



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

TEO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Michael Brazao, OSLA

Counsel for Respondent:
Jérôme Blanchard, HRLU/UNOG

Introduction

1. The Applicant, a Human Rights Officer at the P-3 level, step 8, with the Office of the United Nations High Commissioner for Human Rights (“OHCHR”), filed an application in which she describes the impugned decision as follows (emphasis omitted):

As the present Application will make clear, the contested decision consists of two inextricably intertwined components.

Component “A”: The Applicant’s assignment by her employer, OHCHR, to a General Temporary Assistance ... post contrary to the express terms of a post-matching exercise whereby she was informed in writing that she would be laterally transferred from her former post in the Asia-Pacific Section ... at the Geneva duty station of OHCHR to a regular-budgeted post in the Sustainable Development Goals [“SDG”] Section ... at the New York duty station of OHCHR.

Component “B”: Failure of the Applicant’s employer to assign her appropriate functions commensurate with the SDG position she accepted in good faith pursuant to the above-referenced post-matching exercise.

2. In response, the Respondent submits that, in its entirety, the application is not receivable *ratione materiae* as it does not concern an administrative decision within the meaning of staff rule 11.2(a) or the Dispute Tribunal’s Statute and the relevant jurisprudence. Notwithstanding the submissions on receivability, the Respondent also contends that the application is without merit.

Factual background

3. Without prejudice to any finding of fact that the Tribunal may make at a later stage and to provide context for the present Judgment on receivability, the Tribunal sets forth below the facts as the Applicant presents them in her application, also

noting that the present Judgment solely concerns legal matters and that it appears as if the Respondent does not contest this presentation:

... The Applicant is a Human Rights Officer, P-3, with the Office of the United Nations High Commissioner for Human Rights (“OHCHR”). From 4 April 2008 until 31 October 2011, the Applicant worked in the Asia-Pacific Section (“APS”) within the Field Operations and Technical Cooperation Division of OHCHR on successive 100-series appointments governed by the UN Staff Rules in effect at that time, against various P-3 posts. On 3 December 2011, the Applicant was granted a fixed-term appointment under the current UN Staff Rules, against a regular budget P-3 post in APS.

... Until 23 September 2016, while retaining a lien against her regular budget P-3 APS “parent” post, the Applicant also undertook three temporary assignments at the P-4 level in the Field Operations and Technical Cooperation Division.

... At all relevant times described above prior to 23 September 2016, the Applicant worked at the Geneva duty station of OHCHR.

... On 10 September 2015, the Applicant received a Memorandum co-authored by [name redacted, the] the then-UN High Commissioner for Human Rights, [name redacted, the] the then-UN Deputy High Commissioner for Human Rights, and [name redacted] the Assistant Secretary-General for Human Rights, entitled “Lateral move of posts to new Regional Hubs”. [reference to annex omitted] In that Memorandum the highest management of OHCHR informed the Applicant that “an internal working-level Staff Movement Group (SMG) was established in June to develop a framework to better and more efficiently carry out OHCHR’s mandate... The framework seeks to accomplish changes that are necessary for this Office to operate more effectively while also trying to accommodate staff members’ needs and preferences”.

... The Memorandum further informed the Applicant that:

“[a]s the incumbent of an identified post, you would be expected to move with your post. **However, if you do not wish to keep your post and move with it, you will be offered the opportunity to take part in a lateral staff movement exercise along with other staff across the entire Office. This would give you the**

opportunity to express preferences for available posts/duty stations, including the posts of staff in other locations who opt in to the process that will be coordinated by the SMG... The Steering Group will review the recommendations and the High Commissioner will take decisions on lateral reassignments by the end of November, although the implementation/moves will not occur until the first half of 2016, in consultation with the staff involved.”
[footnote: emphasis added]

The terms of the arrangement underscored in the above-cited quotation, which the Applicant ultimately elected to pursue, are informally referred to within the OHCHR employment environment as a “post matching exercise/process”.

... On 9 December 2015, [the Applicant] received a Memorandum from [name redacted] the Chief of the Programme Support and Management Services (“PSMS”) of OHCHR, titled “Lateral movements under OHCHR Change Initiative”. [reference to annex omitted] In that Memorandum, [the PSMS Chief] stated:

“I am writing with reference to the internal post matching process conducted in the context of the Change Initiative, in which you agreed to participate by declining a proposed move with your post to the field... This is to confirm the High Commissioner’s decision, pending receipt of the necessary budgetary approvals from the General Assembly, to laterally transfer you to the post you indicated as your second preference, Human Rights Officer in **the Millennium Development Goals Section** of RRDD [unknown abbreviation] in New York. Formal confirmation of the implementation of this decision, which will not take place before 2016, will be given following the final budget approval by the General Assembly at the end of this year. At that stage, PSMS/HRMS [unknown abbreviation] will liaise with you regarding the dates for the transfer to take place” [footnote: emphasis added]

... The “Millennium Development Goals Section of RRD[D]” referred to in the correspondence would later be renamed the “Sustainable Goals Division” or “SDG”, which is the Section that was

ultimately promised to and accepted by the Applicant in correspondence to be addressed later in the procedural history of the present Application. For the avoidance of any confusion, the Applicant simply wishes to inform this Honourable Tribunal that despite this change in nomenclature, at all relevant times the Division in which she was promised she would receive a regular budget post appointment pursuant to the post-matching exercise is identical.

... On 15 January 2016, the Applicant received another memorandum from [the PSMS Chief], entitled “Proposed lateral movements under OHCHR Change Initiative”. [reference to annex omitted] In this Memorandum [the PSMS Chief] recalled that:

“[A]s you are by now aware, the General Assembly has decided to delay action on the approval of OHCHR’s proposals in the context of the Change Initiative, pending consideration of a final report to be presented to the seventy-first session of the General Assembly later this year. Given this outcome, it will not be possible to proceed with the implementation of those decisions... In the meantime, further consideration is now being given to options for proceeding with those aspects of the Change Initiative within the authority of the High Commissioner, which we hope will provide opportunities for some movements of posts/staff. This will require a fresh look at the staffing implications, for which the successfully managed matching process will be used as a point of reference. This will, of course, be subject to full consultation with the concerned staff”.

... On 18 March 2016, [the PSMS Chief] noted by telephone that the Applicant had recently been appointed to a temporary P-4 post, and enquired whether she would still be interested in participating in the post matching exercise that would entail the Applicant giving up her “parent” regular budget P-3 post in APS to relocate to the regular budget P- 3 SDG post to which she was matched. [The PSMS Chief] clarified that arrangements would be made to relocate the P-3 SDG post, together with other SDG posts, from Geneva to New York and that the post move would not be tied to the upcoming General Assembly process. While he could not provide a specific date, [the PSMS Chief] said that the post move could be effectuated before the end of calendar year 2016. The Applicant expressed her continued

interest in this opportunity but requested that the issue be revisited once there was clarity as to the date of the proposed move.

... On 30 May 2016, [the PSMS Chief] telephoned the Applicant to inform her that the post matching exercise would take effect on 1 September 2016, and solicited a decision from her as to whether she was still interested in moving to a post situated in New York on that date. The Applicant informed [the PSMS Chief] that she had misgivings about the proposed date [reason redacted for privacy]. The Applicant thus requested whether any flexibility in respect of the move date was possible.

... On 31 May 2016, [the PSMS Chief] reverted to the Applicant to inform her that there could be no extension of the move date as the Office must get the SDG Section up and running in New York as quickly as possible. He [redacted for privacy] [informed her that] the transfer could not be postponed until December 2016. [...]

... On 8 June 2016, after consultation with the Deputy High Commissioner for OHCHR, the Applicant sent an email to [the PSMS Chief], as well as the Chief of HRMS, accepting the offer of the post in New York. [...]

... On 28 June 2016, the Applicant received an email from HRMS indicating that her move to New York had been officially approved effective 1 September 2016 and that she would be contacted by UNOG HR partners on the details of the move. [...]

... On 22 July 2016, having not yet received formal notice relating to her impending move to New York in just over one month, the Applicant discussed with [the PSMS Chief] the possibility of a mutually agreeable alternative date. That same day, [the PSMS Chief] sent the Applicant a Memorandum entitled “Your lateral move under the OHCHR Change Initiative”. [...] In this Memorandum, [the PSMS Chief] informed the Applicant that:

“[A]s discussed, the Controller has approved the move of posts in the OHCHR Sustainable Development Goals (SDG) [formerly Millennium Development Goals or MDG] Section to New York from 1 September 2016, allowing for the implementation of the High Commissioner’s lateral move decisions. Thus, I am pleased to confirm your transfer to the P-3 SDG post (#30501032) in New York, on the agreed date of 23 September 2016. Details regarding the arrangements for

your move will be communicated to you separately from UNOG in the coming days”. [footnote: emphasis added]

... On or about 29 August 2016, the Applicant became aware that the incumbent of the SDG post in New York that she was supposed to occupy in less than one month [name redacted], was having second thoughts about vacating that post and relocating to a new post as part of the same OHCHR Change Initiative post-matching exercise that the Applicant had consistently pursued in good faith since September 2015. The Applicant further learned that [the incumbent] was contemplating legal action to block his relocation, thus leaving the Applicant with no post to occupy upon her arrival in New York in just a few weeks’ time. The Applicant raised these concerns orally with [the PSMS Chief], who assured her to proceed with her preparations for her relocation because, in his words, [the incumbent’s] legal challenge, if filed, would “not be receivable”.

... On 14 September 2016, merely nine days before the Applicant was expected to relocate to New York, she learned that [the incumbent] had filed an Application before this Honourable Tribunal requesting a suspension of action, pending the completion of management evaluation of OHCHR’s decision to laterally transfer him from the SDG post in New York that the Applicant was about to occupy imminently. Upon receipt of this information, the Applicant urgently wrote an email to [the PSMS Chief], which was copied to OHCHR and UNOG senior management, indicating that her relocation preparations were well underway and that if the incumbent’s application was successful it could have untold deleterious consequences for her and her family. She indicated that she had given notice to terminate her apartment lease, given up her child’s place in school, and her spouse had resigned from his [United Nations] job. In that correspondence, she informed the various recipients that it was too late for her and her family to remain in Geneva on such short notice, and requested that management explore alternatives to her imminent deployment to New York on 23 September 2016. [...]

... On 16 September 2016, [the PSMS Chief] responded in writing that there would temporarily be a vacant post in New York against which the Applicant could be placed pending the resolution of the issue of the incumbent’s refusal to vacate his SDG post. He further indicated that should the matter take a long time to resolve, the Applicant could be placed against a one-year vacancy to work on Asia

Pacific issues commencing in January 2017. However, [the PSMS Chief] indicated that he did not expect such contingency plans would be necessary and that, notwithstanding the recent shocking turn of events, the Applicant and her family should move to New York on 23 September 2016 as scheduled. [...]

... On 19 September 2016, [the] Honourable Tribunal [based in Geneva] granted [the incumbent's] requested suspension of action [...].

... The Applicant learned of the successful suspension of action Order on 20 September 2016. That same day, both orally and in writing, the Applicant informed [the incumbent] that while she was willing to accept a certain degree of flexibility in the short term while this situation was sorted out, she expected that none of the benefits or entitlements she had anticipated from the SDG post would be affected by any alternative arrangements made by the Administration. She further emphasized that by accepting the SDG P3 post in New York, she had made a number of professional sacrifices, including foregoing a P4 position in Geneva that had secured temporary funding for at least 15 months, with the possibility of extension of said funding. The Applicant stated that for the sake of her professional security and that of her family, she would not accept to be placed against a temporarily-funded post in the long term, and asked to be transferred to another regular budget P3 post akin to the SDG post she had accepted in good faith. [reference to annex omitted].

... On 21 September 2016, [the PSMS Chief] sent the Applicant an email in which he expressed his understanding that she had participated in the post matching process in good faith and committed to making arrangements to proceed with her deployment to New York pending resolution of the issue surrounding the unavailability of her post. He further stated that as a transitional measure, the Applicant would have to take up a different assignment involving different functions than originally planned, for an unspecified period of time. While [the PSMS Chief] hoped that the case involving [the incumbent] would soon be resolved so that the Applicant could assume the SDG post the incumbent was occupying, he stated that he could not make any guarantees to that effect as the matter was now pending before [the] Honourable Tribunal. Moreover, [the PSMS Chief] refused to confirm that the Applicant would be transferred to a regular budget post at the completion of this process, nor could he guarantee that she would be able to cover any particular portfolio. He did promise to

work with the Applicant in the event that a long-term alternative solution was needed, and would be supportive if the Applicant were to reconsider her move to New York. [...]

... On 22 September 2016, the Applicant responded to [the incumbent] that it would not be feasible to reconsider her move to New York at the last minute, as all the necessary preparations to wind-up her life in Geneva had been made and she was expected to deploy to New York the very next day. The Applicant requested that the administration issue an official Memorandum regarding her deployment. [...].

... On 23 September 2016, [the PSMS Chief] issued a Memorandum to the Applicant titled, “Your move to New York Office”. [...]. [The PSMS Chief] reiterated the situation regarding [the] Tribunal’s Order suspending the administrative decision to transfer [the incumbent] from the post the Applicant was expected to occupy, and sympathized with the hardship this situation had engendered for her and her family. He further reassured the Applicant that “we will make every effort to honour th[e] commitment” to transfer [you] to the SDG post that was “based on the decision of the High Commissioner for Human Rights of 9 December 2015”. He then proceeded to instruct the Applicant that “your move to the New York takes effect as of **today**, i.e. 23 September 2016.” [...] [The PSMS Chief] informed the Applicant that “[u]nder the circumstances, and pending the outcome of the management evaluation process, you will be placed temporarily on a temporary post” and “performing temporarily the functions required of a Human Rights Officer in support of the New York office”.

... On 27 September 2016, the Applicant received a letter from [name redacted] [the] Human Resources Officer, HSRMS UNOG (“the Administrative Decision”). In that letter [the Human Resources Officer] stated:

“This letter cancels and supersedes the previous one dated 22 August [sic] [...] 2016. We wish to confirm that you have been temporarily assigned to the post of Human Rights Officer (P-3) in the Office of the High Commission of Human Rights, New York, for an initial period of three months. This temporary assignment is effective 23 September 2016.” [...]

... From her on-boarding in New York until December 2016, the Applicant performed functions that were not commensurate with the Terms of Reference agreed upon as part of her post-matching exercise. She covered functions related to the UN General Assembly's Third Committee.

... On or about 23 December 2016, the "initial period of three months," referred to immediately above, elapsed. From that time the Applicant has not received any memorandum or other official communication from the Administration related to her Terms of Reference.

... From late December 2016 to the time of the filing of the present Application, the Applicant has been performing functions related to Asia-Pacific issues in the "Country Situations" Section and occasionally has been performing programme support functions where there have been staffing gaps.

... Thus, from her on-boarding in New York in late September 2016 until present, the Applicant has not performed functions commensurate with the terms of reference of the SDG post she was contractually promised by the Administration.

... On 18 November 2016, the Applicant sought management evaluation of the [purported] Administrative Decision referred to above. By letter dated that same day, the Management Evaluation Unit ("MEU") acknowledged receipt of [the Applicant's] request for management evaluation. [...]

...]

4. In the Respondent's reply, it is stated that, on 6 March 2017, the Management Evaluation Unit issued its evaluation letter in the case of the other staff member, whereby it determined that the case was not receivable *ratione temporis*.

Procedural history

5. On 15 March 2017, the Applicant filed the application.
6. On 17 March 2017, the Registry acknowledged receipt of the application on 15 March 2017 and, pursuant to art. 8.4 of the Rules of Procedure, transmitted it to

the Respondent, instructing him to file a reply by 17 April 2017 in accordance with art. 10 of the Rules of Procedure.

7. On 17 April 2017, the Respondent filed his reply.

8. The present case was re-assigned to Judge Alexander W. Hunter, Jr. on 8 January 2018.

9. By Order No. 10 (NY/2018) issued on 19 January 2018, the Tribunal instructed the Applicant to file a response to the Respondent's reply, including on the submissions on non-receivability, by 2 February 2018.

10. On 29 January 2018, the Applicant filed a motion for extension of time to file a response to the Respondent's reply. The Applicant informed the Tribunal that the Applicant's counsel went on leave on 18 January 2018 and returned on 29 January 2018, learning of the Tribunal's instructions in Order No. 10 (NY/2018) for the first time upon his return. Given these circumstances, the Applicant requested a one-week extension to the 2 February 2018 deadline so that the Applicant may benefit from the effective assistance of her counsel.

11. By Order No. 22 (NY/2018) issued on 31 January 2018, the Tribunal granted the Applicant's request for an extension of time and instructed the Applicant to file a response to the Respondent's reply, including on the submissions on non-receivability, by 9 February 2018.

12. On 8 February 2018, the Applicant filed a response to the Respondent's reply.

13. On 12 February 2018, by Order No. 35 (NY/2018), the Tribunal instructed the parties to participate in a Case Management Discussion ("CMD") set down for 22 February 2018.

14. On 22 February 2018, the Tribunal conducted the scheduled CMD, at which counsel for the Applicant and counsel for the Respondent participated by telephone. The Applicant was present in person in the courtroom in New York. At the CMD, the Tribunal noted, *inter alia*, that the instant case appears to raise a preliminary issue of receivability *ratione materiae*. Both parties agreed that receivability can be dealt with on the papers as a preliminary issue.

15. By Order No. 45 (NY/2018) dated 26 February 2018, the Tribunal made the following orders (emphasis omitted):

... The Respondent shall file a reply to the Applicant's submissions on the receivability of the application by 5:00 p.m. on Monday, 5 March 2018. In particular, the Respondent is to provide a detailed explanation in support of his contention that the "[t]he funding source of a staff members post is purely operational and does not impact the Applicant's terms of appointment", together with supporting documentation (including copies of the Applicant's terms of appointment before and after the contested decision).

... The Applicant can file additional particulars and supporting evidence, if any, in relation to her claim that the contested decision has caused her "economic prejudice" by 5:00 p.m. on Monday, 5 March 2018.

... Closing submissions, if any, on the issue of receivability are due by 5:00 p.m. on Wednesday, 14 March 2018.

16. Pursuant to Order No. 45 (NY/2018), on 2 March 2018, the Applicant filed a submission on the "economic prejudice suffered due to [the] administrative decision" and appended a signed "Solemn affirmation" from the Applicant thereon.

17. On 5 March 2018, the Respondent filed his reply to the Applicant's submissions on the receivability as per Order No. 45 (NY/2018).

18. On 13 and 14 March 2018, the Applicant and the Respondent, respectively, filed their closing submissions on receivability.

Parties' final submissions on receivability

19. The Respondent's contentions on receivability may be summarized as follows:

a. The Applicant has not demonstrated why, and how, her transfer to New York in December 2016 would have been different had she been placed on a "regular budget" post. The Applicant has not indicated how this has affected her rights;

b. In *Andronov*, as affirmed by the UNAT in Judgment No. 2013-UNAT-304 (*Al Surkhi et. al.*), the UN Administrative Tribunal ("UNADT") held that "[a]dministrative decisions are ... characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences" (former Administrative Tribunal Judgment No. 1157 (2003)). In *Lee* 2014-UNAT-481, the Appeals Tribunal held that a "key characteristic of an administrative decision subject to judicial review is that the decision must 'produce...direct legal consequences' affecting a staff member's terms and conditions of appointment". A contested decision which has no adverse legal consequences or impact is not an "administrative decision" within the scope of art. 2(1)(a) of the Dispute Tribunal's Statute" (*Maloof* 2017-UNAT-806);

c. A finding of direct and adverse consequences is a "key characteristic" of whether an administrative decision falls within art. 2.1 of the Statute of the Dispute Tribunal. There can be no appealable administrative decision absent a showing that the contested decision (i.e., her transfer to New York in December 2016 on a general temporary assistance funded post) had an actual negative effect on the Applicant when the contested decision was taken;

d. The Applicant's assertion that the contested decision is an administrative decision because it has allegedly caused "significant disruption to her career progression" is too speculative, and stresses that the Applicant's claim relates to a 17-month period. During that period, the Applicant received, and accrued, at least the same entitlements as if she would have been placed on a regular budget post. Also, with respect to the Applicant's argument that she gave up a P-4 level post in Geneva, it is the Respondent's understanding that she would have given up this post anyway upon her transfer;

e. Also, at this stage, it is not possible to comment on how the Applicant's husband is to file the form to obtain a work permit. This particular matter is not part of the Applicant's terms of appointment or contract of employment. The Respondent merely notes that the Applicant has a five-year fixed-term appointment until 2022, which was not affected by her transfer; and

f. The Report of the Advisory Committee on Administrative and Budgetary Questions, an expert committee elected by the General Assembly, quoted by the Applicant, does not purport to vest a staff member with an entitlement to a particular post.

20. The Applicant's contentions on receivability may be summarized as follows:

a. The Applicant's involuntary transfer from a regular budget post to a general temporary assistance post constitutes a contestable administrative decision that has caused a demonstrable economic prejudice. Consequently, the Respondent's preliminary objection that the Application is not receivable must be dismissed;

b. In *Chemingui* Order No. 245 (NBI/2015), the Dispute Tribunal expressly stated that the involuntary removal of a staff member from a regular budget post appeared *prima facie* unlawful. Like the present case, the respondent in *Chemingui* contended that the decision to reassign the applicant was made for “operational reasons” and that the post he was being reassigned to was at the applicant’s current grade and carries responsibilities that corresponded to his level, skills and competencies. In finding the decision to reassign the staff member from a regular budget post to a general temporary assistance post *prima facie* unlawful, the Dispute Tribunal held that it was “clear... that the post is of limited duration and is funded by general temporary assistance (GTA) funds, so that it does not have the security of the post currently encumbered by the Applicant”. The Tribunal further pronounced that “[t]he potential ‘economic prejudice’ to the Applicant that would occasion from being reassigned to a less secure position requires little explanation”;

c. It is a matter of basic common sense, requiring little explanation (to use the language of *Chemingui*) that the involuntary transfer of a staff member from a regular budget post to a general temporary post has a deleterious impact on a staff member’s job security. In the Applicant’s submission of 2 March 2018, the economic prejudice she has suffered as a result of the Administration’s decision was detailed, stating, *inter alia*, that her career progression has been significantly disrupted, that her spouse has had problems with securing employment in New York because of difficulties with obtaining a work permit, and that it has had a negative financial impact for her as a result of challenges with school enrolment and negotiating rental leases. The involuntary removal from a regular budget post to a general temporary assistance post is a contestable administrative decision that has caused her

demonstrable economic prejudice, and the Respondent's receivability argument must therefore fail;

d. In a typical job opening on Inspira (the online United Nations jobsite), the job reference number of the advertised position is generated based on the relevant position's attributes. This number consists of abbreviations of the calendar year, the job family, the department, a system generated number, the position type and the duty station or multiple duty stations in addition to a letter indicating the post nature. The indicator for the post is marked "R" if it is funded as a regular budget post and "X" if the position is funded by voluntary contributions or extra-budgetary resources, including general temporary assistance. Often, the funding source might also be cited in the text of the job opening. Hence, the source of funding for United Nations posts, which is publicized, is equally a determining factor for a candidate to apply to or accept a post;

e. Such was the case for the conscious prioritization of the Applicant's choice of posts in the post-matching exercise in which she participated in 2015. It is clear from the Applicant's submission on economic prejudice that differences in funding sources of posts are not "purely operational" as perceived by the Administration and do translate into concrete consequences for staff members. In this case, the limited nature of the general temporary funding source for the Applicant's various temporary assignments resulted in her having several shortened tours of duty at the New York duty station as opposed to a continuous tour if the position had been funded by the regular budget. Collaterally, this negatively impacted her spouse's work permit application. The financial viability of her family has been negatively affected through negligence and a lack of judgment from the Administration and, by extension, her sustainability to remain in a secured professional status

pursuant to the terms of her appointment and under circumstances for a prolonged and unspecified duration;

f. As chronicled in her submission on economic prejudice, until she was appointed to her current temporary assignment, which expires 30 June 2018, pursuant to a competitive process, her career progression has also been impacted by her assumption of different short-term responsibilities. Her spouse's career progression similarly suffered as a result; and

g. The Advisory Committee on Administrative Budgetary Questions had occasion to comment on the appropriate use of general temporary assistance posts in its "First report on the proposed programme budget for the biennium 2012-2013", when it stated that "the Committee emphasizes that general temporary assistance is intended for additional support during periods of peak workload as well as the replacement of staff on maternity leave or prolonged sick leave. The Committee considers that it should be used solely for those purposes and, therefore, proposals for funding should be time limited".

Consideration

21. It is the consistent jurisprudence of the Appeals Tribunal that the Dispute Tribunal "is competent to review its own competence or jurisdiction" under its Statute and that "[t]his competence can be exercised even if the parties or the administrative authorities do not raise the issue, because it constitutes a matter of law" (see *Tintukasiri et al.* 2015-UNAT-526, para. 20, and similarly, for instance, *O'Neill* 2011-UNAT-182, *Christensen* 2013-UNAT-335 and *Babiker* 2016-UNAT-672). Consequently, when examining the question of receivability, the Dispute Tribunal is in no way limited by the pleadings and claims of the parties and may assess the issue entirely independent thereof.

22. The Tribunal finds that the crux of the Applicant's case is whether, when she moved from Geneva to New York as part of the post-matching exercise, it was unlawful to reassign her to a general temporary assistance post of Human Rights Officer instead of a regular-budgeted post in the SDG section. The Applicant contends that this reassignment caused her harm because she was not assigned functions corresponding to those in the SDG section, as well as other injuries, including economic loss and moral damages.

23. The Respondent's primary contention regarding the application not being receivable *ratione materiae* is, in essence, that the funding source of a post encumbered by a staff member does not impact the staff member's terms of appointment or contract of employment and that a staff member has no right to request to be placed on a regular-budget post. The mere fact that a staff member encumbers a post does not create for him or her a right to remain on this post, or on a similar post. Staff members only have rights attached to a certain type of contract. Even if the Tribunal finds otherwise, the Respondent maintains that the application still does not concern an appealable administrative decision because, with reference to *Warintarawat* 2012-UNAT-208, the contested decisions did not negatively affect the Applicant's rights and, noting that burden rests with her to prove otherwise, she failed to meet her burden.

24. The Applicant, on the other hand, submits that the reassignment was an appealable administrative decision that negatively affected her terms of appointment because, as a matter of basic job security, it is preferable to be on a regular budget post than a general temporary assistance post because the funding source for the former type of post is more secure than that of the latter post. Specifically, in the present case, in response to Order No. 45 (NY/2018), the Applicant contends that being on a general temporary assistance post rather than a regular budget post negatively affected her, and she and her spouse have "suffered the loss of

professional opportunities resulting from the circumstances addressed in this contested decision which has led to detrimental economic, and by extension, moral damage consequences” because of the detriment it has caused both of their professional and private lives, referring, *inter alia*, to her lack of career progression, the “challenges for [her] spouse to qualify for a work permit” in New York, and financial issues concerning school enrolment and rental leases.

25. The Tribunal observes that, in *Lee* 2014-UNAT-481, the Appeals Tribunal defined an appealable decision as follows (affirmed, for instance, in *Harb* 2016-UNAT-643, *Faye* 2016-UNAT-654, *Faye* 2016-UNAT-657, *Hassanin* 2017-UNAT-759, *Zachariah* 2017-UNAT-764, *Fasanella* 2017-UNAT-765 and *Smith* 2017-UNAT-768):

49. We have consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must “produce{} direct legal consequences” [former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V] affecting a staff member’s terms and conditions of appointment; the administrative decision must “have a direct impact on the terms of appointment or contract of employment of the individual staff member”. [*Andati-Amwayi* 2010-UNAT-058]. The UNDT correctly found that the decision Ms. Lee was challenging did not “produce{} direct legal consequences” affecting her employment.

50. The UNDT also properly considered “the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision” [*Bauzá Mercére* 2014-UNAT-404, citing *Andati-Amwayi*], in determining that Ms. Lee was not challenging an administrative decision subject to judicial review.

26. The Tribunal further observes that decisions of the Administration regarding the organization of its work are generally appealable as while “the Secretary-General’s broad discretionary powers when it comes to organization of work, [i]t is well established that, notwithstanding the width of the discretion conferred by this provision, it is not unfettered and can be challenged on the basis that the decision is

arbitrary or taken in violation of mandatory procedures or based on improper motives or bad faith” (see *Lauritzen* 2013-UNAT-282, para. 28, and, similarly, *Rees* 2012-UNAT-266 and *Awe* 2016-UNAT-667).

27. With reference to *Warintarawat* 2012-UNAT-208, in his reply, the Respondent states that this, however, is not the case, if the relevant decision did not “negatively affect” the applicant’s right and it is for the Applicant to demonstrate this. The Appeals Tribunal provided as follows in *Warintarawat* (official translation):

11. For the sake of completeness, it should be added that the Appellant has not proven that the contested decision adversely affected his terms of appointment or his contract of employment, specifically his medical insurance entitlements and benefits. Even if the Administration were not to have complied with provisional staff rule 8.1 in taking the decision to outsource medical claims processing, the Appellant does not prove that this resulted in a change in his medical insurance entitlements and benefits. He makes no serious argument challenging the judgment of the Dispute Tribunal that the then contested decision was not an “administrative decision” within its scope of jurisdiction.

28. In the present case—without entering into the merits of the case and therefore also the specifics of the substantive issues—the basic question regarding receivability is, therefore, whether being reassigned to a general temporary assistance post instead of a regular-budget post is an appealable decision that negatively affects the terms and conditions of the Applicant’s employment contract with the Organization. Should the Tribunal find that this is indeed the case, then the application is receivable. In this case, as part of Tribunal’s substantive review of the case, it will then consider the following questions: (a) did the Applicant have a right to be placed on a regular-budget post; (b), if so, was any such right violated when she was instead placed on a general temporary assistance post; and (c), if so, did she suffer any harm in consequence.

29. The parties agree that, when moving from Geneva to New York, the Applicant was placed on a general temporary assistance post instead of a regular-budget post and that the funding sources of the two posts are different.

30. In this regard, the Applicant submits that being placed on a general temporary assistance post instead of a regular-budget post has a diminishing effect on her job security in that such funding source per definition is more uncertain. The Respondent, in his reply, contends that “[t]he funding source of a staff members [*sic*] post is purely operational and does not impact the Applicant’s contract of employment or terms of appointment” but nowhere contests the Applicant’s submissions that being on a general temporary assistance post as compared to a regular-budget post provides less job security. Also, in his response to Order No. 45 (NY/2018), the Respondent appends the Applicant’s two latest letters of appointment from which follows: (a) that, in December 2015, she was offered a two-year fixed-term appointment as Human Rights Officer at the P-3 level with OHCHR in Geneva/Switzerland; and (b) that, in December 2017, she was presumably offered a five-year renewal of this fixed-term appointment.

31. The Tribunal notes that, according to art. 2.1(a) of its Statute, the Applicant’s “contract” and “terms of appointment” include “all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance”. The Tribunal further notes that, by renewing her fixed-term appointment for another five years in December 2017, the Administration offered the Applicant the longest possible fixed-term appointment under ST/AI/2013/1 (Administration of fixed-term appointments), sec. 4.3 (and sec. 2.2 if it is a new fixed-term appointment).

32. However, this does not change the possibility—and risk—that, during the term of the Applicant’s current five-year fixed-term appointment, this appointment

could be terminated for reason of abolition of post or reduction of staff pursuant to staff rule 9.6(c)(i), which provides that:

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

(i) Abolition of posts or reduction of staff

33. It is trite law that a typical, and generally accepted, reason for abolition of post is that the relevant post has lost its funding. In this regard, based on the parties' submissions, the Tribunal can only conclude that while a regular-budget post generates its financing through the regular budget, the funding source for a general temporary assistance post is different and of provisional, unstable and insecure nature. Accordingly, depending on the funding source, the risk of her fixed-term appointment being terminated due to lack of such funding will therefore necessarily vary—and it is only reasonable to presume that, from a perspective of funding, a regular budgeted post is more secure than a general temporary assistance post. In line herewith, in *Toure* 2016-UNAT-660, the Appeals Tribunal found that the applicant in that case “did not hold a regular-budget established post but one of a temporary nature that could be discontinued without the need for [the relevant Executive Secretary] to seek prior approval” (see para. 36).

34. In conclusion, by placing the Applicant on a general temporary assistance post instead of a regular-budget post necessarily had a negative impact on her level of job security and, by implication, also on the terms and conditions of her employment contract.

35. In light of the above, it therefore follows that the application concerns an appealable administrative decision under art. 2.1(a) of the Statute of the Dispute Tribunal.

Conclusion

36. The application is receivable.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 23rd day of March 2018

Entered in the Register on this 23rd day of March 2018

(Signed)

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