UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/027
Judgment No.: UNDT/2016/035
Date: 22 April 2016
Original: English

**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

DE AGUIRRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

**Counsel for Applicant:**
Self-represented

**Counsel for Respondent:**
Karen M. Farkas, UNHCR

**Introduction**

1. By application filed on 22 May 2014, the Applicant, a former Associate Legal Officer (National Officer B level, "NOB") in the Regional Representation for Western Europe in Brussels ("Brussels RRWE") of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decisions to:

a. Discontinue the position she was encumbering (position No. 10011149, Associate Legal Officer) as of 1 June 2014; and

b. Terminate her indefinite appointment, effective 31 May 2014.

**Facts**

2. The Applicant entered the service of the Brussels RRWE, UNHCR, on 1 February 2002 under a fixed-term appointment as a Senior Protection Assistant, G-7 level. From 24 February 2002, until her separation on 31 May 2014, the Applicant held an indefinite appointment.

3. By memorandum dated 15 March 2005, the then Regional Representative for Western Europe in Brussels ("Brussels Representative"), UNHCR, informed the Applicant that her post had been proposed for reclassification from G-7 to National Officer B level ("NOB"), as she felt that "the functions and responsibilities of [the] post … correspond[ed] more to a position at the National Officer level". As a result, the Applicant was appointed to position No. 10011149 (Post No. 426032), NOB, Associate Legal Officer, Legal Unit, Brussels RRWE, UNHCR, in March 2007.

4. From 16 November 2009 to 15 November 2010, the Applicant was on Special Leave Without Pay ("SLWOP").

5. By email of 22 April 2013, the Brussels Representative informed her staff of changes in the regional representation structure. As for the "Protection" functions, she mentioned:

> In this context and for purposes of a) reinforcing our action viz the region to which we are providing support and b) separately strengthening our approach to Belgium and Luxembourg, [F.] will continue to head the Regional Protection Unit composed of [the Applicant] and they will focus their action on RRWE regional support. [P.] will continue to report to [F.] and will service the needs of all staff in Protection section. [V.] will continue to focus on Belgium and Luxembourg, reporting directly to [P.] and with the help of one (possibly) UNOPS [staff member] to assist her specifically on Lux.

6. On 23 September 2013, the Applicant met with her supervisor, the Brussels WE Regional Representative, and expressed her concern that she did not consider it "normal to feel as if she needed another year of SLWOP", due to the unequal distribution of workload and tensions among colleagues in the Legal Unit, Brussels RRWE.

7. By confidential memorandum of the same day addressed to the Director, Regional Bureau for Europe, UNHCR, the Brussels Representative proposed changes in the structure of the Representation for 2014, which included a recommendation to "downgrade" two NOB Associate Legal Officers positions, one of which was encumbered by the Applicant.

8. As of 4 November 2013, the Legal Unit, Brussels RRWE, was reinforced by recruiting a Legal Associate, G-6 level, under a temporary appointment. No vacancy announcement for this position was posted.

9. By letter dated 18 November 2013, which she received on 20 November 2013, the Applicant was informed that the position she was encumbering would be discontinued as of 1 June 2014, "in line with a regional review of existing capacities" and "in accordance with relevant stipulations of IOM/051/2007-FOM/054/2007".

10. By email and memorandum of 14 January 2014, the Applicant requested management evaluation of the decision communicated to her by letter of 18 November 2013.

11. By email of 28 February 2014, the Office of the Deputy High Commissioner, UNHCR, informed the Applicant that her request for management evaluation was under consideration.

12. On 26 March 2014, a Human Resources Associate, Brussels RRWE, sent the Applicant an email attaching a memorandum, dated 3 March 2014, providing details on her separation formalities.

13. On 4 April 2014, the Brussels Representative sent the Applicant an email advising that the separation memorandum of 3 March 2014 had been officially withdrawn.

14. Further to a request from Brussels Representative dated 8 April 2014, on 10 April 2014, the Regional Assignments Committee ("RAC"), UNHCR, issued its report confirming the "non-suitability of positions for a Comparative Review in the Regional Office in Brussels" with respect to the two NOB Associate Legal Officer positions identified for discontinuation. The Brussels Representative approved the recommendation on 11 April 2014.

15. By letter dated 14 April 2014 from the Director, Division of Human Resources Management ("DHRM"), UNHCR, the Applicant was informed that her indefinite appointment would be terminated effective 31 May 2014, as it had been determined by the RAC that there were "no suitable positions against which a comparative review could take place".

16. By memorandum of 22 April 2014 from the Brussels WE Regional Representative, the Applicant was informed of her separation indemnities and modalities.

17. By email of 30 April 2014 sent to the Deputy High Commissioner, UNHCR, the Applicant referred to her request for management evaluation of 14 January 2014, and attached a "follow-up Memorandum" entitled "Request for Management Evaluation of the Regional Representation for Western Europe – continued", in which she asked that the letter dated 14 April 2014 be withdrawn "in the absence of a (satisfactory) response to [her] request for management

evaluation". In said memorandum, she questioned the discontinuation of her position and the subsequent decision to terminate her appointment effective 31 May 2014.

18. On 7 May 2014, the Applicant filed before the Tribunal an application for suspension of action of the decision to discontinue her position and of the consecutive termination of her indefinite appointment. The application was registered under Case No. UNDT/GVA/2014/020.

19. By Order No. 67 (GVA/2014) of 14 May 2014, the Tribunal concluded that the application had become moot since UNHCR had suspended the contested decisions pending the Applicant's request for management evaluation. In the Order, the Tribunal also rejected the Applicant's request for confidentiality.

20. By memorandum dated 20 May 2014, sent on 21 May 2014, the Deputy High Commissioner, UNHCR, replied to the Applicant's request for management evaluation, upholding the contested decisions.

21. On 22 May 2014, the Applicant filed with the Tribunal the application referred to in paragraph 1 above. At the same time, she requested, *inter alia*, an interim measure, pending proceedings, to suspend the implementation of the discontinuation of her position as well as of the termination of her appointment, and reiterated her request for confidentiality.

22. On 23 May 2014, the Tribunal served the application on the Respondent requesting his comments on the Applicant's request for interim measures by 26 May 2014, and his reply to the application by 23 June 2014.

23. On 26 May 2014, the Respondent submitted his comments on the Applicant's motion for interim measures, with two annexes to it filed *ex parte*.

24. By Order No. 74 (GVA/2014) of 28 May 2014, the Tribunal rejected the Applicant's requests for interim measures and for confidentiality.

25. On 15 June 2014, the Applicant filed a "motion for the production of evidence", requesting the Tribunal to grant her access to the *ex parte* documents filed by the Respondent on 26 May 2014.

26. On 23 June 2014, the Respondent filed his reply to the application, to which were attached a number of *ex parte* annexes that were the same as those he had submitted as *ex parte* annexes to his submission of 26 May 2014.

27. By Order No. 99 (GVA/2014) of 26 June 2014, the Tribunal asked the Respondent to file, by 11 July 2014, his response, if any, to the Applicant's motion for production of evidence, which he did.

28. By Order No. 107 (GVA/2014) of 16 July 2014, the Tribunal ordered that the Applicant be provided with the documents filed *ex parte* by the Respondent, as redacted by the Tribunal and subject to the documents remaining confidential. The Order gave further leave to the Applicant to file, by 13 August 2014, any observations in respect of the documents thereby provided.

29. On 12 August 2014, the Applicant filed her observations pursuant to Order No. 107 (GVA/2014). In her submission, the Applicant raised further issues in respect of a missing memorandum, namely the minutes of the RAC meeting at which the discontinuation of her position was considered, the composition of the RAC, and the competence of the RAC to review her case. Consequent upon these observations, the Respondent was ordered, by Order No. 147 (GVA/2014) of 9 September 2014, to file by 23 September 2014 additional documents and information related to the issues raised by the Applicant, including the missing documents identified by the Applicant in her 12 August 2014 submission.

30. On 23 September 2014, the Respondent filed his response to Order No. 147 (GVA/2014) with Annex 1 to it being submitted *ex parte*.

31. On 14 December 2014, the Applicant filed a motion requesting the disclosure of evidence, namely the full documents earlier shared with her with redaction in respect of the proposed changes in RRWE structures for 2014, as well

as further missing documents, and the holding of an oral hearing. She also filed additional evidence.

32. By Order No. 97 (GVA/2015) of 5 May 2015, the Respondent was ordered to provide additional evidence by 19 May 2015, and the Applicant was given access to a redacted version of the *ex parte* annex attached to the Respondent's 23 September 2014 submission. Additionally, the Applicant was ordered to file, by 27 May 2015, any observations she had on said annex.

33. On 13 May 2015, the Respondent filed a motion for extension of time to comply with Order No. 97 (GVA/2015). By Order No 103 (GVA/2015) of 15 May 2015, the Tribunal granted an extension to the Respondent until 22 May 2015, also extending to 1 June 2015 the Applicant's deadline to file her observations, if any, in respect of the requested new evidence.

34. On 22 May 2015, the Respondent filed his response to Order No. 97 (GVA/2015) and, on 1 June 2015, the Applicant filed her observations also in response to said Order.

35. By Order No. 113 (GVA/2015) of 3 June 2015, the Tribunal set the matter down for a substantive hearing on 30 September 2015, and issued directions in preparation for it.

36. On 18 June 2015, the Applicant filed a motion for summary judgment, and the Respondent filed a motion for extension of time to comply with Order No. 113 (GVA/2015).

37. By Order No. 125 (GVA/2015) of 19 June 2015, the Tribunal suspended part of Order No. 113 (GVA/2015), and convened a case management discussion for 23 June 2015.

38. Following the case management discussion, and consequent upon the Applicant withdrawing her request for a hearing and the Tribunal determining that the matter was to proceed on the papers, the Tribunal, by Order No. 130 (GVA/2015) of 24 June 2015, provided further directions to the parties, namely that:

a. The Respondent file observations on the Applicant's 1 June 2015 submission by 3 July 2015;

b. The Applicant file comments, if any, on such observations by 10 July 2015;

c. The parties file by 16 July 2015 a joint statement of facts and issues, a joint bundle of documents, a list of authorities and any submission they may wish in respect of the effect of the amendment to art. 10.5(b) of the Tribunal's Statue adopted by the General Assembly on 18 December 2015; and

d. The parties file by 30 July 2015 further submissions, if any, on the filings referred to under paragraph 38.c above.

39. On 3 July 2015, the Respondent filed his observations as ordered.

40. On 10 July 2015, the Applicant filed her comments on the Respondent's 3 July 2015 submission.

41. On 16 July 2015, the Applicant filed a submission in response to the Tribunal's directions referred to in paragraph 38.c above.

42. On 30 July 2015, the Respondent filed his closing submission.

**Parties' submissions**

43. The Applicant's principal contentions are:

a. The post allegedly abolished was, in fact, reclassified. First, the 23 September 2013 memorandum from the Brussels Representative to the Director, Regional Bureau for Europe, proposing changes in the structure of the Office for 2014 planning, refers to a "downgrading" of the two NOB Associate Legal Officers positions, which would not have necessarily led to the "abolition" of her post. Indeed, in case of a downgrading, she would have been entitled, as the holder of an indefinite appointment, to continue occupying the "downgraded" position until she would have been able to find

another position. Second, back in 2005, there had been a reclassification of the post that the Applicant encumbered from the General Service category to that of National Professional Officer, and she was appointed to the latter;

b. In deciding to discontinue the Applicant's post there was a failure to hold and promote the highest standards of ethical and professional conduct, and there was an abuse of authority;

c. There has been an abuse of authority by the Brussels Representative as the decision to discontinue the two NOB positions, one of which the Applicant encumbered, appears to be the management's response to address the ongoing tensions in the Brussels RRWE Legal Unit. In the same line, the fact that the memorandum by the Brussels Representative on the proposed changes in the structure of the Office, including the abolition of her post, is dated 23 September 2013, which is the same day on which the Applicant had a difficult conversation with the Brussels Representative shortly after expressing concern about feeling that she needed another year of SLWOP, should not be regarded as a mere coincidence and be further investigated. The physician she consulted on the next day, i.e., on 24 September 2013, issued a certificate for a three-week home rest. The fact that she was driven to a point where she was feeling like resigning from her position should not give cause to discontinue her position;

d. The logic that National Officers cannot exercise regional functions while staff at the G-level would be allowed to do so is questionable. Moreover, the Respondent uses policy established by the International Civil Service Commission ("ICSC") when it suits him (e.g., the remaining National Officer is not only responsible for Belgium but also for Luxembourg, and the Applicant is aware of National Officers in other offices who are carrying out regional functions, whereas, at the same time, staff members at the General Service level are being requested to carry out functions that are not limited to the country where they are posted;

e. Classification of posts and staff within the Brussels RRWE has not been conducted according to the nature of the duties and responsibilities required for the tasks performed;

f. Furthermore, the procedures for the classification of the posts created following the discontinuation of the post encumbered by the Applicant appear not to have been in accordance with UNHCR's IOM/051/2007-FOM/054/2007 (Revised Framework for Resource Allocation and Management) and UNHCR's IOM/028/2011-FOM/029/2011 on Preparation and processing of submissions, since completed and updated job descriptions had not been finalized and submitted for consideration;

g. The determination by the RAC that there were no suitable positions against which a comparative review could take place in accordance with paragraph 5 of UNHCR's IOM/066/2012-FOM/067/2012 (Comparative Review Policy for Locally Recruited Staff Members) ("Comparative Review Policy") did not take into account the fact that another staff member of the RRWE Legal Unit, who was hired on a temporary assignment at the G-6 level as of November 2013, had been taking over her duties;

h. The comparative review process undertaken by the RAC was flawed because:

i. The RAC that reviewed her case appears not to have been constituted properly, since the 5 May 2014 memorandum announcing the RAC revised composition to staff was withdrawn on 12 May 2014;

ii. The RAC composition was not as required: as per paragraph 141 of UNHCR's Policy and Procedures on Assignments of Locally recruited Staff ("PPAL") (IOM/049-FOM/050/2012), a member of the RAC at the G-6 level should not have reviewed her case; and

iii. In view of the number of National Officers and International Professional posts in Brussels, her case should have been reviewed by a Local Assignments Committee ("LAC") and not by the RAC, in application of paragraph 114 of PPAL;

i. The failure to respond to or address a request for management evaluation before the relevant response period for such has expired constitutes a breach of fundamental rights;

j. In view of the above, the Applicant requests:

i. Rescission of the contested decisions and compensation for substantive and procedural irregularities, as well as for the Administration's failure to follow its own rules;

ii. The Tribunal to conclude that there were irregularities in the process leading to the discontinuation of the post she encumbered and the consequent termination of her indefinite appointment, and that they constituted an abuse of authority by improperly influencing her career and employment conditions;

iii. The Tribunal "to acknowledge that the failure by the Respondent to critically review his decisions and to take remedial action before cases escalated to the Dispute Tribunal, and the Respondent's failure to respond to the observations made by the Applicant […] obstructing a fair and expeditious disposal of the proceedings, may be considered to cause damage, in the form of neglect and emotional stress"; and

iv. "Guarantees" that having taken the risk to "speak up" will not improperly influence the Applicant's career.

44. The Respondent's principal contentions are:

a. It is well settled jurisprudence that an International Organization has necessarily the power to conduct restructuring, including the abolition of

posts, the creation of new posts and the redeployment of staff. In the present case, the abolition of the post encumbered by the Applicant was part of a restructuring exercise by the Brussels Representative "with the emphasis on strengthening and harmonizing more efficient national and regional protection capacities"; in particular, two NOB positions—including the one encumbered by the Applicant—were discontinued, whereas two were created, namely one at the GL-6 level (Protection Associate) and one at the P-3 level (Regional Protection Officer). The job description of the new P-3 position "reflects the broader and regional focus of the tasks, while absorbing the specific legal and regional responsibilities formerly held by the NOB positions". The standard job description of the new GL-6 position "also illustrates the nature of this position which absorbs some of the national functions of the previous NOB position". Finally, "the new positions at the G and P level no longer concentrate on legal matters only—as did the discontinued position of Associate Legal Officer—but contain the broader accountabilities and responsibilities of International Protection";

b. UNHCR is legally bound by an ICSC instruction concerning National Officers' functions, whereby their work should have a national, not regional, focus;

c. The Applicant has submitted no evidence in support of her allegation that there was abuse of authority by the Brussels Representative in discontinuing two NOB positions; she has therefore failed to meet her burden of proof in this respect;

d. The Applicant was eligible to apply, as an internal candidate, to the newly created P-3 position in accordance with UNHCR's IOM/FOM/33/2010 (Policy and Procedures on Assignments and Promotions) ("PPA"); however, she did not apply to it or to "any other position in the international professional categories". Furthermore, in accordance with paragraph 32 of the PPA, she "may apply to internally advertised international professional positions for five years following her separation";

e. The RAC confirmed that there was no suitable position to conduct a comparative review. The Applicant's argument that discontinuation of the temporary appointment of a G-6 colleague "would have mitigated the need for a comparative review" cannot stand since the post in question was:

i. A temporary position;

ii. Charged against a position three grades lower than the one the Applicant encumbered; and

iii. Intended to undertake the functions of the new G-6 Protection Assistant position;

f. The termination of the temporary appointment "would not have resulted in, nor required a comparative review as it would not have vacated a suitable position for the Applicant";

g. Given the number of locally recruited staff at the Brussels RRWE, oversight of said office under the PPAL fell on the RAC and not on a LAC;

h. A late response to the Applicant's request for management evaluation was without prejudice to her rights; she received it within the 90-day deadline to seek judicial review and, therefore, as confirmed by the UNAT, it triggered a new 90-day deadline.

**Consideration**

45. Pursuant to art. 2.1(a) of its Statute, the Tribunal is competent to examine the legality of administrative decisions. The Tribunal first has to determine which administrative decision the Applicant is contesting, and, in this respect, recalls what the Appeals Tribunal held in *Massabni* 2012-UNAT-238, namely that:

> 2. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to

> accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.
>
> 3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

46. The administrative decisions challenged in this case are:

a. The discontinuation, effective 1 June 2014, of the position the Applicant encumbered (position No. 10011149); and

b. The termination, effective 31 May 2014, of the Applicant's indefinite appointment.

47. These specific decisions are, thus, the subject of the Tribunal's scrutiny, and their judicial review will be limited to considering relevant arguments in their respect.

*Discontinuation of the position encumbered by the Applicant*

48. First, the Tribunal needs to determine whether the discontinuation of the position encumbered by the Applicant resulted from its reclassification or its abolition.

49. The discontinuation and creation of posts in the UNHCR at the time of the events was governed by the UNHCR's Revised Framework for Resource Allocation and Management ("Framework"), issued by the High Commissioner on 18 July 2007, and is applicable in this matter.

50. In the Tribunal's view, the Applicant's reference to a 2005 reclassification of the post she then encumbered from the General Service category to the National Professional Officer category, is not relevant because such reclassification was governed by provisions in force prior to the promulgation of the Framework.

51. Annex 1, Part 5, of the Framework provides for "Post Changes" and *inter alia* for the following:

> 9. Reclassification (changes of title and/or upgrades or downgrades) can only be effected within the same functional groups (e.g. protection, programme, administration, security, finance, clerical, driver, etc.). Standard job descriptions may be used or amended to reflect the circumstances of the position and/or location. In all cases, job descriptions must be provided at the time of notification.
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> …
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> 16. Representatives and Hub Managers (the latter on the conditions set out in paragraph 6 above) have the authority to reclassify and/or discontinue national (NO and GL) positions so long as the ratio of staff and support costs to operational costs remains the same or decreases and any earmarking is respected and, in the case of encumbered positions, with the changes not implemented for six months from the date of notification to the staff member concerned.

52. Formal reclassification of a post requires the procedure set forth in paragraph 9 of the Framework. There is no evidence on record of such provision having been referred to, or acted upon, in the case at hand. While the use of the word "downgrading" in paragraph 13 of the 23 September 2013 memorandum from the Brussels Representative to the Director, Regional Bureau for Europe, UNHCR, concerning "2014 Planning", may appear to point to a reclassification of a post, the Tribunal, having thoroughly examined the parties' submissions and the documents before it, is of the view that the Brussels Representative intended, in fact, the abolition of different positions, one of them being the one encumbered by the Applicant, and the creation of new posts, among which were a P-3 post of "Regional Protection Officer" ("new P-3") and a G-6 post of "Protection associate" ("new G-6 post"). Indeed, the staffing changes conducted by the Administration went beyond a mere redefinition of duties and responsibilities, and entailed a significantly far-reaching restructuring encompassing various employees, posts and offices.

53. Hence, the Tribunal finds that the evidence on record shows that the discontinuation of the post encumbered by the Applicant resulted from its abolition in the context of a restructuring exercise.

54. The Tribunal notes that the Applicant has abundantly addressed what she perceives to be post classification shortcomings within UNHCR, for example, staff members performing functions not in line with the grade at which the post they encumber is classified, or "under classification" of posts, non-compliance with the Charter of the United Nations and with UNHCR issuances on post classifications.

55. Furthermore, the Applicant emphasized in her submissions that "the issue she wishe[d] to see addressed is the classification of posts and staff according to the nature of the duties and responsibilities required". However, given the Tribunal's above finding, matters related to classification of posts within UNHCR have no bearing on its examination of the legality of the clearly identified administrative decision at issue, namely the abolition of the post encumbered by the Applicant.

56. Next, the Tribunal recalls that it is well established by the jurisprudence of the United Nations internal justice system that the Respondent has the "power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff." (see *Gehr* 2012-UNAT-236, at paragraph 25).

57. Regarding a case raising similar matters as in the present one, the Tribunal held in *Rosenberg* UNDT/2011/045 that:

> 14. There is a principle that is widely followed by labour courts and tribunals internationally. An employer is entitled to re-organise the work or business to meet the needs and objectives set by the employer at a particular time. 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 the loss of employment for the complainant. However, the court would be vigilant to guard against restructuring and reorganisation decisions which are made for the ulterior purpose of

> disadvantaging the individual applicant in a case before it. Reorganising and restructuring of the workplace should not be used as a mechanism for getting rid of an employee whom management may regard as being troublesome or whose continued presence was no longer deemed desirable.

58. The Tribunal in *Rosenberg*, relied on Judgment No. 2933 (2006) of the International Labour Organization Administrative Tribunal, in the following passage:

> According to firm precedent, decisions concerning the restructuring of an international organisation's services, such as a decision to abolish a post, may be taken at the discretion of its executive head and are consequently subject to only limited review. For this reason, while it is incumbent upon the Tribunal to ascertain whether such a decision has been taken in accordance with the rules on competence, form or procedure, whether it rests on a mistake of fact or of law, or whether it constituted abuse of authority, it may not rule on its appropriateness, since it may not supplant an organisation's view with its own …"

59. Furthermore, it is to be also recalled that it is not for the Tribunal to substitute its own views to that of the Secretary-General on how to organize work and meet operational needs. The Tribunal may only examine and set aside decisions on very limited grounds, where there has been a finding of a breach of the administrative law considerations surrounding a decision. These will include if the decision was:

a. Reached in breach of the procedural rules;

b. Arbitrary, capricious or made in circumstances of bias, was so unreasonable that no reasonable decision-maker would have made such a decision; and

c. Tainted by errors, improper motives or constitute an abuse of discretion.

60. The Appeals Tribunal held in *Asaad* 2010-UNAT-021 that:

> [T]he Administration's discretionary authority is not unfettered. The jurisprudence of the former [Administrative] Tribunal

> provides that the Administration must act in good faith and respect procedural rules. Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration … We would add that its decisions must not be based on erroneous, fallacious or improper motivation.

61. It is additionally to be noted that the Applicant has the burden of proof when seeking to demonstrate any improper motive (see *Asaad,* supra, and *Hepworth* 2011-UNAT-178).

62. To conduct judicial review of the abolition process in the case at hand, it is appropriate to examine the events and actions taken leading up to the abolition of the post encumbered by the Applicant, its rationale, and the Administration's compliance with administrative issuances as well as with other broader obligations in respect of post abolition.

63. The start of the process is to be traced to a memorandum of 23 September 2013 from the Brussels Representative to the Director, Regional Bureau for Europe, UNHCR, where the former wrote concerning "2014 Planning". After examination, nothing in this document indicates that the actions suggested in it are in any way arbitrary, based upon improper motive or taken in violation of mandatory procedures.

64. The Applicant questions one of the reasons behind the discontinuation of the position she encumbered, namely that National Professional Officers are bound to undertake national, and not regional, work as per administrative requirements laid down by the ICSC. The Applicant, thus, argues that the reasons given for the creation of the new posts are not genuine and that the staff restructuring is in fact based upon improper motives.

65. Having examined the ICSC documents on file, the Tribunal notes that the ICSC rejected the notion of a regional National Professional Officer. However, nowhere is it to be found that the National Professional Officer is *only* to undertake national work; rather, it is stated that "work performed by NPOs should have a national content". "Should" imports a meaning, in the specific context, that the National Professional Officer will normally be expected to carry out national

content work as part of their work, but does not rule out the possibility of carrying out other types of work, if the need arises. It is a matter in which discretion may be exercised.

66. Additionally, the use of the word "a" refers to a class of work. It does not denote an exclusivity of the class, merely one of a number of types or classes of work which may be performed. It is opposed, in this context, to any considerations of exclusivity, in which case the appropriate word to use would have been "only", rather than "a". Furthermore, if regional work is performed, the region in question will generally include the nation from which the National Professional Officer is a national.

67. Thus, the position expressed by the Brussels Representative as to the limitations of the work to be performed or able to be performed by a National Professional Officer in the memorandum of 23 September 2013 "that National Officers cannot exercise regional functions" was incorrect.

68. In so stating, the Brussels Representative determined that there was a total prohibition against a National Professional Officer performing regional work. This is both contrary to the plain meaning of the requirements and to the practice at different UNHCR Offices.

69. The issue remains as to what was the weight of this error in triggering the abolition of the post encumbered by the Applicant; in other words, whether in its absence the abolition would have been entirely void, or whether it was only one of a number of factors to be taken into account in deciding to abolish posts and creating new ones.

70. In the detailed memorandum of 23 September 2013, the Brussels Representative notes that "the regional support function is currently and in effect only served by one post (1 P-4)". This was not the post encumbered by the Applicant. What then follows in the memorandum is the placement of posts in Belgium, and *inter alia* their abolition, into a larger framework of Western European requirements, including the Netherlands, Switzerland and Ireland. It shows that the Administration entered into a consideration of reorganization of

posts well beyond those in Belgium alone. There is no evidence that the error in respect of the ability of National Professional Officers to undertake regional work was the determinative issue in respect of the reorganization affecting many of the operations of the UNHCR in Western Europe, including Belgium.

71. It is further noted that the considerations referred to in the memorandum of 23 September 2013 cannot be said to have been the result of, or in any way connected to, the discussion of the Applicant with her supervisor on the same day. The memorandum is six pages in length, and contains a detailed analysis of the requirements of the UNHCR, as assessed by the Brussels WE Regional Representative. Any inference to the effect that the abolition of the post encumbered by the Applicant was related to the discussion she had with the Brussels Representative is not supported by the evidence. The Applicant has not proven that the issuance of the memorandum on the same day as the discussion is anything else than purely coincidental.

72. In view of the foregoing, the Tribunal finds that the process leading to the abolition of the post encumbered by the Applicant respected the applicable procedures, and that there is no evidence of it being tainted by improper motive.

*Termination of the Applicant's indefinite appointment*

73. With respect to termination for abolition of post, staff rule 9.6 *inter alia* provides that:

> (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.

74. The Comparative Review Policy "provides principles and procedures for the comparative review to be followed in cases of anticipated termination for abolition of posts … pursuant to Staff Rules 9.6(e) and (f) in the General Service and National Officer categories", and states that "[s]taff members whose posts are discontinued will not automatically be separated".

75. Finally, in its section "Comparative Review Principles", the Comparative Review Policy provides the following:

> 4. Prior to undertaking a comparative review, the concerned office should verify that there are no staff members on temporary appointments or affiliate workforce *undertaking similar functions* to those of the discontinued position(s) and whose contract discontinuation would mitigate the need for a comparative review (emphasis added).
>
> 5. A comparative review process is the means by which staff members encumbering positions which are to be abolished, and who hold indefinite or fixed-term appointments not expiring on or before the effective date of the abolition of the relevant position, will be matched against suitable posts according to a set of criteria relating to the staff members' suitability for such posts. The "suitable posts" are interpreted, for the purpose of the comparative review, as posts at the staff member's duty station and at the staff member's grade level and within the same functional group as per the position title (Annex I lists the different functional groups and for the purposes of this policy, groupings under Level Three shall apply) [footnote omitted]. In the absence of suitable positions against which a comparative review may take place, upon confirmation by the Assignments Committee (AC), the incumbent of the abolished position will be separated as per applicable procedures.

76. From the above, it is clear that in the context of an exercise to abolish a post, the intent and purpose of paragraph 4 is that the Administration looks for alternative employment for its staff affected in a situation of abolition of posts.

77. The Applicant alleges that since November 2013, a staff member serving on a temporary appointment at the G-6 level ("G-6 TA") gradually took over the functions of the position she encumbered and that, therefore, it should have been determined that this person's contract discontinuation would have mitigated the need for a comparative review, in application of paragraph 4 of the Comparative Review Policy.

78. The Respondent noted that the G-6 TA was charged against a G-6 position, which was three grades lower than that of the Applicant and performing the functions of the new G-6 position of Protection Associate created following the abolition of the post encumbered by the Applicant, and that the termination of the G-6 TA "would not have vacated a suitable position for the Applicant". On these grounds, the Respondent concluded that paragraph 4 of the Comparative Review Policy was therefore not applicable to the position at stake.

79. In his closing submission, the Respondent sustained that:

> 23. [He] has … demonstrated that even if, as suggested by the Applicant, the RAC would have considered the termination of the [G-6 TA] … such consideration would not have led to the vacation of a "suitable position". Pursuant to paragraph 5 of the Comparative Review Policy, for the purposes of a comparative review, the expression "suitable position" means "posts at the staff member's duty station and at the staff member's grade level and within the same functional group as per the position title." The "suitable position" therefore needs to fulfil all of the following three criteria: (i) at the same duty station; (ii) at the same grade as the affected staff member; and (iii) in the same function group.
>
> 24. Therefore, even if the Tribunal were to find that the RAC and the Administration incorrectly considered not to terminate the G-6 TA in order to mitigate the need for a comparative review, since this G-6 TA was at the G-6 level, such termination would not have vacated a position at the Applicant's grade (being NOB), as required under paragraph 5 of the Comparative Review Policy.

80. The Tribunal disagrees with the Respondent and is of the view that, indeed, paragraph 4 of the Comparative Review Policy should have been applied in the Applicant's case. Furthermore, had this been done, there would have been no need for a comparative review, as its application would clearly have "mitigated the need for [it]" as expressly provided in paragraph 4 of the Comparative Review Policy.

81. The Respondent, incorrectly, mixes the criteria of paragraphs 4 and 5. Indeed, paragraph 4 makes no reference to "suitable posts" and/or "functional groups". It only requires to look for "staff members on temporary appointments or affiliate workforce **undertaking similar functions to those of the discontinued position**". To fully grasp the reach of this provision, one must read it in connection with staff rule 9.6(e), combined with paragraph 8 of the Comparative Review Policy, which create an obligation for UNHCR to undertake efforts to retain certain staff, among whom are those holding an indefinite appointment such as was the case of the Applicant at the time. Applying the suitable posts and functional groups requirements to paragraph 4 would make the provision redundant.

82. Paragraph 4 of the Comparative Review Policy provides for no particular implementation requirement other than the discontinuation of the engagement of the person under a temporary appointment and, such discontinuation can only be rendered meaningful if it is to make possible the appointment in his or her instead of the staff member concerned by the abolition to such temporary post, should they so agree. Relevantly, there is no condition as to the grade of the temporary position or to the type of post being encumbered, that is regular or temporary. The relevant criterion under this provision is that of the need for the staff member on a temporary appointment to be "undertaking similar functions to those of the discontinued position".

83. To ascertain whether "functions" are "similar", one should have recourse to the practicalities of the position, that is, what is actually the work being undertaken and not refer exclusively to the job description, as such job descriptions invariably are the subject of informal variation to meet needs, as in

this case has been admitted by the Respondent, who submitted that the G-6 TA position holder undertook other work while awaiting the appointment of an incumbent to the P-3 post.

84. Furthermore, the Tribunal notes that as early as 24 September 2013[1], it was anticipated to create the new G-6 and new P-3 positions, between which the functions of the abolished post had been allocated. In October 2013, necessary action was taken to reinforce the Legal Unit, RRWE, with a temporary post, namely the G-6 TA and, additionally, in May 2014, i.e., before the separation of the Applicant, the RRWE staffing table showed two G-6 regular posts ("Protection Associate", positions 10020933 and 10021772) against one of which the G-6 TA was being charged.

85. The record therefore shows that there were options open to the UNHCR to retain the Applicant under the provision of paragraph 4 of the Comparative Review Policy. The Tribunal notes that, not only was there a staff temporarily appointed performing functions similar to those of the post flagged for abolition, but, also, two positions in the same functional group as the one of the post flagged for abolition (i.e., 2.2.a) existed prior the Applicant's separation from service.

86. From its examination of the evidence, including the terms of reference of the G-6 TA, the job description of the National Professional Officer post encumbered by the Applicant, description of the duties and samples of work undertaken by the G-6 TA staff member, the Tribunal is of the view that the functions of the G-6 TA and that of the post encumbered by the Applicant were "similar". The Applicant should have been offered the temporary position, in accordance with paragraph 4 of the Comparative Review Policy.

87. In view of the foregoing, the Tribunal finds that not applying paragraph 4 of the Comparative Review Policy in the Applicant's case constitutes a fundamental procedural error in the implementation of said Policy. It further finds that the contested decision, namely the termination of the Applicant's indefinite appointment, is unlawful and must be rescinded.

[1] See Annex 11 to the Respondent's response to Order No. 97 (GVA/2015).

88. Given the above findings, it is not necessary to proceed to further examine the application of paragraph 5 of the Comparative Review Policy, as paragraph 4 operates as a precondition before the undertaking of the comparative review process provided for in paragraph 5.

89. Art. 10.5(a) of the UNDT Statute provides that the Tribunal "shall … set an amount of compensation that the [R]espondent may elect to pay as an alternative to the rescission of the contested administrative decision", as the decision that has been found to have breached the Applicant's terms of appointment concerns termination. In calculating the amount of compensation, the Appeals Tribunal has stressed that its determination must be done on a case-by-case basis, and that it carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265).

90. In the case at hand, the Applicant held, at the time of her separation from service, an indefinite appointment and had been with the Organization for approximately 12 years. The Tribunal further notes that as per the UNHCR Policy and Procedures on Assignment and Promotions, the Applicant is eligible until 30 April 2019 for internally advertised vacancies in the international professional category to which she applies.

91. However, considering that the UNHCR failed in its duty of care towards the Applicant in connection with measures in place related to termination for abolition of posts, the Tribunal finds that it would be adequate in the present case to award compensation in lieu of rescission in an amount equal to two years' net base salary, based on the Applicant's salary on the date of her separation from service.

92. Finally, with respect to the Applicant's claim that the lack of a response to a request for management evaluation by the end of the statutory deadline constitutes a breach of fundamental rights, the Tribunal is of the view that it is not so if the said response is received within the 90-day deadline to seek judicial review, thus resetting the deadline for it.

**Conclusion**

93. In view of the foregoing, the Tribunal DECIDES:

a. The contested decision terminating the Applicant's indefinite appointment is hereby rescinded;

b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant an amount equivalent to two years' net base salary;

c. The aforementioned compensation in lieu of rescission shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and

d. All other claims are rejected.

(*Signed*)
Judge Rowan Downing
Dated this 22nd day of April 2016

Entered in the Register on this 22nd day of April 2016
(*Signed*)
René M. Vargas M., Registrar, Geneva