of an appointment was unlawful rests with the staff member (*Hepworth*; *Jennings* 2011-UNAT-184).

... The Applicant's appointment was not renewed because there was insufficient funding to continue to finance her position. The Appeals Tribunal has held that a lack of financial resources is a valid basis for not renewing or for terminating a staff member's

Note that the Respondent's argument is based almost entirely on the LAW, and relies on the assertion that the Applicant's post had to be abolished because there was no budget to fund it.

This means UN staff members have to prove malice on the part of their managers - but do so WITHOUT access to the evidence they need to prove that malice…

See para 164 below

appointment (*Liverakos* 2012-UNAT-206). The record of finances confirms that the Applicant's appointment was financed by extra-budgetary funding, which was expended as of 30 June 2016.

... The Applicant's position was funded through extra-budgetary funds in [the] […] [OIA account] since she joined OIOS on 15 May 2013 […]. The OIA account is funded through cost disbursement for OIOS services to [United Nations] Funds and Programmes. A total of three Administrative Assistant positions in the [ID/OIOS] were funded through this account.

See para 164 below

... The frequency of OIOS's cost disbursement work for [United Nations] Funds and Programmes had reduced over the past 5 years causing the OIA funds to deplete. The last deposit into the OIA account was made in December 2013. By November 2014, there were insufficient resources in the OIA account to continue to fund the three Administrative Assistant positions, including the Applicant's position […]. Accordingly, the Administrative Management Officer of the [ID/OIOS] advised the affected staff members, including the Applicant, of the lack of funds […].

Note that the Respondent's argument is based almost entirely on the LAW, and relies on the assertion that the Applicant's post had to be abolished because there was no budget to fund it.

... On 19 November 2015, the Executive Office informed the Applicant that OIOS would honour her appointment until 28 October 2016. The Executive Office clarified to the Applicant that any further extensions of her appointment would be subject to available funding, due to lack of funds in the OIA account […].

... The OIA funds were depleted as of 30 June 2016 […]. As an exceptional measure, and at the request of the [ID/OIOS], the Executive Office used temporary funding for the Applicant's position, until its expiration on 28 October 2016. This funding came from the Peacekeeping Support Account as General Temporary Assistance (GTA). As a rule, OIOS only uses [General Temporary Assistance ("GTA")] funding in exceptional and/or peak workload circumstances, for the replacement of staff on maternity or sick leave, or for time-limited projects. The GTA funding could, therefore, not be used to continue to fund the Applicant's position beyond the expiry of her appointment.

What is the explanation for Ms SD's employment? See page 25 above

... The Applicant's claim that she was not informed of the contested decision is factually incorrect. The Applicant has been on notice since November 2014 that the renewal of her appointment was contingent on available funding. The Organization formally informed her of the contested decision on 7 September 2016, seven weeks before the expiry of her contract […].

What is the explanation for not informing the staff member immediately on 30 June 2016? (see page 21 above)

... The Applicant's assertions that the contested decision was motivated by improper purposes have no merit. The Applicant has provided no evidence that the contested decision was made in

> retaliation for her prior complaints. The Ethics Office has found that the Applicant has not established a *prima facie* case of retaliation […]. The Applicant has not met her burden of proving that the decision was so motivated (*Jennings, Hepworth* 2011-UNAT-178).
>
> […]

"Retaliation" in the UN is narrowly defined in ST/SGB/2005/21 which is NOT the same as the dictionary definition.

See note on page 26 above

Considerations

Applicable law

103. Article 7 of the Dispute Tribunal's Rules of Procedure (time limits for filing applications) provides as follows in relevant parts:

> 1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:
>
> (a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;
>
> (b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or
>
> (c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.
>
> […]
>
> 5. In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. The request shall not exceed two pages in length.

104. Staff regulation 9.3 provides that:

> (a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:
>
> (i) If the necessities of service require abolition of the post or reduction of the staff;

(ii) If the services of the staff member prove unsatisfactory;

(iii) If the staff member is, for reasons of health, incapacitated for further service;

(iv) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;

(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;

(vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned;

(b) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a change or termination of a mandate, and in accordance with the standards of the Charter;

(c) If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations;

(d) The Secretary-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member whose appointment has been terminated, provided that the termination is not contested, a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

105. Staff rule 9.1 (definition of separation) provides as follows:

Any of the following shall constitute separation from service:

[…]

(iii) Expiration of appointment;

[…]

106. Staff rule 9.4 (expiration of appointments) provides that:

> A temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

107. Staff rules 9.6 and 9.7 state, in relevant parts, regarding termination, as follows:

> Rule 9.6 - Termination
>
> Definitions
>
> (a) A termination within the meaning of the Staff Regulations and the Staff Rules is a separation from service initiated by the Secretary-General.
>
> (b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement, or death shall not be regarded as a termination within the meaning of the Staff Rules.
>
> Reasons for termination
>
> (c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:
>
> (i) Abolition of posts or reduction of staff;
>
> […]
>
> Termination for abolition of posts and reduction of staff
>
> (e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, 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.

[…]

(f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty stations.

Rule 9.7 - Notice of termination

[…]

(b) A staff member whose fixed-term appointment is to be terminated shall be given not less than 30 calendar days' written notice of such termination or such written notice as may otherwise be stipulated in his or her letter of appointment.

[…]

108. The Convention on Termination of Employment No. 158 of 1982 provides, in relevant parts (emphasis omitted), as follows:

[…]

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.

2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a

country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms termination and termination of employment mean termination of employment at the initiative of the employer.

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

[…]

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article

shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

[…]

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term ["]the workers' representatives concerned["] means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

[…]

109. ST/AI/2010/3 (Staff selection system), sec. 11.1 (placement authority outside the normal process) provides as follows:

11.1 The Assistant Secretary-General for Human Resources Management shall have the authority to place in a suitable position the following staff members when in need of placement outside the normal process:

(a) Incumbents, other than staff members holding a temporary appointment, of positions reclassified upward for which an applicant other than the incumbent has been selected;

> (b) Staff, other than staff members holding a temporary appointment, affected by abolition of posts or funding cutbacks, in accordance with Staff Rule 9.6 (c)(i);
>
> (c) Staff members who return from secondment after more than two years when the parent department responsible concerned has made every effort to place them.
>
> After determining the availability of a suitable position in consultation with the head of department/office and the staff member concerned, the Assistant Secretary-General for Human Resources Management shall decide on the placement, in accordance with staff regulation 1.2 (c).

Receivability framework

110. As established by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own competence or jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* (*Pellet* 2010-UNAT-073, *O'Neill* 2011-UNAT-182, *Gehr* 2013-UNAT-313 and *Christensen* 2013-UNAT-335). This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Dispute Tribunal's Statute prevents it from considering cases that are not receivable.

111. The Dispute Tribunal's Statute and the Rules of Procedure clearly distinguish between the receivability requirements as follows:

> a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);
>
> b. The application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance

with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i)–(iv) of the Statute and arts. 7.1–7.3 of the Rules of Procedure.

112. It results that, in order to be considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae

113. The Applicant is a former staff member of ID/OIOS holding a two-year fixed-term appointment and therefore the application is receivable *ratione personae*.

Receivability ratione materiae

114. The Applicant is challenging the decisions to:

a. "Take away [her] Major Duties";

b. "Cancel [her] full access to the Case Management System Database (goCase)";

c. "Change [her] Reporting Line;

d. "Abolish [her] Post";

e. "Decide not to Renew [her] two-year fixed-term contract ending on 28 October 2016 […]";

f. "Refusing to Re-assign [her] under zero incumbency for Two Months to [the Counter Terrorism Executive Directorate, ("CTED")], where [she has] been selected for a Short-Term Position until 31 December 2016"; and

g. "Possibility of Providing a Negative Reference about [her] to [the Office of Legal Affairs, ("OLA")]], where [she has] been interviewed and considered for a Short-Term position of Six Months.

115. The Tribunal notes that it is uncontested that the Applicant filed a timely request for management evaluation of the decisions to: (a) Take away her major duties; (b) Cancel her full access to the Case Management System Database (goCase]; (c) Change her Reporting Line; (e) Decide not to renew her two-year fixed-term contract ending on 28 October 2016; (f) Refuse to re-assign her under zero incumbency for two months to CTED where she has been selected for a sort-term position until 31 December 2016. The Applicant filed this request for management evaluation on 14 October 2016, therefore the application in relation to these five contested decisions is receivable *ratione materiae*.

116. The Respondent contends that the application regarding the decisions to (d) abolish her post and (g) the possibility of providing a negative reference about her to OLA where she has been interviewed and considered for a short-term position of six months are not receivable *ratione materiae* because the Applicant has not requested management evaluation of these two decisions.

That does **not** mean that these things did not happen.

This should also raise concerns about the Tribunal's ability to hear - and rule on- further instances of improper conduct by the Organization after an Application is filed with the Tribunal.

117. The Tribunal notes that according to staff rule 9.1, any of the following shall constitute separation from service: resignation, abandonment of post, expiration of appointment, retirement, termination of appointment, death. Further, according to staff rule 9.6(a), a termination is a separation initiated by the Secretary-General and according to staff rule 9.6(b), an expiration of appointment should not be regarded as a termination within the meaning of the Staff Rules.

118. As results from the evidence, the Applicant's post was abolished due to lack of funds in June 2016 and it was not renewed for this reason, which constitutes a reason for termination according to staff rule 9.6(c)(i) "abolition of post[…] or reduction of staff". See para 165 below

119. Regarding the decision to abolish the Applicant's post, the Tribunal notes that, as results from the Respondent's reply, the Applicant, together with the other two staff members being assigned to the three Administrative Assistant posts/positions in OIOS at the same level and funded through extra budgetary funds from the OIA account, were advised in November 2014 that there were insufficient resources in this account to continue the funding of these positions. A year later, on 19 November 2015, the EO/OIOS informed the Applicant that OIOS would honor her appointment until 28 October 2016 and that any further extension of her appointment would be subject to available funds, due to the lack of funds in the OIA account.

120. The Organization informed the Applicant formally on 7 September 2016 of the decision to abolish her post, seven weeks before the expiration of her contract on 28 October 2016.

121. It results that the decision to abolish the Applicant's post due to a lack of funds was taken in June 2016 and notified to the Applicant on 7 September 2016. It was decided to be effectively implemented on 28 October 2016 when she was to be separated because of the termination of her contract. The date of the implementation of the abolition of the Applicant's post was postponed and finally coincided with the expiration date of her two-year fixed-term contract and determined the non-renewal of her contract. The abolition of a post and the expiration of a fixed- term contract, as the Tribunal will explain below, are different reasons for separation, and the abolition of post was initiated before the expiration of the fixed-term contract.

OIOS withheld the information for over two months.

122. The Tribunal considers that the Applicant was officially notified on 7 September 2016 of the decision to abolish her post starting from 28 October 2016, resulting in the non-renewal of her contract after this date. On 7 September 2016, the

Note that in para 18 above, it explains the Applicant only found out about her contract being cancelled because she applied for a Russian language course. If she had not done that, the delay in informing her would have been even longer!

Applicant filed a request for management evaluation of the decision, which was notified to her on that date not to renew her contract. The Tribunal considers that, in the request for management evaluation, she clearly referred to the contested decision as being the decision not to renew her contract which was determined and therefore was the consequence of the abolition of her post starting on 28 October 2016. This reason of non-renewal of the Applicant's contract was confirmed in the management evaluation response, which stated that "[…] the decision not to renew [the Applicant's] appointment was the natural consequence of the lack of identification of additional funding since November 2015" and concluded that the Applicant's contract "was not renewed due to lack of funds". The Tribunal considers that it results that the legal nature of the contested decision is a termination since the abolition of post was initiated before the expiration of the contract. The Tribunal further considers that the fact that the date of the implementation of the decision to abolish the Applicant's post was postponed and finally coincided with the expiration date of the Applicant's contract is not changing the legal nature of the termination decision.

See para 165 below; which suggests the Management Evaluation Unit relied on misleading evidence from OIOS and/or failed to conduct adequate independent enquiries

123. The Tribunal concludes that the 7 September 2016 request for management evaluation contesting the decision not to renew the Applicant's fixed-term contract also covered the reasoning of this decision, namely the abolition of her post, as results from above. In light of the above, the Tribunal concludes that the present application regarding the abolition of post is receivable *ratione materiae*.

124. Regarding the second decision that the Respondent does not consider receivable *ratione materiae*, the Tribunal notes that the Applicant filed on 2 March 2017 a management evaluation request of (g) "the possibility of providing a negative reference about [the Applicant] to OLA where [she has] been interviewed and considered for a short-term position of six months". The Tribunal notes that the evidence on the record does not show that OLA effectively requested ID/OIOS to provide a reference regarding the Applicant and that there was any such decision taken orally or in writing by ID/OIOS.

Question: How would the staff member have access to the documentary evidence of any communications between OLA and OIOS/ID if the information was not voluntarily disclosed by OIOS?

125. The possibility of issuance of such a decision/act cannot be viewed by the Tribunal as an administrative decision to be contested before it, in accordance with the consistent jurisprudence of the Appeals Tribunal and the Dispute Tribunal. The contested decision must be an administrative decision with actual legal effects on the Applicant's contractual rights and must not consist in the possibility of such effect. The Tribunal therefore considers that, regarding this matter, in the absence of the evidence that such a decision was taken, the application is not receivable *ratione materiae*. Moreover, the Tribunal notes that in the application, the Applicant indicated that she became aware of this contested decision/act "between 14 October and 8 November 2016". It results that the request for management evaluation was to be filed within 60 days from the notification, respectively latest on 8 January 2017. The Applicant filed the management evaluation request after the expiration of the deadline and therefore, in the absence of a timely filed request for management evaluation, the application before the Tribunal in relation to this decision is not receivable *ratione materiae*. Therefore the part of the application regarding the decision identified under "g) the possibility of providing a negative reference about [the Applicant] to OLA where [she has] been interviewed and considered for a short-term position of six months" is to be rejected as not receivable.

The rules of evidence in the UN make it very difficult for a staff member to obtain the evidence of something their managers wish to keep from them.

That does not mean it did not happen, and the Staff Member here was not permitted to call witnesses on the merits of the case.

Receivability ratione temporis.

126. The Tribunal notes that the Applicant filed the present application on 10 November 2016.

127. The Tribunal notes that, on 2 June 2016, the Applicant received the management evaluation response in relation to the contested decisions to (a) take away her major duties and (b) cancel her full access to the Case Management System Database (goCase), and, on 14 June 2016, regarding the contested decision to (c) change her reporting line. It results that the present application in relation to the above-mentioned three contested decisions was to be filed within 90 days from the

date the Applicant received the management evaluation decisions, respectively on 2 September 2016 and 14 September 2016.

128. In her submission filed on 11 January 2017 in response to the receivability issues raised by the Respondent, the Applicant requested a waiver from the Tribunal to the time limit to file an appeal against the three decisions (a)-(c) mentioned above due to the alleged hostile working environment in ID/OIOS, the alleged abuse of power exercised on her by OIOS Senior Management and the alleged retaliation against her—right after the departure of the former Director of ID/OIOS, Mr. MS—which allegedly caused her tremendous stress, damaged her moral and affected her health. She also mentioned that she was on sick leave.

129. The Tribunal notes that as results from art. 7 paras. 1 and 5 of the Dispute Tribunal's Rules of Procedures, a request for suspension, waiver or extension of the time limit to file an application before the Dispute Tribunal, is to be based on exceptional circumstances that, in the view of the applicant, justifies such a request. In accordance with the relevant and binding jurisprudence of the Appeals Tribunal (*Czaran* 2013-UNAT-373; *Williams* 2013-UNAT-376; *Bofill* 2014-UNAT-478; *Shehadeh* 2016-UNAT-689), a request for the Tribunal to waive the time limit to file an application must be (a) filed before the expiration of the relevant time limit and (b) be based on relevant circumstances that are beyond the applicant's control and which prevented her/him from exercising the right of appeal in a timely manner. The Tribunal considers that the circumstances invoked by the Applicant in her request to waive the time limit to file the application for the three above-mentioned decisions related to the alleged hostile working environment in ID/OIOS and the alleged abuse of power exercised on her by OIOS senior management which caused her tremendous stress cannot be viewed as exceptional, since she was able to file in a timely manner appeals in relation to other contested decisions at approximately the same period. Therefore, the Applicant's request to waive the time limit is to be rejected.

130. The Tribunal concludes that the application in relation to the two decisions of 2 June 2016 to (a) take away the Applicant's major duties and (b) cancel her full

access to the Case Management System Database (goCase); and to the decision of 14 June 2016 to (c) change her reporting line, was filed on 10 November 2016 therefore after the expiration of the mandatory time limit. The Tribunal concludes that this part of the application is not receivable *ratione temporis* and is to be rejected.

131. The Tribunal notes that, on 4 October 2016, the Applicant received the management evaluation response of the contested decisions (d) to abolish her post and (e) to not renew her two-year fixed-term contract ending on 28 October 2016 due to the abolition of her post determined by a lack of funds. The application was filed within 90 days from the date when the Applicant received the response and the application regarding these two decisions is therefore receivable *ratione temporis*.

132. The Respondent contends that the application is premature and therefore not receivable *ratione temporis* in relation to the decision (f) to refuse to re-assign the Applicant under zero incumbency for two months to the CTED, where she had been selected for a short-term position until 31 December 2016 because she had not received at the date of filing—10 November 2016—the outcome of her request for management evaluation dated 14 October 2016, and that the time period to file an application regarding this decision started on 13 November 2016.

133. The Tribunal notes that the present application regarding, *inter alia*, the contested decision (f) to refuse to re-assign the Applicant under zero incumbency for two months to the CTED, where she had been selected for a short-term position until 31 December 2016, was filed on 10 November 2016 without all annexes. The Applicant uploaded in the New York Registry's eFiling portal annexes 40 to 137 on Friday, 11 November 2016, at 2:31 p.m., and, later on the same day, at 5:31 p.m., she re-uploaded all the annexes (1 to 137). The application, together with all the annexes, was transmitted to the Respondent on Monday 14, November 2016, after the expiration of the deadline for the management evaluation response regarding the decision to be issued and the Tribunal considers that the application in relation to this decision is receivable *ratione temporis*.

The process of abolition and the non- renewal of the Applicant's two-year fixed-term contract

134. The Tribunal notes that the process of abolition of the Applicant's post due to a lack of funds started on 30 June 2016, when the decision to abolish her post was taken. The Applicant was verbally informed on 7 September 2016 that since the position she encumbered was to be abolished due to a lack of funds, her fixed-term contract was not to be renewed after its expiration on 28 October 2016. The Applicant's contract was extended pursuant art. 4.10 of ST/AI/2013/1 until 31 August 2017. The process was finalized and the decision to abolish her post and the resulting decision not to renew her two-year fixed-term contract due to lack of funds were effectively implemented on the date of her separation from the Organization on 1 September 2017.

Reasons for separation from service

135. Under the Staff Regulations and Rules, the Secretary-General may separate a staff member from service in accordance with the terms of his/her appointment or for any of the reasons specified in the staff regulations 9.1 to 9.3 and staff rules 9.1 to 9.6.

136. The reasons for separation from service can be organized into five categories:

Separation *ope legis*

137. There are certain types of separation from service that do not involve unilateral action from one party (the Organization or staff member) or the parties' consensus. These include:

a. Expiration of the contract in accordance with the terms of appointment (staff rule 9.1(iii) and 9.4);

b. Death of the staff member (staff rule 9.1(vi));

c. Retirement (staff regulation 9.2 and staff rules 9.1(iv) and 9.5).

Separation by the parties' agreement prior to the expiration of the contract (staff regulation 9.3(a)(vi) and staff rule 9.6(c)(vi))

138. According to the general principle of legal symmetry—*mutuus consensus, mutuus disensus*—a labor contract, which is a consensual contract, can be terminated by agreement between the parties.

139. All types of appointments (temporary, fixed-term or continuing/indefinite/permanent) can be terminated in the interest of the good administration of the Organization and in accordance with the standards of the United Nations Charter provided that this action is not contested by the staff member. A termination based on this reason can only take place if the action is not contested by the staff member. In other words, such an action can only be legally implemented by the Secretary-General if the staff member agrees with it. The staff member's agreement is a conditional requirement for the application of this rule and the Secretary-General's initiative to terminate the contract is in this case an offer to the staff member. If the staff member accepts freely and unequivocally, the offer is then an agreed termination and the parties can come to an agreement orally or in writing.

140. In *Jemiai* UNDT/2010/149, the Tribunal held that an agreed termination on terms negotiated free from any duress or misrepresentation is an essential feature of good employment relations and should be given effect and honored by the contracting parties.

Separation initiated by the staff member

141. There are two types of separation which may be initiated by a staff member:

a. Resignation (staff regulation 9.1 and staff rule 9.2); and

b. Abandonment of post (staff rule 9.3).

Separation initiated by the Secretary-General

142. There are five sub-categories in the types of separation which may be initiated by the Secretary-General:

a. Termination for reasons (grounds) not related to the staff member: abolition of posts or reduction of staff (regulation 9.3(a)(i) and staff rule 9.6(c)(i) and 9.6(e));

b. Termination for reasons (grounds) related to the staff member:

i. If the staff member is, for reasons of health, incapacitated for further service (staff regulation 9.3(a)(iii) and staff rule 9.6(c)(iii));

ii. If the services of the staff member prove unsatisfactory (staff regulation 9.3(a)(ii) and staff rule 9.6(c)(ii));

iii. If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light and, if they had been known at the time of his/her appointment, should, under the standards established in the United Nations Charter, have precluded his or her appointment (staff regulation 9.3(a)(v) and staff rule 9.6(c)(v));

iv. If the conduct of the staff member does not meet the highest standards of integrity required by art. 101, para. 3, of the United Nations Charter (staff regulation 9.3(a)(iv));

Who makes this decision in the case of unethical conduct by OIOS officials?

v. Disciplinary reasons in accordance with staff rule 10.2(a)(viii)–(ix) (rule 9.6(c)(iv). Rule 10.2(a) states that disciplinary measures can take only one or more of the following forms:

(i) Written censure;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

c. Termination in the interest of good administration of the Organization (staff regulation 9.3(b) and staff rule 9.6(d)):

i. In addition to the reasons given in the letter of appointment, staff regulation 9.3(a) provides that "in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff member if, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization to be interpreted principally as a change or termination of a mandate and in accordance with the standards of the Charter".

ii. This additional reason for termination is distinct from the ones presented above and can be understood as being:

1. Applicable only to a staff member who holds a continuing appointment;

2. A termination without the consent of the staff member;

3. A direct result of the Secretary-General's unilateral opinion that the termination is in the interest of the good administration of the Organization; the Secretary-General's authority to determine the interest of good administration of the Organization and his discretionary power to terminate a staff member's contract are provided for by the Staff Regulations and Staff Rules.

4. This termination is to be interpreted principally as a change or termination of a mandate.

5. The written notice is three months.

143. Staff regulation 9.3(b) and staff rule 9.6(d) are applicable when the Secretary-General's action is taken without the consent of the staff member in cases other than the ones mentioned expressly in staff regulation 9.3(a) and staff rule 9.6(c), namely when the General Assembly decides not to extend the mandate of a mission or there are no funds available. According to the text, this reason itself can be interpreted in two ways, either as a change or a termination of the mandate. No ambiguity about this reason for termination is possible since the plain reading of the rule is clear in this sense and this reason cannot be assimilated or compared with any other because it is related directly to the extension of the United Nations mandate and/or the availability of funds.

Was staff rule 9.6(e)(iii) respected in the Applicant's case?

144. The Tribunal notes that in the present case, the Applicant's fixed-term contract was terminated following the abolishment of her post due to a lack of funds,

See para 165 below

and it will further analyze if the termination decision was issued in accordance with the mandatory legal provisions. The Tribunal also notes that staff rules 13.4, 9.6(c)(i) and 9.6(e)(iii) are applicable to fixed-term appointments.

145. Staff rule 9.6 (e)-(f) states as follows:

> **Termination for abolition of posts and reduction of staff**
>
> (e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, 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.
>
> When the suitable posts available are subject to the principle of geographical distribution, due regard shall also be given to nationality in the case of staff members with less than five years of service and in the case of staff members who have changed their nationality within the preceding five years.
>
> (f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty stations.
>
> […]

146. Pursuant to ST/AI/2010/3, sec. 11.1, and staff rule 9.6(e)(iii), subject to availability of suitable posts, the Applicant had the right ("shall") to be retained in service. The Organization, including OIOS, had the correlative obligation to retain her in service in any of the available suitable posts in which her services could have been effectively utilized with due regard to her relative competence, integrity and length in service.

What is the legitimate explanation for why OIOS so desperate to separate this staff member and obstruct her chances of finding an alternative position elsewhere in the Organization?

147. The Tribunal notes that the Applicant was a General Service staff member, namely an administrative assistant at the G-4 level with a two-year fixed-term contract at the date of the abolition of her post, and according to her uncontested statement prior to the implementation of the contested decision, she was also placed on a roster of "Administrative Assistant" at the G-5 level.

This would indicate that this was a staff member with no performance issues; which begs the question of why OIOS should be so hostile towards her.

148. The Tribunal underlines that staff rule 9.6 (e)(iii) does not include any express reference for the staff member(s) to be retained in the order of preference exclusively to available suitable post(s) at the same level as the one occupied at the date of abolition of the post(s), and therefore considers that the text is to be interpreted as referring to all the available suitable posts, at the same level and/or at an inferior level, which must be taken into consideration for the legal mandatory requirement to be respected.

149. Furthermore, the Tribunal considers that according to staff rule 9.6(f), this requirement covers the suitable posts within the parent organization exclusively at their duty station for staff member(s) in the General Service and related categories. The Tribunal further considers that a staff member who is to be retained in the order of preference established in staff rule 9.6(e) is not required, according to this provision, to be fully competent for the alternative post where s/he is to be retained, but to have a relative competence for the new suitable post, as clearly specified in staff rule 9.6. A staff member holding a fixed-term appointment is to be presumed that s/he has at least a relative competence for any similar or inferior positions available in the job family(s) and /or job network(s) to which the one(s) occupied prior to the abolition of her/his post belonged (if applicable) competence which can be later completed during a reasonable period through training/retraining courses, if necessary.

150. Staff members holding fixed-term appointments have the right to be retained in any suitable positions vacant at the date of abolition or reduction of staff, or occupied at the date of abolition or reduction of staff by staff members with temporary appointments.

151. The Tribunal underlines that, in order for the Administration to fully respect its obligation pursuant to staff rule 9.6(e), it firstly has the duty to timely provide staff member(s) affected by abolition of post(s) or reduction of staff with a list of: (a) all posts, at the staff member's duty station, occupied at the date of abolition by staff members with a lower level of protection than the one of the staff member(s) affected, if any; and (b) all the vacant suitable positions at the same level or at a lower level, if any. Secondly, the Administration has to provide a formal offer, together with the list or as soon as possible, after the notification of the list, in order for the staff member(s) to be able to evaluate all the options and to timely express his/her interest accordingly and after consultations between the parties and the staff union, if necessary (in accordance with the mandatory provisions of art. 13.1 of the International Labour Organization ("ILO") Convention on Termination of Employment No. 158 of 1982).

In this case, OIOS not only failed to provide the staff member with information about alternative vacancies, but even delayed informing her that they had abolished her post.

152. Further, the Tribunal underlines that staff member(s) affected by abolition of post or reduction of staff have the right to be considered and retained for any of the available suitable positions as detailed above on a preferred or non-competitive basis in the mandatory order established by staff rule 9.6(e). Therefore, the staff member(s) is/are entitled to be retained without having to go through a competitive selection process for the available suitable post(s), including without applying for vacant job opening(s) since such a step represents the beginning of any competitive selection process based on the staff member(s) relative competence, integrity, length in service and, where required, on his/her nationality and gender. This aspect is reflected in ST/AI/2010/3, sec. 11.1.

153. The Tribunal considers that a competitive review process may be justified only when two or more identical posts are to be restructured and because there are no sufficient similar available suitable posts for all staff members at the same level affected by the abolition and at least two of them insist on being retained on the same post. In this case, it may be necessary to give due regard to the staff members' relative competencies for new posts, integrity and length in service, and therefore to

In this case, there appears to be no explanation for the disparate treatment of the staff member identified as 'SD' (page 25 above) compared to the applicant.

compare them in order to decide who is to be retained in the highest position(s) available.

154. Moreover, the Tribunal considers that the provisions of staff rule 9.6(e) refers to all staff members, internationally or locally recruited, since the text makes no specific reference to any of these categories.

155. In this regard, the Tribunal underlines the general principle "*ubi lex non distinguit, nec nos distinguere debemus*", where the law does not distinguish, the interpreter of the law is not allowed to distinguish.

156. The Tribunal also underlines, as stated in *Villamoran* UNDT/2011/126, (confirmed at 2011-UNAT-160) and in *Korotina* UNDT/2012/178, that at the top of the hierarchy of the Organization's internal legislation is the United Nations Charter, followed by resolutions adopted by the United Nations General Assembly, Staff Regulations, Staff Rules, Secretary-General's bulletins, and administrative instructions (see *Hastings* UNDT/2009/030, affirmed in *Hastings* 2011-UNAT-109; *Amar* UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

157. The Tribunal further considers that the decision to separate the Applicant as a result of the abolition of her post at the G-4 level due to a lack of funds, and the consequent decision not to renew her two-year fixed-term contract for another two years (28 October 2016 to 28 October 2018) is unlawful for the following considerations:

The Tribunal's finding on the alleged "lack of funds" is found at para 165 below

158. The main reason for the abolition of post and for the non-renewal of the Applicant's contract was a lack of funds.

159. In this regard, the Tribunal notes that there is no specific measure of reorganization proposed by OIOS and/or decided by the General Assembly, such as

the abolition of Administrative Assistants posts due to lack of funds prior to the abolition of the Applicant's post.

160. The Respondent stated in his submissions, including in the closing submissions, that the Applicant's post was funded from the OIA account, which is an extra-budgetary source of funding, also known as the Reimbursement Account for the OIOS. The OIA account was established on 1 January 2001 to receive cost reimbursement for OIOS services provided to United Nations Funds and Programmes. ID/OIOS reduced the amount of cost reimbursement type work it performed in 2010-2011 and the account began to deplete. The last deposit into the OIA account was made in December 2013, and, by November 2014, there were insufficient resources in the OIA account to continue to fund the three Administrative Assistant posts. As of 30 June 2016, the balance was USD279.32 and, as of 31 December 2016, the balance was minus USD690. However, as results from the correspondence of February 2015, there were clear activities within the OIA account, different amounts of money being deposited and payments being made.

The reason why OIOS should be carrying out less work for the Funds & Programs from 2010-2011 onwards is not clear.

These two statements appear to be contradictory

161. In the reply, the Respondent indicated that between 1 July 2016 to October 2016, "Senior Management in OIOS approved the temporary use of General Temporary Assistance (GTA) funds to create a position for the sole purpose of honouring the remaining length of the Applicant's appointment, which was valid through to the end of October 2016".

162. The Tribunal is of the view that the information related to the OIA account as being the source of funding for the Applicant's post until 2016 is contradicted by the fact that since November 2014, OIOS used funds from the OIOS Trust Fund for all the existing posts in 2014, including the Applicant's, and that these funds were to cover the existing posts until 2018. Also, these funds were considered to be sufficient not only for the existing posts until 2018 but also for new posts. The Tribunal also notes that OIOS created a new G-level post in 2016 before OIOS decided to abolish the Applicant's post for lack of funds. Further, it is unclear if after November 2014,

This is material; it indicates that:
1) OIOS presented a misleading argument to the Tribunal and
2) Counsel for the Respondent knowing relied on that fallacious argument

these funds were transferred into the OIOS regular budget or remained in the OIOS Trust Fund.

This is prima facie evidence of both OIOS and Counsel for the Respondent withholding information from the Tribunal.

This is indicative of Contempt of the Tribunal.

163. The Respondent provided no information on the funding situation of the OIA account after 30 December 2016 despite an express request the Tribunal made in Order No. 33 (NY/2017); neither in the 20 March 2017 Respondent's response to Order No. 33, nor in any of the subsequent submissions provided during the proceedings, including the closing submissions. The Tribunal considers that there is no clear evidence that, on September 2017, when the Applicant was effectively separated from the Organization, the situation of the OIA account was the same as in December 2016.

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164. The Tribunal notes that, as results from an email sent on 23 July 2014, the EO/OIOS informed Mr. BS that OIOS received funds for four years in 2014, to be placed in the OIOS Trust Fund for Enhancing Professional Capacity ("the Trust Fund") to cover the existing posts and that it was confirmed with the Executive Office that "the existing staff members [would] get two-year appointments and the new staff [would] get one-year appointments". As a result, the Applicant's contract was renewed for two years, until October 2016, and it was expected to be renewed for another two years, since the funding of the existing staff members/posts, including the Applicant's, was secured for four years, until 2018. According to the established jurisprudence, a fixed-term contract does not carry an expectancy of renewal, except in situations where the Administration made an express promise that gave rise to a legitimate expectation of renewal (see Hepworth UNAT-2015-503). The Tribunal considers that based on this written confirmation that her post, which existed in October 2016, would be funded until October 2018, the Applicant had a legitimate expectancy for her two-year fixed-term contract to be renewed after 28 October 2016.

In short; OIOS argued that this staff member was originally paid out of Account 'A', but they then paid her salary out of Account 'B' for two years…. and tried to get rid of her by abolishing her post because Account 'A" was empty…..

Finding of FACT

165. It results that since the Applicant post was no longer funded since November 2014 from the OIA account, the lack of funds in OIA was not relevant and could not constitute a reason for the abolition of the Applicant's post in September 2016.

This indicates that OIOS (with the complicity of OHRM/ ALS as Counsel for the Applicant) misled the Tribunal.

Finding of FACT

166. Moreover, on 21 February 2017, four months after the abolition of the Applicant's post, but before her effective separation in September 2017, OIOS published a vacancy announcement for a temporary position of "Team Assistant" at the G-4 level which was limited to 364 days, with responsibilities and competencies similar to the ones performed by the Applicant. It results that OIOS had the funds to employ a new temporary staff member in a different section of OIOS at the G level which had similar functions as the Applicant's. As results from a report of the Independent Audit Advisory Committee dated 24 February 2016 on the Proposed budget of the OIOS under the support account for peacekeeping operations for the period 1 July 2016 to 30 June 2017. The OIOS budget for the period 1 July 2016 to 30 June 2017 was approved and the Committee agreed with the Controller's proposal not to endorse the OIOS request to create a new post at the G level during this period.

Duplicity by OIOS

Finding of FACT

167. It appears that OIOS had sufficient additional available funds for up to one year for a temporary post in a different unit with similar functions as the post abolished in October 2016 and it appears that its funding was not approved until the next budget period, on 30 June 2017. These funds, if available in October 2016, could have been used to continue the funding of the Applicant's post, in case no other funds were available, or the Applicant could have been reassigned to this new post.

Duplicity by OIOS

168. As a result of the abolition of the Applicant's post, pursuant to staff rule 9.6 (c)(i) and staff rule 9.6(e)(iii), the Applicant was to be offered, without being subject to a selection process, any available post, including new posts either on a one-year or two-year fixed-term or a temporary contract, before selecting and appointing another staff member, based on the priority principle which was not respected by the Organization.

Question: What is the explanation for OIOS being so opposed to assisting the Applicant finding an alternative position?

169. The Applicant acted diligently and in good faith and immediately after being informed in September 2016 that her post was to be abolished and that her contract would not be renewed. Between September 2016 and September 2017, including during the period when she was on certified sick leave, the Applicant applied to several temporary job openings and she was competitively selected for some of them

Is this further evidence that the "Investigation War" in the UN is still ongoing?

https://foreignpolicy.com/2015/08/26/the-u-n-s-investigation-wars/

(with CTED, OPPBA and OCSS). However, even when after she accepted the offer in some cases, the Applicant was not able to continue working for the Organization before her separation, because OIOS considered that she could not be released on another post. After her separation, the Applicant worked for one month between 12 September 2017 and 7 October 2017.

Note that there was also uncontested evidence of OIOS giving her a bad reference.

Finding of FACT

170. As the Applicant stated during the hearing, she was rostered for the G-5 position before being separated but the Organization did not offer any of the available suitable posts to the Applicant, even though, as would result from the below, there is an extensive pool of vacant suitable posts against which the Applicant could have been retained, and on any of the available posts as identified by the Respondent.

Finding of FACT

171. The complete list of available suitable post(s) was not timely provided to the Applicant and there was no formal offer issued by the Administration before or after the termination of her appointment in order to retain the Applicant by assigning her to one of the existing available suitable positions in the General Service category at the G-4 and/or G-5 level, either vacant or occupied by staff members under temporary contracts (at the same level or lower) in OIOS or in other departments, according to the mandatory order of preference established by staff rule 9.6(e)(iii) and with the mandatory provisions of section 11.1(b) of ST/AI/2010/3.

172. The Tribunal notes the following recent relevant jurisprudence of the Appeals Tribunal and the Dispute Tribunal concerning the abolition of a post of a staff member holding a contract under staff rule 9.6(e)(iii). In *El-Kholy* UNDT/2016/102 (concerning a former staff member of UNDP), the Dispute Tribunal stated as follows (footnotes omitted):

> 58. The question for decision is whether the Respondent complied with the obligation of good faith in carrying out his responsibilities under staff rules 9.6(e), 9.6(g) and 13.1(d).
>
> 59. A review of the case law indicates that there has to date been a very limited opportunity for UNAT to rule on the proper interpretation to be given to the obligation upon the Administration to use good faith efforts to find displaced staff members alternative employment

particularly, those on permanent appointments, under current staff rules 9.6(e) and 13.1(d) in case of abolition of their post. In *Dumornay* UNDT/2010/004, this Tribunal found that the Applicant was shortlisted and considered for twenty-nine posts, including a number of posts for which she did not even apply. Her permanent appointment was ultimately terminated, since, despite these efforts by the Administration, the Applicant had not been found suitable for any of those posts. The Tribunal found in that case that the Organization had met its obligation of good faith under former staff rule 109.1(c)(i)1. The Appeals Tribunal ruled that reasonable efforts were made by the Administration to find suitable alternative employment given the factual findings (*Dumornay* 2010-UNAT-097).

60. In the absence of specific authority from the United Nations Appeals Tribunal regarding the proper meaning and effect of staff rules 9.6(e) and 13.1(d), the Tribunal considers that the jurisprudence of the former former United Nations Administrative Tribunal ("UNAdT") and of the International Labour Organization Administrative Tribunal ("ILOAT") in relation to the same issue may be regarded as persuasive.

61. The UNAdT held that the obligation of the Administration under former staff rule 109.1(c) meant that "once a bona fide decision to abolish a post has been made and communicated to a staff member, the Administration is bound—again, in good faith and in a non-discriminatory, transparent manner—to demonstrate that all reasonable efforts had been made to consider the staff member concerned for available and suitable posts" (*Hussain* Judgment No. 1409 (2008)). The former UNAdT further noted in *Fagan* Judgment No. 679 (1994) that the application of former staff rule 109.1(c) was vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1(c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation.

62. According to the former UNAdT, since "the circumstances under which the staff member is being separated are not of his making at all" "it is for the Administration to prove that the incumbent was afforded that consideration", a duty that is "not discharged by a simple ipse dixit but by showing what posts existed; that the staff member was considered against them and found unsuitable and why that was

so (*Hussain* Judgment No. 1409 (2008); *Soares* Judgment No. 910 (1998); *Carson* Judgment No. 85 (1962)).

63. The ILOAT stated in Judgment No. 3437 (2015), para. 6, that: The Tribunal's case law has consistently upheld the principle that an international organization may not terminate the appointment of a staff member whose post has been abolished, at least if he or she holds an appointment of indeterminate duration, without first taking suitable steps to find him or her alternative employment (see, for example, Judgment 269, under 2, 1745, under 7, 2207, under 9, or 3238, under 10). As a result, when an organisation has to abolish a post held by a staff member who, like the complainant in the instant case, holds a contract for an indefinite period of time, it has a duty to do all that it can to reassign that person as a matter of priority to another post matching his or her abilities and grade. Furthermore, if the attempt to find such a post proves fruitless, it is up to the organisation, if the staff member concerned agrees, to try to place him or her in duties at a lower grade and to widen its search accordingly (see Judgments 1782, under 11, or 2830, under 9).

64. In Judgment No. 1782 (1998), the ILOAT applied staff rule 110.02(a)2 of the United Nations Industrial Development Organization, which is similar to staff rule 9.6(e) and, in para. 11, ruled as follows: What [staff rule 110.02(a)] entitles staff members with permanent appointments to is preference to "suitable posts in which their services can be effectively utilized", and that means posts not just at the same grade but even at a lower one. In a case in which a similar provision was material (Judgment 346: in re Savioli) the Tribunal held that if a staff member was willing to accept a post at a lower grade the organisation must look for posts at that grade as well.

65. In relation to the Respondent's contention that vacancy lists were published and the Applicant did not apply, the ILOAT, in Judgment No. 3238 (2013), in considering whether the mere advertising of posts inviting individuals to apply.

[…]

67. The fact that the Staff Rules provide that in assessing the suitability of staff members for available positions, due consideration has to be given to the relative competence, integrity and length of service, does not imply that the Organization can make such assessment only if and when a staff member has applied for a particular vacancy. Nothing in staff rules 9.6(e) and 13.1(d) indicates that the suitability for available posts of a staff member affected by the abolition can only be assessed if that staff member had applied for the post.

68. On the contrary, in case of abolition of post or reduction of staff, the Organization may be expected to review all possibly suitable available posts which are vacant or likely to be vacant in the near future. Such posts can be filled by way of lateral move/assignment, under the Secretary-General's prerogative to assign staff members unilaterally to a position commensurate with their qualifications, under staff regulation 1.2(c). It then has to assess if staff members affected by the restructuring exercise can be retained against such posts, taking into account relative competence, integrity, length of service, and the contractual status of the staff member affected. It is clear from the formulation of staff rules 9.6(e) and 13.1(d) that priority consideration must be accorded to staff members holding permanent appointments. Preferential treatment has to be given to the rights of staff members who are at risk of being separated by reason of a structural reorganisation. If no displaced or potentially displaced staff member is deemed suitable the Organisation may then widen the pool of candidates and consider others including external candidates, but at all material times priority must be given to displaced staff on permanent appointments. The onus is on the Administration to carry out this sequential exercise prior to opening the vacancy to others whether by an advertisement or otherwise. Accordingly, an assertion that the Applicant's suitability could not be considered for any vacant positions if she had not applied for them is an unjustifiable gloss on the plain words of staff rules 9.6(e) and 13.1(d) and imposes a requirement that a displaced staff member has to apply for a particular post in order to be considered. If that was the intention, the staff rule would have made that an explicit requirement. But most importantly, such a line of argument overlooks the underlying policy, in relation to structural reorganisation, of according preferential consideration to existing staff who are at risk of separation prior to considering others and giving priority to those holding permanent contracts.

[…]

75. The Tribunal notes that the purpose of staff rules 9.6(e) and 13.1(d) and the Administration's obligation under these provisions to secure employment, cannot be undermined by norms of a lower level, such as the UNDP Recruitment Policy. Indeed, the Staff Rules and Regulations do not provide for such a restriction, and the Secretary-General's prerogative, under staff regulation 1.2(c), to assign staff members does not exclude lateral moves outside a particular unit, or simply because a staff member does not, at a certain point in time, belong to a particular "business unit". To find otherwise would be arbitrary if staff members, like the Applicant, were precluded from a lateral move by the mere fact that they were between-assignment, hence, at a certain point in time, did not belong

> to a particular "business unit". As noted above, the limitation under staff rule 9.6(f) only applies to staff members in the General Service category, but not to those of the Professional category, as the Applicant. The duty vis-à-vis the Applicant, under staff rules 9.6(e), (g) and 13.1(d) extends to all available suitable positions against which the staff member's service can be retained, throughout UNDP as a whole, without any limitation to a particular department or duty station.

173. These determinations were upheld by the Appeals Tribunal in *El-Kholy* 2017-UNAT-730 in which it held that:

> 31. It is for the Administration to prove that the staff member holding a permanent appointment was afforded due and fair consideration as required by Staff Rules 9.6(e), 9.6(g) and 13.1(d). Moreover, the use of the words "shall be retained" in Staff Rule 9.6(e) creates an obligation on the Administration, which has not discharged its burden in this case in light of the existing suitable posts at the time of the events. In other words, the Job Fairs alone do not fulfill the Administration's obligation under the Staff Rules and does not satisfy Ms. El-Kholy's individual entitlement to be duly and fairly considered for any suitable and vacant post within UNDP, around the time that her temporary assignment was due to end.
>
> 32. To that effect, and in response to an order during the proceedings before the UNDT, the Administration revealed that several posts at the P-5 and D-1 level were filled outside the scope of the Job Fairs by way of a lateral move or placement of an unassigned staff member holding a permanent appointment, which means that those staff members were considered without having applied for them. Why did Ms. El-Kholy not have the same treatment and was instead supposed to apply for those posts whose existence she could only have known about from public announcements?
>
> 33. Furthermore, the new post of Director of the OGC itself, previously occupied by Ms. El-Kholy, was subject to external recruitment after the announcement of November 2014. It is true that Ms. El-Kholy did not apply for it. Nevertheless, to consider that Ms. El-Kholy was supposed to apply for suitable and advertised posts, concurring with the same conditions as external candidates, would render moot her right of preference deriving from Staff Rules 9.6(e), 9.6(g) and 13.1(d). Therefore, more important than the great similarity of the job descriptions between the previous and the new post, as mentioned by the UNDT, is the fact that the Administration failed in its obligation to consider Ms. El Kholy's suitability for the new post;

> particularly so, when we consider that her performance evaluations during her 16 years of career exceeded expectations and were considered outstanding.
>
> 34. In view of the foregoing, there is no doubt that Ms. El-Kholy was informed that she was affected by the structural change and about the risk of separation from service due to the abolition of her post. However, the real question is whether she was offered suitable available posts with UNDP during the search period, in light of the preference established by Staff Rules 9.6(e), 9.6(g) and 13.1(d). As previously mentioned, the answer is "no". Not all reasonable and bona fide efforts had been made to consider Ms. El-Kholy for available and suitable posts, as an alternative to the abolished one, with a view to avoiding to the greatest extent possible the separation of the staff member holding a permanent appointment.

174. Further, in *Fasanella* 2017-UNAT-765, the Appeals Tribunal reaffirmed *El-Kholy* and stated as follows:

> 31. The Appeals Tribunal agrees that Mr. Fasanella's termination was unlawful, albeit without fully agreeing with the reasoning of the Dispute Tribunal. Initially, the Administration has the burden of showing that it complied with the Staff Rules in terminating Mr. Fasanella. As the UNDT found, the Administration did not meet its burden. Mr. Fasanella – and any permanent staff member facing termination due to abolition of his or her post – must show an interest in a new position by timely and completely applying for the position; otherwise, the Administration would be engaged in a fruitless exercise, attempting to pair a permanent staff member with a position that would not be accepted. Mr. Fasanella did apply for two positions, and the Administration does not claim that he was not qualified for these posts.
>
> 32. Once the application process is completed, however, the Appeals Tribunal is of the view that the Administration is required by Staff Rule 13.1(d) to consider the permanent staff member on a preferred or non-competitive basis for the position, in an effort to retain the permanent staff member. This requires 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. Only if there is no permanent staff member who is suitable may the Administration then consider the other, non-permanent staff members who applied for the post. As this was not done for Mr. Fasanella, the UNDT properly concluded that the decision to terminate Mr. Fasanella was unlawful.

[…]

175. The Tribunal considers that the Administration's obligation for staff members holding a fixed-term appointment, as indicated in staff rule 9.6(e) and staff rule 13.4, exists and is applicable to all staff members affected by the abolition of posts in the mandatory order of preference set out in secs. (i), (ii) and (iii) of staff rule 9.6(e), including to the Applicant's two-year fixed-term appointment.

Consider the long-standing 'hostile working environment' in OIOS/ID, and the Applicant's (uncontested) evidence that she was targeted because she had worked for former Investigations Director Mick Stefanovic.

176. The Tribunal notes that the Applicant stated that, in April 2017, before her effective separation on 1 September 2017, she was rostered at the G-5 level, and this statement was not contested by the Respondent. In this situation, the Administration had the obligation after this date to retain the Applicant and to place her on any available suitable posts at the G-5 or G-4 level or at a lower level available in New York.

The Applicant's evidence indicates that nothing has changed in OIOS /ID since the publication of the UNDT judgement in Nguyen-Kropp & Postica (UNDT/ 2-13/176) (Page 26 above)

177. Consequently, the Tribunal concludes that the Administration did not comply with its obligation pursuant to staff rule 9.6(e)(iii) and 9.6(f) and sec. 11.1(b) of ST/AI/2010/3 to retain the Applicant and her correlative right to be retained in any available suitable post at her level (G-4) or at a lower level in in New York.

178. In conclusion, in light of the above considerations, the abolition of the Applicant's post was unlawful, and the consequent decision not to renew her fixed-term appointment is also unlawful since it was based on an unlawful abolition of her post, and the Applicant had the legitimate expectation of renewal of her contract that was created by the written confirmation of 23 July 2014 that the funding for all the existing posts was covered for four years—until 2018. Accordingly, the decision to abolish the Applicant's post and the decision not to renew her two-year fixed-term contract due to a lack of funds are to be rescinded.

179. Regarding the decision consisting in the refusal to re-assign the Applicant under zero incumbency for two months to the CTED, where she had been selected for a short-term position until 31 December 2016, the Tribunal considers that this decision, which was taken without the mandatory provisions of staff rule 9.6(e)(iii)

and 9.6(f) and sec. 11.1(b) of ST/AI/2010/3 being observed and applied, in light of the above considerations, is also unlawful because it breached the Applicant's right to be reassigned on a non-competitive basis to any available suitable vacant post, under a fixed-term or temporary appointment, or to any other post for which she was competitively selected and that she would preferably accept.

Further evidence of a 'hostile working environment'?

Relief

The Applicant's requests for relief

180. The Applicant requests the following reliefs:

> … […] that the Tribunal rescind the decision not to extend her two years fixed-term contract.
>
> ... […] that the Tribunal order OIOS to extend her two years fixed-term contract for an additional period of two years as per the [United Nations] Rules and Regulations.
>
> ... […] that the Tribunal direct that she be reassigned to another department in order to avoid further harm and retaliation by [Mr. BS] and other OIOS officials.
>
> ... […] financial compensation for the violations of her due process rights and further compensation for the moral damage caused by misconduct of managers in OIOS, DFS and DPKO.

Investigations Director Ben Swanson

Rescission and alternative compensation pursuant to art. 10.5(a) of the Statute of the Dispute Tribunal

181. As results from the above considerations, the contested decisions: to abolish the Applicant's post due to lack of funds and the consequent decision not to renew her two-year fixed-term contract due to lack of funds are unlawful and pursuant to art. 10.5(a) of the Statute Dispute of the Tribunal, are to be rescinded. The Tribunal considers that the rescission of unlawful decisions has the *ope legis* effect of the parties being retroactively placed in the same contractual relationship that existed before the issuance of the rescinded decisions.

182. It results that, when a separation, including a termination, decision is rescinded, the separated staff member is, in principle, to be retroactively reinstated in her/his former position and s/he is to receive his/her salary and other entitlements from the date s/he was notified of the upcoming separation until her/his effective date of separation, as determined by the Dispute Tribunal. However, when a party or both parties expressly indicate that, due to the particular circumstances of a case, the effective reinstatement no longer constitutes a possible option, the remedy can consist solely in compensation.

183. The Tribunal notes that the Applicant applied to different vacant positions within the United Nations before and after her separation, therefore expressing her interest to continue working for the Organization.

184. After the parties filed their closing submissions in the present case, on 12 March 2018, the Applicant filed a motion informing the Tribunal that she had applied to a temporary position in the OCT in New York for which she was selected and that she had accepted an offer of appointment which was supposed to start on 1 March 2018. The Applicant submitted in her motion that she had experienced delays in starting her contract due to the fact that "[…] because she holds a work permit and not a green card […]". Therefore, the Tribunal considers that this important aspect of the Applicant's career is to be taken into consideration in relation to the execution of the present Judgment and it expresses its trust that the Organization, including OHRM, will act for an immediate implementation of the Applicant's latest temporary contract, if not yet implemented.

185. The Tribunal considers that, *mutadis mutandi*, in the present case, as an *ope legis* effect of the rescission of the decisions to abolish the Applicant's post and not to renew her two-year fixed-term contract due to lack of funds, in the light of the particular circumstances of the present case, the Applicant's two years fixed-term contract with ID/OIOS is to be considered extended with retroactive effect from 1 September 2017 until 28 October 2018 and her service within UN Secretariat is to be considered continuous. The Applicant is to be considered reassigned to EOSG from

12 September to 8 October 2017. Further she is to be considered reassigned from OIOS to OCT, from the effective date of her current appointment with OCT until the expiration of this contract.

186. The Tribunal underlines that, if on the date of issuance of the present judgment , the Applicant is employed on a temporary appointment with OCT or with another department in New York which expires before 28 October 2018 since the requested to be assigned to a different department, pursuant to the mandatory provisions of sec. 11.1(b) of ST/AI/2010/3, the ASG/OHRM is to determine before the expiration of her contract, together with the Applicant and the Head(s) of the Office, where suitable available post(s) in New York were identified, her future placement at least until 28 October 2018. The Respondent is to retain the Applicant with retroactive effect from 1 September 2016 in any current suitable available post(s): occupied by a temporary staff member, or vacant either at the General Service level (at the G-5, G-4 level or lower) in New York (her duty station), as identified in the job family(s) and/or job network(s), to which the Applicant belonged prior to the abolition of her post, if applicable, except in OIOS, as requested by the Applicant.

187. However, in case the issuance of the decision to retroactively extend the Applicant's contract with ID/OIOS from 1 September 2017 until 28 October 2018 together with the specific performance mentioned above is no longer possible at the date of the issuance of the present Judgment due to unforeseen circumstances, which are to be fully disclosed to the Applicant, pursuant to art. 10.5(a) of the Dispute Tribunal's Statute, as an alternative to the rescission of the decisions and to the specific performance ordered by the Tribunal to retroactively extend her contract from 28 October 2016 until 28 October 2018, the Respondent may elect to pay a compensation to the Applicant consisting in USD10,000.

Given the evidence of bad faith on the part of OIOS, the question should be one of ***accountability.***

Compensation for the harm caused to the Applicant by the rescinded decisions

188. Pursuant to art. 10.5(b) of the Statute of the Dispute Tribunal, taking into consideration that the Applicant's fixed-term contract was unlawfully terminated effective on 1 September 2017 and that, despite her continuous efforts she remained unemployed between 1 September and 12 September 2017 and between 8 October 2017 and 19 March 2018 (the date of the Applicant's last submission in the present case), the Tribunal will award the Applicant six months' net-base salary as a compensation for the harm produced by the unlawful decision which consisted in her employment. In addition, the Applicant shall receive compensation in the amount equal to the contributions (her contribution and the Organization's contributions) that would have been paid to the United Nations Joint Staff Pension Fund ("UNJSPF") for this period.

Why is the UNDT so tolerant of this unethical behaviour by OIOS officials?

Why has no one been referred to the Secretary-General to be held accountable for their actions?

189. Should the Applicant currently be employed with the Organization at her duty station on a temporary contract, if any, with OCT or other department and this contract is due to expire before 28 October 2018 and is not renewed after this date, and in the absence of any alternative post against which she can be retained on a non-competitive basis pursuant to sec. 11.1(b) of ST/AI/2010/3, the Respondent is to pay the Applicant, in addition to the compensation for six months established above, the net-base salary for the remaining period of unemployment between the date of expiration of the current temporary appointment and 28 October 2018, together with the compensation in the amount equal to the contributions (her contributions and the Organization's contributions) that would have been paid to the UNJSPF for this period

190. In the alternative that the Applicant remained unemployed until the issuance of the present Judgment and her status would not change until 28 October 2018, the Respondent is to pay the Applicant's net-base salary for the period when she remained unemployed, from 1 September 2017 to 12 September 2017 and from 8 October 2017 to 28 October 2018 (between 12 September and 8 October 2017, the Applicant was temporarily employed with the Executive Office of the

Secretary-General) together with the compensation in the amount equal to the contributions (her contributions and the Organization's contributions) that would have been paid to the UNJSPF for this period.

Moral damages

191. The Tribunal notes that art. 10.5(b) of the Dispute Tribunal's Statute was amended by the General Assembly in December 2014 and that the text introduced, as a mandatory new requirement, that the Dispute Tribunal may only award compensation "for harm, supported by evidence". This requirement is both substantive, because the compensation can only be awarded for harm, and procedural, because the harm must be supported by evidence.

192. In the *Black's Law Dictionary*, 6th Ed. (1990), the word "harm" is defined as "[a] loss or detriment in fact of any kind to a person resulting from any cause" (see p. 718).

193. It results that, since art. 10.5(b) of the Dispute Tribunal's Statute makes no distinction between physical, material or moral harm, the provision is applicable to any types of harm and that the harm must be supported in all cases by evidence.

194. In *Benfield-Laporte* 2015-UNAT-505, para. 41, the Appeals Tribunal held that (footnote omitted):

> … […] [W]hile not every violation of due process rights will necessarily lead to an award of compensation, damage, in the form of neglect and emotional stress, is entitled to be compensated. The award of compensation for non-pecuniary damage does not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing.

195. Further in *Kallon* 2017-UNAT-742, the majority of the full bench of the Appeals Tribunal decided (footnotes omitted) that:

> 62. The authority conferred by the [Dispute Tribunal, ("UNDT")] Statute to award compensation for harm thus contemplates the

possibility of recompense for non-economic harm or moral injury. But, by the same token, [art.] 10(7) of the UNDT Statute prohibits the UNDT from awarding exemplary or punitive damages. The dividing line between moral and exemplary damages is not very distinct. And for that reason, a proper evidentiary basis must be laid supporting the existence of moral harm before it is compensated. This prudent requirement is at the heart of the amendment of [art.] 10(5)(b) of the UNDT Statute by General Assembly resolution 69/203. For a breach or infringement to give rise to moral damages, especially in a contractual setting (including the contract of employment), where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances. Whether damages can be recovered depends therefore on evidence of the purpose and ambit of the contract, the nature of the breach, and the special circumstances surrounding the contract, the breach and its positive or negative performance.

63. Generally speaking, the presence of certain circumstances may lead to the presumption of moral injury – *res ipsa loquitur*. The matter may speak for itself and the harm be established by the operation of the evidentiary presumption of law. However, when the circumstances of a certain case do not permit the application of the evidentiary presumption that such damages will normally follow as a consequence to an average person being placed in the same situation of the applicant, evidence must be produced and the lack of it may lead to the denial of compensation. Much will necessarily depend on the evidence before the UNDT.

64. Conscious of the amendment and its purpose, the UNDT in this case thoughtfully deliberated upon the nature of the harm caused by the injury and the evidence before it supporting a finding of harm. In reaching its conclusion, the UNDT was guided by the principles pronounced by this Tribunal in *Asariotis* [2013-UNAT-309] prior to the amendment of Article 10(5)(b) by General Assembly resolution 69/203. In that case this Tribunal said:

> … To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:

> (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a *fundamental* nature, the breach may *of itself* give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
>
> (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.
>
> … We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.

65. The distinction drawn between the two categories of moral injury or non-patrimonial damages in *Asariotis* [Judgment No. 2013-UNAT-309] has two dimensions. On the one hand, it speaks to the kinds of moral damage ordinarily at issue and, on the other, mentions the kind of evidence necessary to prove each kind of moral damage.

66. The first kind of moral injury acknowledged in *Asariotis* takes the form of a fundamental breach of contract resulting in harm of an unascertainable patrimonial nature. Awards of moral damages in contractual suits by their nature are directed at compensating the harm arising from violations of personality rights which are not sufficiently remedied by awards of damages for actual patrimonial loss. The harm experienced by a blatant act of procedural unfairness may constitute an infringement of *dignitas*, not in all but especially in severe cases. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern. The purpose of an award for

> infringement of the fundamental right to dignity is to assuage wounded feelings and to vindicate the complainant's claim that his personality has been illegitimately assailed by unacceptable conduct, especially by those who have abused administrative power in relation to him or her by acting illegally, unfairly or unreasonably.
>
> […]
>
> 68. The evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence; or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(b) of the UNDT Statute. And in this regard, it should be kept in mind, a court may deem prima facie evidence to be conclusive, and to be sufficient to discharge the overall onus of proof, where the other party has failed to meet an evidentiary burden shifted to it during the course of trial in accordance with the rules of trial and principles of evidence.

196. The Tribunal notes that, in her application, the Applicant requested as an alternative to rescinding the decision separating her from service, at minimum two years' net base salary in compensation for the Administration's failure to follow its obligations to her, together with the appropriate level of compensation for moral damages. In the closing submissions, the Applicant clearly also indicated that she requested two years' net base salary in compensation, together with moral damages for "the Administration's failure to follow its obligations towards her". It results that the Applicant's request for moral damages relates to the first category of moral damages identified in *Asariotis*.

197. The Applicant claimed mental distress and anxiety produced by the contested decision. As results from para. 70 from *Kallon*, additional evidence is required in case of mental distress or anxiety allegedly produced by the contested decision, evidence which can consist in the applicant's testimony and/or medical or psychological

reports/evidence to prove that the harm can be directly linked or is reasonably attributable to the alleged violation. The Applicant testified before the Tribunal, stating that the stress and anxiety she was experiencing were caused by both the abolition of her contract and the non-renewal of her fixed-term contract, followed by her successful selections for posts and in particular for a post which was finally lost due to the decision not to release her to this new post until December 2017 and/or to reassign her to other posts, resulting both in financial difficulties and health problems.

198. This Tribunal agrees with the majority decision taken in *Kallon* and considers that, in the present case, the Applicant suffered moral harm as a result of the unlawful termination decision, which breached her right to be retained according to the mandatory provisions of art. 9.6(e)(iii) and 9.6(f) and the harm caused to her by the unlawful discontinuation of her two-year fixed-term contract with ID/OIOS, which was expected to continue until 28 October 2018. As results from the totality of evidence presented before the tribunal and according to the standard of proof established by the Appeals Tribunal in *Kallon*, "[t]he evidence to prove moral injury of the first kind may take different forms. The harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence". The Tribunal considers that all factual elements, together with the nature of the breach, and the written and oral evidence the Applicant provided, constitute sufficient evidence in the present case to conclude that harm was caused to the Applicant's dignity and to her career potential.

199. The Tribunal considers that, taking into consideration the particular circumstances of the present case, including that the Applicant was on certified sick leave for approximately one year, the present Judgment, together with an amount of three months net-base salary, represents a reasonable and sufficient compensation for the moral harm caused to the Applicant by the rescinded decisions, and her request for moral damages is therefore to be granted in part.

Conclusion

200. In light of the foregoing, the Tribunal DECIDES:

a. The Application is granted in part.

b. The contested decisions to abolish the Applicant's post, the consequent decision not to renew her two-year fixed-term appointment, and the refusal to re-assign the Applicant under zero incumbency for two months to CTED until 31 December 2016, where she had been selected for a short-term position until 31 December 2016, are rescinded.

c. The Applicant's two-year fixed-term contract with ID/OIOS is to be considered extended with retroactive effect from 1 September 2017 until 28 October 2018, and her service within the United Nations Secretariat during this period is to be considered continuous. The Applicant is to be considered reassigned to the Executive Office of the Secretary-General between 12 September 2017 and 8 October 2017. Further, she is to be considered reassigned from OIOS to OCT or to other department if the case from the effective date of her current appointment, if any, until the expiration of this contract.

d. In case on the date of issuance of the present judgment, the Applicant is employed on a temporary appointment with OCT or with another department in New York which expires before 28 October 2018, the ASG/OHRM is to determine before the expiration of her contract, together with the Applicant and the Head(s) of the Office, where suitable available post(s) in New York were identified, her future placement at least until 28 October 2018. The Respondent is to retain the Applicant with retroactive effect from the date of expiration of such contract until at least 28 October 2018 in any current suitable available post(s): occupied by a temporary staff member, or vacant either at the General Service level (at the G-5, G-4 level or

lower) in New York (her duty station), as identified in the job family(s) and/or job network(s), to which the Applicant belonged prior to the abolition of her post, if applicable, except in OIOS, as requested by the Applicant.

e. However, in case the issuance of the decision to retroactively extend the Applicant's contract with ID/OIOS from 1 September 2017 until 28 October 2018, together with the specific performance mentioned above, is no longer possible at the date of the publication of the present Judgment due to unforeseen circumstances, which are to be fully disclosed to the Applicant, pursuant to art. 10.5(a) of the Statute of the Dispute Tribunal, as an alternative to the rescission of the decisions and to the specific performance ordered by the Tribunal, the Respondent may elect to pay a compensation to the Applicant consisting in USD10,000.

f. Taking into consideration that the Applicant's fixed-term contract was unlawfully terminated effective on 1 September 2017 and that, despite her continuous efforts, she remained unemployed between 1 September and 12 September 2017 and between 8 October 2017 and 19 March 2018 (the date of the Applicant's last submission in the present case), the Respondent will pay to the Applicant six months' net-base salary. In addition, the Respondent will pay to the Applicant a compensation in the amount equal to the contributions (her contribution and the Organization's contributions) that would have been paid to the United Nations Joint Staff Pension Fund ("UNJSPF") for this period.

g. In the alternative the Applicant is employed with the Organization at her duty-station—New York—on a temporary contract with OCT or another department which is due to expire before 28 October 2018 and is not renewed after this date, and in the absence of any alternative post against which she can be retained on a non-competitive basis pursuant to sec. 11.1(b) of ST/AI/2010/3, the Respondent will pay the Applicant, in addition to the compensation for six months established above, the net-base salary for the

remaining period of unemployment between the date of expiration of the current temporary appointment and 28 October 2018, together with the compensation in the amount equal to the contributions (her contributions and the Organization's contributions) that would have been paid to the UNJSPF for this period.

h. In the alternative that the Applicant remained unemployed until the issuance of the present Judgment and her status would not change until 28 October 2018, the Respondent is to pay the Applicant's net-base salary for the period 1 September 2017 to 12 September 2017 and 8 October 2017 to 28 October 2018, together with the compensation in the amount equal to the contributions (her contributions and the Organization's contributions) that would have been paid to the UNJSPF for this period.

i. The Respondent is to pay the Applicant a compensation of three months of net-base salary as moral damages.

j. The awards of compensation shall bear interest at the U.S. Prime Rate with effect from the date this judgment is executable until payment of said awards. An additional five per cent shall be applied to the U.S. Prime Rate 60 days from the date this judgment becomes executable.

k. The remaining claims of the application are rejected as non-receivable.

Observation

201. The Tribunal observes that there are currently no legal provisions included in staff regulation 9.3(a)(i) or staff rule 9.6(e) defining separation initiated by the Organization for termination of contract(s) for reasons not related to the staff member regarding abolition of post(s) and reduction of staff and the procedure to be followed.

202. Taking into consideration the importance, both for the Organization and for the staff members, of having legal, fair and transparent restructuring processes, the

Tribunal recommends additional legal provisions to be adopted, on an urgent basis, in order to clearly define legal notions of abolition of post and reduction of staff, together with the procedure to be applied in each case, in accordance with the international human rights standards, and to fully implement the mandatory requirements of art. 13.1 of the ILO Convention on Termination of Employment No. 158 of 1982 (emphasis added).

> Article 13
>
> 1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
>
> **(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;**
>
> (b) give, […], the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.
>
> […]

Question: **Given the Organizations reliance on the "lack of funds" argument; why is the Tribunal nor more concerned about the Respondent's failure to provided the information on the funding situation of the OIA account after 30 December 2016, in direct violation of Order No. 33 (NY/2017)?** (See para 163)

(Signed)

Judge Alessandra Greceanu

Dated this 26th day of June 2018

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

(Signed)

Morten Albert Michelsen, Registrar, New York, Officer-in-Charge