



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/182
UNDT/GVA/2016/039
Judgment No.: UNDT/2017/073/Corr.1
Date: 12 September 2017
Original: English

Before: Teresa Bravo
Registry: Geneva
Registrar: René M. Vargas M.

LOEBER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Anca Apetria, Schwab, Flaherty & Associés

Counsel for Respondent:

Alexandre Tavadian, UNHCR

Elizabeth Brown, UNHCR

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal

Introduction

1. By application filed on 23 December 2015, the Applicant contests the decision to discontinue the post of Chief of Section (Procurement of Goods) in the Procurement Management and Contracting Service (“PMCS”), Division of Security and Supply (“DESS”), Office of the United Nations High Commissioner for Refugees (“UNHCR”), effective 1 March 2016, which coincides with the expiration of his fixed-term appointment.
2. The application was registered under Case No. UNDT/GVA/2015/182 and served on the Respondent who filed his reply on 8 February 2016. The Applicant filed a rejoinder on 16 March 2016.
3. By application filed on 10 June 2016, the Applicant, by then former Chief of Section (Procurement of Goods), PMCS, DESS, UNHCR, contests the decision to separate him from service with UNHCR effective 2 March 2016.
4. The application was registered under Case No. UNDT/GVA/2016/039 and served on the Respondent who filed his reply on 15 July 2016.

Facts

5. The Applicant was selected for the P-5 post of Chief of Section (Procurement of Goods), PMCS, effective 2 March 2014, under a two year fixed-term appointment (“FTA”) due to expire on 1 March 2016.
6. By email of 1 August 2014, the Head, PMCS, informed the PMCS Goods team about changes in reporting lines, *inter alia*, that the mixed items team would now report to the P-4 Senior Supply Officer (“SSO”), who would also focus on field goods case submissions and serve as single point of contact for the field.

7. In September 2014, the *Fritz Institute* was commissioned to undertake a re-evaluation of the supply chain at UNHCR, as a follow-up to a similar study undertaken in 2008 and in light of increasing demands on the Organization resulting from multiple emergencies as well as from an increase in the number of displaced persons.

8. On 8 December 2014, the Applicant filed a complaint for harassment against the Head, PMCS, with the Inspector General's Office ("IGO"), UNHCR, copied to the Ethics Office, UNHCR. He subsequently asked the IGO to put the complaint on hold, since he thought the matters would be resolved through managerial actions. At the hearing on the merits, he admitted that he never asked the IGO to take the matter up again, and that it had been overcome by events.

9. A meeting took place in Budapest, in December 2014, between the Director, DESS, the Head, PMCS, and the Applicant, during which some of the concerns raised by the Applicant relating to the management decisions by the Head, PMCS, as well as the concerns raised by the Head, PMCS, with respect to the impact of the Applicant's management style on staff were discussed. The Director, DESS, encouraged the two managers to improve their communication. It was also decided that any reorganization of the team should await the recommendations of the Fritz report.

10. The report of the *Fritz Institute* was presented in March 2015. It stressed the dramatic change that the Organization had undergone since the 2008 report, noting, for instance, that income and expenditure in response to a wide range of ongoing and protected emergencies had almost doubled.

11. On 4 June 2015, a meeting was held, *inter alia*, between the High Commissioner, UNHCR, the Assistant High Commissioner for Operations, UNHCR, the Head, DESS, the Head, PCMS, and the Head, Supply Management and Logistics Service ("SMLS"), UNHCR. In an email dated 11 June 2015, entitled "Note on HC's meeting on the Supply Chain, 4 June 2015", addressed to the members of the meeting and others, it is stated, *inter alia*, that:

DESS also requested to strengthen its staff in Budapest, for an additional cost of 800,000 USD. 20% of all audit recommendations in UNHCR were on procurement and procurement therefore needed to be transformed into a more robust service ([Headquarters (“HQ”)] section and Field section). The HC noted that this would be acceptable for 2016 as these concerns are valid and this function needs strengthening.

12. The Head, DESS, sent a memorandum dated 16 June 2015 to the High Commissioner, entitled “Follow up to the Fritz Institute Review of the Supply Chain”. In that memo, the Director, DESS, noted four “priority actions and decision making points for consideration by the High Commissioner”. One of them concerned “the transformation of procurement into a more robust service by reconfiguring the service into a HQ section and a Field section”. To that memorandum, the Head, DESS, annexed further explanations on the proposed restructuring, including an organigram on the proposed DESS new structure. The High Commissioner signed the memorandum off on 25 June 2015.

13. The Head, PMCS, the Applicant’s supervisor, informed the latter during a meeting on 18 June 2015 of the intention to propose to the Budget Committee the restructuring of two services within DESS: PMCS and SMLS. This implied the proposal to discontinue the Applicant’s position and that of Chief of Section (Procurement of Services), and the creation of two P-5 level posts of Chief of Section (Procurement Field Support, on the one hand, and Procurement HQ, on the other hand); this was confirmed to the Applicant in writing by letter dated 22 June 2015.

14. In a memorandum dated also 18 June 2015, and entitled *Follow up to the Fritz Institute Review of the Supply Chain*, the Director, DESS, submitted the new structuring proposal to the Secretary of the Budget Committee. It was received by the Budget Committee on 19 June 2015. During a meeting with staff of both services held also on 19 June 2015, the Heads of PMCS and SMLS presented the restructuring proposal, and responded to questions raised by staff, including the Applicant.

15. In an email of 29 June 2015, to the Deputy High Commissioner, UNHCR, and others, the Applicant expressed his concerns and criticism about the submission to the Budget Committee with respect to the new/modified posts at SMLS/PMCS. He noted, particularly, that the new posts proposed as Section Chief HQ Procurement and Field Procurement were not grounded in the *Fritz report*, which was however used “to implement subliminal changes desired by PMCS leadership”.

16. The Budget Committee had a first meeting on the matter of the restructuring on 2 July 2015, at which it decided to request additional information to be provided by DESS before a decision could be made, partly arising from the issues the Applicant raised in his email of 29 June 2015. That additional information was provided to the members of the Budget Committee on 9 July 2015.

17. At its 10 July 2015 session, the Budget Committee approved the proposed PMCS restructuring, including the discontinuation of the position encumbered by the Applicant, effective 1 March 2016. The Applicant was informed of that decision by the Head, PMCS, in a letter dated 24 July 2015, which the Applicant signed on 27 July 2015.

18. On 28 August 2015, the Applicant filed a request for management evaluation with the Deputy High Commissioner of the decision to abolish his post; in his request, he also asked to be provided with a copy of the Budget Committee Decision of 10 July 2015. The Applicant received no response with respect to such request.

19. In the UNHCR September 2015 compendium, two P-5 posts were published in the newly called Procurement Service (“PS”), which was composed of two sections: the Procurement HQ Section and the Procurement Field Support Section. One of the P-5 posts published in September 2015 was that of Chief of Section (Procurement Field Support), whereas the other was that of Chief of Section (Procurement HQ). The Applicant did not apply to either of these positions.

20. By memorandum dated 6 October 2015, the Applicant informed the Deputy High Commissioner about a possible opportunity for him to take a two-year loan to the Food and Agriculture Organization of the United Nations (“FAO”). The Applicant stressed that such loan would be possible only if his position at UNHCR remained in place, and asked for reconsideration of the decision to abolish the post he encumbered.

21. On 16 February 2016, the Applicant received copy of a memo dated 15 February 2016, notifying him that he would be separated effective 2 March 2016. The letter stated: “[a]s you are aware your fixed-term appointment is due to expire on 01 March 2016. As we have so far not received any information for extending your services, or any notification that you have been selected for a new position within UNHCR, we regret to inform you that we are proceeding with your separation effective 02 March 2016”.

22. On 25 March 2016, the Applicant filed a request for management evaluation of the 15 February 2016 separation decision.

Procedural history

23. The Applicant filed three applications with the Geneva Registry of the Dispute Tribunal, which were registered under Case Nos. UNDT/GVA/2015/182, UNDT/GVA/2016/039 and UNDT/GVA/2016/078. All three cases were assigned to Judge Goolam Meeran, who, after consultation with the parties, decided to consolidate them into a combined proceeding.

24. A hearing on the merits was held from 21 March 2017 to 23 March 2017. Following a request for recusal of Judge Meeran, filed by the Applicant on 27 March 2017, the President of the Tribunal ordered by Order No. 77 (GVA/2017) of 30 March 2017 that Judge Meeran be recused from the three cases. As a result of that order, the cases were reassigned to the undersigned Judge.

25. After holding a case management discussion on 6 June 2017, the undersigned Judge convoked the parties to a hearing, held from 10 to 14 July 2017, and during which the Tribunal heard several witnesses. The Respondent filed his closing submissions on 19 July 2017, and the Applicant on 28 July 2017.

Parties' submissions

26. The Applicant's principal contentions are:

a. The decision to abolish the Applicant's post was not the result of a genuine restructuring process and is contrary to a legitimate organizational interest;

b. Prior to his appointment, the Head, PMCS, called the Applicant on 5 September 2013 trying to dissuade him from taking the post; he subsequently proposed the second best candidate instead of the Applicant;

c. Already in May and June 2014, the Head, PMCS, started creating a parallel management, excluding the PMCS Goods team (six out of fifteen) from the Applicant's supervision and assigning tasks to the SSO (P-4). Mixed items goods procurement cases (which represent 20-30% of the total caseload) were to be approved by the Head, PMCS, rather than the Applicant; these changes resulted in significantly reducing the scope of the post of Chief of Section encumbered by the Applicant since March 2014;

d. While he initially qualified as a lie the statement by the Head, PMCS, that the restructuring had been duly endorsed by DESS and the Division of Human Resources Management ("DHRM"), the Applicant later acknowledged that the Head, PMCS, had indeed consulted with DHRM, which had endorsed the change of reporting lines;

e. The new post of Chief of Section (Procurement Field Support), Job ID number 11605, formalizes the changes that had been reversed by the Director, DESS, namely the placing of six team members that were reporting to the Applicant under the direct supervision of the Head, PMCS;

f. Indeed, the Applicant had objected to this arrangement and after a meeting with the Director, DESS, the latter completely reversed the changes initiated by the Head, PMCS, with the exception of “Mixed items” case clearance; the Director, DESS, confirmed that any reorganizations were to be made only after the issuance of the Fritz Institute’s recommendations; there was no indication of a dissolution of the team and/or of its leadership position;

g. The newly created post of Chief of Section (Procurement Field Support), appears to cover the exact functions the Applicant disputed with the Head, PMCS in 2014;

h. The new structure, including the creation of the two new posts and abolition of that encumbered by the Applicant, do not address any of the issues raised by the *Fritz report*; rather, it contradicts a number of recommendations of the report; none of the improvements suggested in that report will be achieved by abolishing the Applicant’s post and establishing the two new P-5 posts;

i. The abolition of the post does not address any of the concerns raised by internal criticism, either;

j. It is unclear how the new post of Chief of Section (Procurement Field Support) would better address the internal criticism of field case handling, given that the same staff member handling Field cases “would be leading or positioned under the new post”;

k. Relying on intuition—as admitted by the Head, PMCS, at the meeting with staff—is not a sound justification for the restructuring; it is also uncertain how performance improvements would be measured under the new structure;

l. It is counter-productive to abolish a post that had been established after a large-scale restructuring exercise in the field of procurement, about a year after its filling;

m. The restructuring was not subject to consultation with the staff; it was presented to staff on 19 June 2015, that is, one day after the intention to terminate the Applicant’s employment was communicated to him;

n. The decision to abolish his post was arbitrary, based on extraneous factors, and retaliatory; he and the Head, PMCS, had a strained relationship; their numerous disagreements were referred to by the Head, PMCS, in the Applicant’s performance evaluations; the Head, PMCS, constantly tried to reduce the scope of the Applicant’s functions, as reflected in the Applicant’s complaint for harassment; he was also subject to verbal abuse and disrespectful treatment on behalf of the Head, PMCS;

o. The Applicant had commented on several very serious procurement shortcomings and breaches of basic public procurement principles at Headquarters; he also called the attention of management to the fact that fees charged to Country Operations by the Global Stock Management Warehouses—which are administered by SMLS—appeared over-priced and not tailored to actual cost; the Head, PMCS, implemented the abolition of the Applicant’s post with the support of the Head, SMLS;

p. The Organization had created a legal expectancy that his post would be extended; the reference in his letter of recruitment to a standard assignment length (“SAL”) of five years, and to the fact that his post would be re-advertised at least once in six years, confirm the intention of the Organization to establish a longer running post; the Director, DESS, in

December 2014 also assured the Applicant of the continuity of the post, and that any further restructuring would be done after the recommendation of the *Fritz report*;

q. The Organization's good faith is in doubt; under the circumstances, it would have been more appropriate to advertise the post he had encumbered as a project or other time-limited post, in which case the Applicant would have reflected carefully before accepting it, transferring from an on-going, unterminated fixed-post in another Organization;

r. The process lacked fairness and transparency; he was not given a signed copy of the decision of the Budget Committee, even after he had requested it in his request for management evaluation;

s. He was notified of the intention to abolish his post a day before the restructuring plan was presented to all staff as a *fait accompli*; contrary to IOM/FOM No. 051/2007, no prior consultation with staff took place;

t. The Organization failed to inform the Applicant of the reasons for the decision;

u. Only the High Commissioner had the authority to approve the restructuring exercise upon the recommendation by the Budget Committee; the High Commissioner did not approve the recommendation prior to the Budget Committee meetings of 2 and 10 July 2015; also, by merely putting his initials on the memorandum of 16 June 2015, on 25 June 2015, the High Commissioner did not approve the restructuring; the information provided to the High Commissioner, particularly with respect to the abolition of the Applicant's post, was confusing and did not allow him to take an informed decision;

v. As to moral damages, the Applicant stated at the hearing that when he became aware of his supervisor's intention to change the reporting lines and provide the SSO with more managerial functions, he felt sad, disappointed and irritated. Further, when he and his family learned that his post was

abolished and that his appointment would not be renewed, they suffered stress and anxiety because, *inter alia*, they thought their daughter's international education would be at stake; and

w. The Applicant requests that the decision to separate him be declared unlawful and nullified; that his contract be extended beyond 1 March 2016; that he be reinstated to the post of Chief of Section, (Procurement of Goods). Alternatively, he requests compensation in the amount of three years' gross salary and pension contributions, compensation for the education grant for his child for the same period, compensation for moral damages in the amount of EUR100,000, legal costs so far amounting to CHF19,650 (for Cases No. UNDT/GVA/2015/182 and UNDT/GVA/2016/039), and that the Organization cover any national tax deductions applicable to any compensation payments awarded to the Applicant in this proceedings.

27. The Respondent's principal contentions are:

a. The Organization enjoys broad discretionary authority in the restructuring of its departments and units, including the abolition of posts and the creation of new posts;

b. Contrary to the Applicant's allegations, the restructuring was genuine and grounded in the *Fritz report*, which, *inter alia*, stressed the need for implementation of end-to-end process improvements; Senior management in procurement reviewed the *Fritz report* and identified additional areas for strengthening, as well as steps to address audit report issues; as a consequence, UNHCR developed a Global Supply Chain Strategy on the basis of the Fritz Report that included a proposal for a revision of the structure of PMCS and SMLS, and the transformation of procurement into a more robust service by reconfiguring the service into two sections, namely HQ Procurement and Field procurement, both headed by a Chief of Section, to focus on field support; the restructuring fell within the administrative discretion of the Organization;

c. The Applicant did not apply to either of the new Chief of Section posts. As such, he failed to make reasonable efforts to mitigate the potential effects of the restructuring process on his UNHCR career; he decided not to apply at his own risk;

d. The decision to discontinue the post encumbered by the Applicant was lawful and he failed to establish that it was tainted by bias, arbitrariness or extraneous factors, or that it was retaliatory; his allegations in that respect are speculative and unsubstantiated. There is no evidence that the Applicant's post was abolished because he had identified procurement shortcomings or had raised concerns about the fees charged by the GSM warehouses;

e. The fact that the Head, PMCS, had recommended the Applicant as his second out of three recommended candidates does not allow concluding that this affected the decision to abolish the post;

f. The performance evaluation of the Applicant by the Head, PMCS, does not provide any evidence of bias on the part of the latter, but of rather constructive feedback; for the year 2014, he received the rating "successfully meets performance expectations"; if the Applicant disagreed with it, he could have instituted rebuttal proceedings, which he did not;

g. The Applicant did not pursue his complaint for harassment, filed on 8 December 2014, against the Head, PMCS. Moreover, he asked the IGO to put it on hold, and never asked it to take the matter up again;

h. Contrary to what the Applicant asserts, the restructuring in 2013 was not large-scale, but simply consisted of establishing PMCS as a service, rather than as a section within SMLS, and the adding of a D-1 position;

i. The Applicant's argument that in May and June 2014, the Head, PMCS, started creating a parallel management by gradually excluding the PMCS Goods Team from his supervision is unfounded. Rather, the Head, PMCS, made good faith efforts to provide a structure giving the SSO (P-4) a role in line management of the Goods team, whilst maintaining the SSO's reporting line to the Applicant;

j. The Organization did not create a legal expectancy that the Applicant's post would be extended; FTAs do not carry any expectancy of renewal or conversion, which can only be based on a firm commitment or an express promise to renew the appointment; none of these existed in the case at hand; any standard reference in the letter of recruitment to the standard assignment length ("SAL") is not relevant for the purpose of a promise or firm commitment of contract renewal; the SAL has no impact on the length of a contract or on the continuity of a post someone is encumbering; particularly, the Applicant was recruited against an "expert post" and, as such, was not subject to rotation; furthermore, the Applicant was given seven months' notice of the abolition of his post; in light of all of the foregoing, his arguments concerning a lack of good faith on behalf of the Administration in dealing with him must fail;

k. With respect to the Applicant's argument that the process was not transparent and that he was not consulted, the Appeals Tribunal held in *Tsoneva* 2013-UNAT-339 that no such consultation was required with respect to the discontinuation of a post at UNHCR. It is sufficient to inform the staff member, discuss the matter with him/her before referring it to the Budget Committee, and informing the staff member of the outcome of Budget Committee's consideration. This is precisely what happened in the present case: the Applicant was duly informed of the intention to discontinue his post before the matter was submitted to the Budget Committee; he also commented on the submission in an email to the Deputy High Commissioner (Chairperson of the Budget Committee), and was notified of the approval of the Budget Committee;

l. The Tribunal is not competent to review the restructuring decision; in any event, the High Commissioner approved the restructuring exercise on 25 June 2016; the abolition of the Applicant's post was approved by the Budget Committee; the HC did not have to approve that decision;

m. UNHCR also supported the Applicant's wish to go on loan to the FAO, which unfortunately did not materialize;

n. The Applicant was extensively informed of the reasons behind the contested decision during a meeting with the Head, PMCS, of 19 June 2015; in his email of 29 June 2015 addressed to the Deputy High Commissioner, the Applicant provided his views on the submission to the Budget Committee; the latter requested additional information, in view of the Applicant's email, which it received; it was on the basis of that additional information that the Budget Committee took its decision on 10 July 2015; and

o. The non-renewal of the Applicant's FTA on the grounds of the abolition of his post was lawful, and the applications should be rejected.

Consideration

28. The two applications are intrinsically linked and concern the same facts. Thus, the Tribunal finds it appropriate to join them and issue one judgment on the two cases.

Receivability

29. The Tribunal notes that in his first application (Case No. UNDT/GVA/2015/182), the Applicant contests the decision notified to him by letter dated 24 July 2015, to discontinue the P-5 post of Chief of Section (Procurement of Goods), effective 1 March 2016, which coincided with the expiration of his FTA. At that time, the Applicant had not yet been informed about the decision not to renew his FTA, which was notified to him on

16 February 2016, and concerning which he filed a second application registered under Case No. UNDT/GVA/2016/039.

30. The Tribunal first has to examine the receivability of the applications, and notes the relevant jurisprudence of the Appeals Tribunal in this respect. Indeed, in *Lee* 2014-UNAT-481, para. 51, the Appeals Tribunal held the following:

At the time her application was pending before the Dispute Tribunal, the General Assembly had not acted on the proposed programme budget and had not adopted a resolution that would abolish Ms. Lee's post. And even if the General Assembly had adopted such a resolution, that decision would not have changed anything. Both the Secretary-General's budgetary proposal and the General Assembly's adoption by resolution of the budget proposal are merely acts prefatory to or preceding an administrative decision that would "produce direct legal consequences" to Ms. Lee's employment. Although Ms. Lee cannot challenge the discretionary authority of the Secretary-General to restructure the Organization or to abolish her post, she may challenge an administrative decision resulting from the restructuring once that decision has been made.

31. It follows from the above that the application registered under Case No. UNDT/GVA/2015/182, insofar as it is directed against the decision to discontinue the post encumbered by the Applicant, is not receivable *ratione materiae*.

32. However, in his application registered under Case No. UNDT/GVA/2016/039, the Applicant contests his separation from service effective 2 March 2016 and the non-renewal of his appointment, as a result of the abolition of his post. This is an administrative decision resulting from the restructuring and the abolition of the Applicant's post. In accordance with the above-referenced jurisprudence in *Lee*, the Tribunal finds that this application is receivable.

Merits

33. In order to assess the merits of the application against the decision to separate the Applicant from service, the Tribunal has to address the following issues:

- a. Was the legality of the contested decision affected by any procedural irregularities?
- b. Did the Applicant have an expectancy of renewal of his appointment?
- c. Did his failure to apply for the newly created P-5 positions have an impact on the non-renewal of his appointment?; and
- d. Was the contested decision motivated by extraneous factors?

34. The Tribunal recalls the broad discretionary power of the Organization in the restructuring of its departments, including the abolition of posts.

35. In *Gehr* 2012-UNAT-236, the Appeals Tribunal held that:

25. The Administrative Tribunal of the International Labour Organisation (ILOAT) has held that it is well settled jurisprudence that “an international organisation necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff” (footnote omitted).

36. This was confirmed in *Pacheco* 2013-UNAT-281, *Simmons* 2014-UNAT-425, para. 31; *Hersh* 2014-UNAT-433, para. 16; *Bali* 2014-UNAT-450, para. 21; *Matadi et al.* 2015-UNAT-592, para. 16; and *Simmons* 2016-UNAT-624, para. 12.

37. At the same time, the Appeals Tribunal clarified in *Abdullah* 2014-UNAT-482 with respect to limits of managerial discretion that:

60. However, as recognised by the UNRWA DT, managerial discretion is not unfettered and the jurisprudence of the Appeals Tribunal has reiterated on numerous occasions that a decision of the Administration may be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors or was flawed by procedural irregularity or error of law.

38. Further, with respect to decisions not to renew an FTA, the Appeals Tribunal stressed in *Morsy* 2013-UNAT-298 that:

23. An administrative decision not to renew a fixed-term appointment—even one not to renew based on poor performance—can be challenged on the grounds the decision was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation (footnote omitted).

Procedural regularity

39. The Tribunal has to decide whether the grounds alleged by the Applicant to contest the restructuring and the abolition of the post he encumbered are pertinent and impact the legality of the contested decision.

40. The Applicant first argued that the restructuring of PMCS was not genuine, then he also sustained that it was at least used to “get rid of him” and as a pretext not to renew his FTA. He further claimed that in the restructuring exercise and the abolition of his post, the Administration failed to respect the applicable procedural rules.

41. In order to assess whether the decision to separate the Applicant, and thus not to renew his FTA, was unlawful, the Tribunal has to examine the legality of the underlying restructuring exercise and of the abolition of the Applicant’s post. The Respondent’s argument that the Tribunal is not competent to examine the legality of the restructuring exercise must fail. A restructuring exercise that was unlawful will affect the legality of any separation/non-renewal decision taken on the basis of that restructuring. Therefore, while an application against the restructuring and post abolition in itself may not be receivable (cf. paras. 30 and 31 above), the Tribunal, in order to assess the legality of the subsequent

administrative decision, is bound to examine, incidentally, the legality of these prior decisions.

42. The Tribunal notes that the proposal to restructure PMCS was made following the issuance of the Fritz report. The documentary evidence and the oral evidence provided at the hearing confirmed that while the Fritz report did not really make recommendations with respect to a revised structure of PMCS, nothing therein contradicted the establishment of two new sections, namely a Section on Procurement for Headquarters and a Section on Procurement for Field Support, in replacement of the sections of Procurement of Goods and Procurement of Services.

43. The Applicant further argues that the decision to restructure was not approved by the High Commissioner, in violation of para. 5 of the Terms of Reference of the Budget Committee and Part 6.1 of IOM/051/2007-FOM/054/2007. The Respondent on his part argues that the High Commissioner did approve the restructuring of PMCS on 25 June 2015. Further, in her evidence provided to the Tribunal, the Deputy High Commissioner stressed that it is the practice within UNHCR to get the High Commissioner's approval prior to the deliberations of the Budget Committee, and that it is not the usual practice to resubmit such matters to the High Commissioner once the Committee has reviewed them.

44. The Tribunal notes that para. 5 of the Terms of Reference of the Budget Committee provides that the Committee has the authority to review budgetary implications of proposals for structural changes at Headquarters and to make recommendations to the High Commissioner for decision. The same process flow is reflected in Part 6.1 of IOM/051/2007-FOM/054/2007, which provides under "[s]tructural changes at Headquarters" that "[a]ny structural changes at Headquarters shall be reviewed by the Budget Committee and approved by the High Commissioner".

45. Therefore, the Tribunal first has to examine whether the High Commissioner approved the restructuring and, if so, at what point in time he did it.

46. The record shows that, on 4 June 2015, DESS held a meeting with the High Commissioner during which he agreed in general terms to the strengthening of DESS staff in Budapest and, to transform UNHCR procurement into a more robust service, to the splitting into a Headquarters and a Field Support section. Furthermore, the High Commissioner was provided with a detailed description of the restructuring by the Director, DESS, by memorandum dated 16 June 2015, through the Assistant High Commissioner for Operations. In that memorandum, under “Priority actions and decision making points for consideration by the High Commissioner”, it is stated:

2. The Fritz report stressed the need for a **seamless supply chain**. Therefore, DESS management has reviewed the structures and proposed a reorganization to bring clarity on roles and responsibilities, consolidate common services and increased efficiencies. (Emphasis in the original)

...

- The **transformation of procurement** into a more robust service by reconfiguring the service into a HQ section and a Field section with a special emphasis on tailor made regional services and capacity building. While some of the changes proposed will be offset through post cuts and a consolidation of existing structures, an additional 4 P4/3 posts and 3 G posts are requested for Procurement (7 in total). Please refer to pages 4&5 of the summary note on the Fritz review for further details on the rationale (Annex 1). (Emphasis in the original)

47. Attached to that memo was an explanatory note *Follow up to the Fritz institute review of the supply chain*, which under section II, “Procurement Service (PS) structure - Annex 2”, notes the following:

17. As noted above, it is proposed to reconfigure the Procurement Management and Contracting Service into a much strengthened Procurement Service with a view to addressing the weaknesses highlighted through audits, internal feedback and the Fritz review. It will consist of two Sections:

- The **Procurement HQ Section** which will be divided into Procurement Support Units providing specialized services to HQ Divisions (DESS/DPSM; DHRM/DFAM/DER; DIST and others) with the requisite technical knowledge to provide faster services and quicker turnaround. A Vendor & Contract Management Unit will be also established through the creation of a P3 position (contemplated in the APR) to enable effective follow up to audit recommendations on these topics. (Emphasis in the original)
- The **Procurement Field Support Section** which will provide dedicated support to the different regions so that colleagues build up familiarity with the local and regional markets and can focus exclusively on field support. This section will support the HQ Contracts Committee submissions from the field and contain staff resources for Partner and Pre-Qualification support; the Supply Policy and Capacity Building Unit to bring together policy development, help desk support and to lead capacity building for both SMLS and PS. The Procurement Field Support Unit will be enhanced by the creation of 2 P3 positions, 1G7 and 1 G6, and the upgrade of an existing position from G6 to G7. These changes were already partially requested during the APR. (Emphasis in the original)

48. Annex 2 referred to under that section is an organigram of the new Procurement Service structure, with a Procurement Headquarters Section and a Procurement Field Section, each headed by a P-5 Chief of Section. Annex 3 to the explanatory note, "Position Changes/Justification", is a table showing the reconfiguration of SMLS and PS that, *inter alia*, indicates that the post at the time encumbered by the Applicant would change category from "Expert" to "Standard Specific", as of 1 January 2016.

49. Having closely analysed the documents submitted to the High Commissioner, the Tribunal is satisfied that when, on 25 June 2015, he put his initials on the 16 June 2015 memorandum, he approved, *inter alia*, the new PS structure. The Tribunal finds that even if it were true that the documents submitted to the High Commissioner with respect to whether the Applicant's post was to be discontinued or not were confusing, this would be irrelevant. Indeed, the High Commissioner is a policy maker and the highest authority within UNHCR; he is at the top of the hierarchical chain. His authority under the relevant rules is limited to approve the overall restructuring; it is not his role, nor does he have the authority, to approve the abolition of a particular post. That authority falls on the Budget Committee as will be further developed below.

50. The Tribunal further considered the fact that the High Commissioner's approval of the overall restructuring of PMCS was made *prior* to the review of the matter by the Budget Committee on 2 and 10 of July 2015. According to the above-referenced rules the High Commissioner approves restructuring exercises upon the recommendation of the Budget Committee, that is, after the matter has been reviewed by the Committee.

51. The Tribunal has to consider whether the High Commissioner's approval *ex ante*, that is, prior to the review by the budget Committee renders the restructuring exercise unlawful. In administrative law, a procedural flaw can be cured if the participation of a particular organ in the decision making process prescribed by the rules occurs at a later stage. Further, in administrative law, a distinction has to be made between "mandatory" procedural requirements, the breach of which render a decision null and void, and "directory" preconditions, which do not.¹ As a consequence, the effect of failing to comply with statutory procedural requirements depends on its significance.

52. The Tribunal notes that the Budget Committee is only an advisory body in this matter, and that the sole authority to approve any structural change lies with the High Commissioner. In the case at hand, after the High Commissioner's

¹ See David Feldman, *Error of law and flawed administrative acts*, 73 (2) The Cambridge Law Journal 275, 314 (2014).

approval, the matter was reviewed by the Budget Committee. In the submission to the Budget Committee of 18 June 2015, it was stressed that the matter had been discussed and agreed upon by the High Commissioner and the Assistant High Commissioner for Operations. The Budget Committee, after obtaining additional information, was satisfied with and agreed to the restructuring at its meeting of 10 July 2015. The Tribunal is convinced that if the High Commissioner had reviewed the matter after and not before the Budget Committee's meeting of 10 July 2015, the outcome would have been exactly the same. In other words, the High Commissioner would have approved the restructuring just as he did on 25 June 2015. The Tribunal's assessment would have been different had the Budget Committee not agreed to the restructuring at its meeting of 10 July 2015. The Respondent confirmed that the High Commissioner approved the restructuring subject to the endorsement of the Budget Committee, and that if the committee had not agreed with it, the matter would have gone back to the High Commissioner. However, since the committee agreed to the restructuring, and the High Commissioner had previously approved it, the Tribunal is satisfied that any procedural irregularity resulting from the order of the review of the restructuring, if arguably not cured, did not have any impact on the outcome of the restructuring and did not prejudice the Applicant. It is thus irrelevant for the Applicant's case.

53. The Tribunal is also satisfied that it was the Budget Committee only that had the authority to approve the abolition of the post encumbered by the Applicant. Such post abolition was thus not subject to the High Commissioner's approval. The Budget Committee's authority to approve the discontinuation of a post is provided for in paras. 1, 2 and 10 of the Procedural Guidelines for Changes in Status of Positions (IOM/FOM/027/2009), which read as follows:

Changes in position status (discontinuation, reclassification)

1. When a manager intends to seek a reclassification or review, including discontinuation or redeployment, of a position encumbered by a staff member who was appointed to the position through the APPC or the APPB process, the Manager must inform the staff member in writing that a reclassification/review of the position is being sought. Such information should be relayed to the incumbent of the

position before submission of the request to the Budget Committee, for the Annual Programme Review or to the Director, Representative, Situational Coordinator or Hub Manager under the RAF. It is therefore the responsibility of the manager to discuss proposed changes in position status directly with the staff members concerned. In all cases, standard procedures as set out in the Staff Administration and Management Manual (SAMM) are to be followed.

2. Discontinuations or redeployments of encumbered positions generate additional costs in terms of reassignments/redeployment cost, salaries between assignments for professional staff, and possible termination indemnities. In view of this, the effective date of discontinuation or redeployment of all positions that are encumbered will be no less than six months after the approval of the request by the Budget Committee, in the context of the Annual Programme Review, or by the Director, Representative, Situational Coordinator or Hub Manager in the context of the RAF.

...

10. Upon receipt of the decision of the Budget Committee, in the context of the Annual Programme Review, or the decision of the Director, Representative, Situational Coordinator or Hub Manager to whom such authority has been delegated through the RAF for approving changes to positions, the Manager must immediately inform the staff member of the outcome of the position change, from which time the six month notification period starts.

54. The minutes show that on 10 July 2015, the Budget Committee duly approved the abolition of the Applicant's post. This is also reflected in the letter of 24 July 2015 notifying the Applicant of the decision to discontinue his post with effect from 1 March 2016. The Tribunal thus concludes that the decision to abolish the Applicant's post was taken by the competent authority, namely the Budget Committee.

55. The Applicant further argues that he was informed about the intention to abolish his post a day before the restructuring plan was presented to all staff as a *fait accompli*, and that no prior consultation with staff took place, in contradiction with IOM/FOM/051/2007. The Respondent argues that the consultation was in

accordance with that memorandum and with the jurisprudence of the Appeals Tribunal; he also stressed that the memorandum in question was unclear as to whether the information should be relayed in writing or not to the incumbent of the position before submission of a request to the Budget Committee.

56. The Tribunal recalls what the Appeals Tribunal held in *Tsoneva* 2013-UNAT-339, with respect to the requirement of consultation under the relevant rules at UNHCR:

23. We disagree with the UNDT's interpretation of the prescribed procedure. There is no requirement in either the Procedural Guidelines or the Policy that the staff member's meeting with the manager must take place after the staff member has received written notification. The only temporal requirement imposed by the procedure is that the manager must inform the staff member of the intention to request a discontinuation of the position in writing before submission of the request to the Budget Committee. The manager is charged with the responsibility of discussing proposed changes in position status directly with a staff member, but there is no specific requirement in the Procedural Guidelines of when such discussion should take place. Furthermore, there is no requirement in either the Procedural Guidelines or the Policy that the manager must "consult" a concerned staff member.

57. In the case at hand, the Applicant's manager had a meeting with him, on 18 June 2015, during which he informed the Applicant about the reconfiguration of SMLS and PMCS that would affect the Applicant's and others' posts. Thereafter, the matter was submitted to the Budget Committee, by memorandum of 18 June 2015 (received by the committee on 19 June 2015). On 19 June 2015, an all staff meeting was held, during which the Applicant and other staff members raised questions with respect to the restructuring. Finally, by memorandum of 22 June 2015, the Administration's intention to request the discontinuation of the expert position the Applicant was encumbering was confirmed to him in writing. It was stressed that the proposed discontinuation was subject to approval by the Budget Committee.

58. The Tribunal disagrees with the Respondent's argument that the rules are not clear about whether the information on the intention for discontinuation should have been relayed to the incumbent *in writing* before submission of a request to the Budget Committee. The first sentence of para. 1 of the Procedural Guidelines for Changes in Status of Positions clearly states that the manager shall inform the staff member *in writing* about the discontinuation. While the second sentence does not reiterate that the information shall be relayed *in writing*, by using "such information" in reference to the first sentence, the meaning can only be that it should be relayed in writing. If it were meant to be otherwise, the rules should have explicitly stated that "such information" can be relayed orally before submission to the Budget Committee, as long as it is followed by written information, to comply with sentence 1.

59. Furthermore, in *Tsoneva*, the Appeals Tribunal found that the only temporal requirement in the rules is that a manager must inform the staff member of the intention to request a discontinuation of the position *in writing* before submission of the request to the Budget Committee.

60. In the present case, the Applicant was not informed *in writing* before the submission was made to the Budget Committee. However, the Tribunal notes that he did not contest that he was informed orally prior to the submission, on 18 June 2015. Also, and more importantly, after the letter of 22 June 2015, the Applicant had and did use the opportunity to submit his written comments on the submission to the Budget Committee, by email of 29 June 2015 to the Deputy High Commissioner/Chair of the Budget Committee. The Deputy High Commissioner gave evidence that that email was considered by the Budget Committee, which gave rise to a request for additional information to the Director, DESS, at its meeting of 2 July 2015. The Tribunal finds that it is unfortunate that the Organization did not comply with a formality contained in its procedural rules, by informing the Applicant only orally on 18 June 2015, and in writing thereafter on 22 June 2015. However, the Tribunal is satisfied that the rationale of this procedural rule has been complied with because the Applicant was made fully aware, before submission to the Budget Committee, of the intention to discontinue

his post, in an individual meeting with his direct supervisor, which lasted around twenty to thirty minutes. He further attended an all staff meeting on 19 June 2015 at which he was able to and did ask (a) question(s). Finally, once he had received the written confirmation by memorandum of 22 June 2015, he was able and did make a written submission on the matter, which was taken into account. The non-compliance with a formality, which is that the information be conveyed in writing prior to a submission to the Budget Committee, did thus not prejudice the Applicant's rights. The rationale behind such requirement is to ensure that staff members are aware in a timely manner of the management decisions regarding their post, but it shall not be used to prevent the implementation of such decision if it was taken by the competent authority and if it did not jeopardize the subjective rights of staff members.

61. Without prejudice to its conclusions above (cf. paras. 51 and 52 above, as well as paras. 58 to 60 above), the Tribunal is satisfied that the prefatory acts at the basis for the Applicant's separation from service, and thus the non-renewal of his FTA, were taken by the competent authorities and did not prejudice the Applicant's rights.

Expectancy of renewal

62. FTAs do not carry any expectancy, legal or otherwise, of renewal or conversion to any other type of appointment, unless the Administration has made an express promise that gives the staff member an expectancy that his or her appointment will be renewed. To be sustained, a legitimate expectancy must not be based on a mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case, and must generally be in writing (*Igbinedion* 2014-UNAT-411; *Munir* 2015-UNAT-522).

63. The Applicant sustains that he had a legitimate expectancy to have his contract renewed beyond 1 March 2016. He bases his assertion, on the one hand, on the reference contained in his letter of recruitment of February 2014 to the five-year standard assignment length and, on the other hand, on the reference in

the same letter to the fact that his position would be re-advertised at least once in 6 years.

64. The mere references in a letter of recruitment to the specifics applying under the relevant rules to a particular recruitment do not satisfy the requirements for a legitimate expectancy of renewal as described above. The Applicant was on notice, at the latest on 24 July 2015, that his post was going to be discontinued and, hence, was aware that there was a possibility that his contract would not be renewed beyond 1 March 2016 against that position.

65. The offer of appointment that the Applicant accepted and signed in December 2013, that is, prior to receiving the letter of recruitment, contained a specific reference to the nature of the appointment as well as to its two-year duration.

66. The reference that the Applicant made to the five-year period of permanence in a specific duty station is a general/standard clause that must not be confused with the duration of his appointment. In fact, such reference to the SAL, when applicable, is enshrined in all contracts and does not affect the expiration of a contract, nor does it create any subjective rights for extension. The Applicant was fully aware of the duration and the nature of his appointment when he signed his letter of appointment. The argument that he had a legitimate expectation of renewal does fail.

Applicant's failure to apply to the newly created P-5 positions

67. The Respondent argues that the Applicant made it impossible to keep him in the employment of UNHCR since he failed to apply to any of the two newly created P-5 positions, namely that of Chief Procurement Headquarters and that of Chief Procurement Field Support. The Applicant on his part submits that it would have been contradictory for him to apply to any of these two positions while he was at the same time strongly contesting and opposing the whole restructuring exercise. The fact of the matter remains that he did not apply to any of these two posts for which he admitted, and the Administration confirmed, to be suitable.

The Tribunal cannot but observe that the Applicant deprived the Organization of a real possibility to maintain him in service.

68. The Tribunal is further satisfied by the Administration's explanation concerning why it was not possible to transfer the Applicant to any of the newly created P-5 positions. Indeed, while consideration was given to it, DHRM decided that the difference in substance between the new and the old P-5 positions in PS/PMCS did not allow filling the posts without advertisement and a competitive recruitment exercise. That decision was taken by DHRM and did not fall within the authority of either the Applicant's first or second reporting officer. This approach is further supported by the change in legal status of the posts, namely from "Expert" to "Standard Specific".

Extraneous factors

69. The Tribunal recalls that the burden of proving any allegations of ill-motivation or extraneous factors rests with the Applicant (*Assad* 2010-UNAT-021; *Jennings* 2011-UNAT-184; *Azzouni* 2010-UNAT-081, *Jennings* 2013-UNAT-329, para. 25; *Obdeijn* 2012-UNAT-201, para. 38; *Beqai* 2014-UNAT-434, para. 23).

70. The Tribunal notes that the Applicant's supervisor did withdraw some functions from him and tried to change supervisory roles before the official restructuring had been approved. It also notes that the change of supervisory roles was ultimately put on hold, after the intervention of the Director, DESS, pending the Fritz report. After hearing and reviewing all the available evidence, the Tribunal understands that the Applicant's direct supervisor took some of these measures to smoothen tensions that appeared to have come up in the team, and to ensure the team worked efficiently. This falls within a manager's powers and does not qualify as harassment. While it would have been sound management to further consult the Applicant on these matters, and maybe not to have withdrawn (some of) the functions from him, the Tribunal, in light of the available evidence, is not satisfied that by his behaviour the Applicant's supervisor showed any bias against him. Rather, the Head, PMCS, took managerial actions, in good faith, as he

believed they were in the Organization's interest. Indeed, it is a manager's role to balance and motivate a team, and the Tribunal is satisfied that the Applicant's supervisor had good reasons to take the measures he did.

71. While there is some extensive evidence of professional disagreements between the Applicant and his direct supervisor, the Applicant failed to prove that the non-renewal of his appointment was based on extraneous factors or that the restructuring was used to get rid of him. The Tribunal also notes that the IGO did not open an investigation into the Applicant's complaint for harassment against his direct supervisor. Indeed, the Applicant admitted in his evidence before the Tribunal that he had himself asked that the complaint be put on hold and that he did not request the IGO at any point to take the matter up again.

72. Moreover, the Tribunal observes that the Applicant admitted that his direct supervisor gave positive references for him in three recruitment exercises he underwent outside UNHCR during and after his employment with UNHCR. The Applicant, who indicated his direct supervisor as a reference, was selected for at least one of the three positions. Thus, any argument of bias from his direct supervisor, which may have supported an argument that the Applicant's separation from service was based on extraneous factors, must fail.

73. Finally, the Tribunal cannot but observe that the restructuring led to the abolition of several posts, one of which was that encumbered by the Applicant. The Applicant willingly decided not to apply for any of the new P-5 posts he was suitable for under the new structure. His separation from service, and the resulting non-renewal of his FTA, was based on a genuine restructuring exercise and the abolition of the post he encumbered.

Remedies

74. The Tribunal finds that having regard to the applicable legal principles and in light of the evidence produced, the decision at stake is not illegal and cannot be rescinded.

Case No. UNDT/GVA/2015/182

UNDT/GVA/2016/039

Judgment No. UNDT/2017/073

75. In light of these conclusions, the Tribunal cannot grant the Applicant a remedy, either in the form of rescission and/or of compensation for material and moral damages, under art. 10.5 of its Statute.

Conclusion

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

- a. The application registered under Case No. UNDT/GVA/2015/182 is rejected as not receivable, *ratione materiae*;
- b. The application registered under Case No. UNDT/GVA/2016/039 is rejected in its entirety.

(Signed)

Judge Teresa Bravo

Dated this 12th day of September 2017

Entered in the Register on this 12th day of September 2017

(Signed)

René M. Vargas M., Registrar, Geneva