



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2015/129
UNDT/GVA/2015/133
Judgment No.: UNDT/2017/048
Date: 27 June 2017
Original: English

Before: Rowan Downing
Registry: Geneva
Registrar: René M. Vargas M.

BROWN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Thad Guyer

Counsel for Respondent:

Kara D. Nottingham, HRLU, UNOG

Stéphanie Cochard, HRLU, UNOG

Introduction

1. By application filed on 11 May 2015, the Applicant contests the decision of 29 October 2014 not to renew her fixed-term appointment beyond its expiration date of 2 December 2014, and the decision conveyed to her by email of 10 December 2014 “that the High Commissioner ha[d] agreed for an extension of two years of [her] fixed-term appointment and also a lateral move to the Regional Office of [the Office of the High Commissioner for Human Rights (‘OHCHR’)] in Suva, Fiji as the Regional Representative for the Pacific, without prior consultation”.

2. The application was registered under Case No. UNDT/GVA/2015/129 and served to the Respondent, who filed his reply on 11 June 2015.

3. On 18 May 2015, the Applicant filed a second application, against:

a. “Her threatened separation from service, with effect from 21 May 2015, while on service-incurred medical leave”;

b. The “Respondent’s refusal to grant [her] request for a stay (on newly asserted medical grounds) of her lateral transfer to Fiji”; and

c. The Management Evaluation Unit’s 15 May 2015 rejection of her 13 May 2015 request for management evaluation related to the above two decisions.

4. The 18 May 2015 application was registered under Case No. UNDT/GVA/2015/133, and was served to the Respondent, who filed his reply on 17 June 2015.

Facts

5. With effect from 28 December 2011, Mr. C. was released from his Senior Human Rights Officer post (P-5), OHCHR, (post No. 501057) to go on mission assignment as Chief, Human Rights Officer, MONUSCO, at the D-1 level, for an initial period of one year. He kept a lien against his post at OHCHR.

6. On 11 July 2012, job opening (“JO”) 12-HRI-OHCHR-24481-R-Geneva (R) was issued indicating the following: “[t]his position is vacant due to the temporary assignment/secondment of the regular incumbent to another office/organization. The selection and extension of the appointment of the selected candidate will be contingent on the return of the incumbent who maintains a lien against this post”.

7. Prior to the JO, OHCHR had issued a temporary vacancy announcement (TVA 12/OHCHR/016/Geneva), for the replacement of Mr. C., and had informed the Human Resources Management Service (“HRMS”), United Nations Office at Geneva (“UNOG”) that it wished to select the Applicant, who had been an (external) roster candidate, against that post. HRMS, UNOG, informed OHCHR that it was not possible to select a roster candidate against a temporary vacancy announcement. It was only thereafter that the above JO was issued.

8. The Applicant was selected against the position in question (RB post No. 501057) and recruited at the Office of the High Commissioner for Human Rights (“OHCHR”) on 3 December 2012, under a two-year fixed-term contract expiring on 2 December 2014, as Senior Human Rights Officer (P-5), OHCHR, Geneva. Her letter of appointment did not contain any special conditions.

9. Prior to working for OHCHR, the Applicant occupied a D-2 position as Strategic Adviser to the Director General of the World Intellectual Property Organization (“WIPO”), on secondment from the Australian Government. The Australian Permanent Mission to the United Nations in Geneva advised OHCHR, in a *note verbale* of 16 November 2012, of its agreement that the Applicant would be equally placed on secondment from the Australian Government to OHCHR, as Senior Human Rights Officer, P-5, in Geneva, and that she would keep her right to return to the Government service after the expiration of her secondment to the United Nations.

10. The mission assignment of Mr. C. to MONUSCO was subsequently extended several times, until his return to OHCHR on 15 August 2014, when he was placed against post No. 501057. In an email dated 15 September 2014, the

Chief, Field Operations and Technical Cooperation Division (“FOTCD”), Africa Branch, informed the unit that upon the return of the incumbent of RB post 501057, the structure of the Branch remained identical with two Sections and that the Applicant “continue[d] to oversee the East and Southern Africa Section”, that is, Africa I section, whereas Mr. C. would be acting as Chief, Africa II Section.

11. As reflected in the personal action forms on file, upon the return of Mr. C., the Applicant was charged against post No. 509992. The post had become vacant upon the promotion of its regular incumbent.

12. It appears from the evidence before the Tribunal that Mr. C. went on temporary duty assignment to MONUSCO from September 2014 until 17 October 2014, when he was declared *persona non grata* by the Democratic Republic of Congo. Mr. C. then went on annual leave, and returned to OHCHR against post No. 501057 on 27 October 2014.

13. On 21 October 2014, the Applicant received a written request from the Director, Internal Oversight Division (“IAOD”), World Intellectual Property Organization (“WIPO”), to be interviewed by the external investigator in a WIPO investigation. The Applicant advised the Legal Adviser at OHCHR of this request. According to the Applicant, the Legal Adviser indicated that she would discuss the matter with the High Commissioner.

14. By email of 29 October 2014, the Applicant was informed by the Chief, Human Resources Management Section (“HRMS”), OHCHR, of the decision not to renew her fixed-term appointment upon its expiration on 2 December 2014. He noted that the decision was taken in view of the fact that she had been appointed against the position during the assignment of the regular incumbent to another department, from which the latter had now returned.

15. The Applicant responded to this email on the same day, noting that upon the return of the regular incumbent of the post for which she had been recruited, the latter had been placed as Head of Africa II Section, and that her own duties as Head of Africa I Section had not changed. She referred to the above email of

15 September 2014, from the Chief, FOTCD, OHCHR, by which all staff had been informed that upon the return of the incumbent of post No. 501057, the Applicant would continue in her functions as Head of Africa I Section. She stressed that “there was therefore clearly an expectation of the renewal of [her] contract as Head of the Africa I Section”, and recalled that her fixed-term contract did not mention any “special conditions”.

16. On 5 November 2014, the Director, IAOD, WIPO, wrote to the High Commissioner, OHCHR, requesting the latter to allow him to interview the Applicant. The High Commissioner responded on 6 November 2014 that he agreed that the Applicant be interviewed. The Legal Counsel, OHCHR, indicated that there was no need to lift the Applicant’s immunity, as this was an investigation internal to the United Nations.

17. The Applicant wrote to the Legal Counsel, OHCHR, on 6 November 2014, expressing her concern that the non-renewal of her contract had come a few days after WIPO had requested to interview her and of the possible link between the non-renewal of her contract and the WIPO investigation.

18. The Applicant was placed on certified sick leave as of mid-November 2014. In response to a request from the Applicant’s counsel, the latter was informed by email of 28 November 2014 from the Legal Counsel, OHCHR, that the Applicant’s contract had been extended until 31 December 2014 “in view of [her] currently being on certified sick-leave and on compassionate ground”. She further noted that “other options [were] under review for the period beyond 31 December 2014”.

19. As the Applicant’s certified sick leave continued, and, to the extent it was endorsed by the Medical Services Section (“MSS”), UNOG, her contract was renewed on several occasions for administrative purposes to permit her to exhaust

her sick leave entitlement, as reflected in the relevant personnel actions and letters of appointment, as Senior Human Rights Officer, OHCHR, in Geneva.¹

20. By letter dated 19 November 2014, the Applicant's then counsel wrote to the High Commissioner, requesting him to "immediately renew [the Applicant's] contract". The Counsel noted that the High Commissioner himself had told the Applicant on 1 November 2014 that she was "'on strong legal grounds' for contesting the decision", and that the High Commissioner had "promised [the Applicant] that she would not lose her job at OHCHR" adding that "however, she [had] not yet received written confirmation of this".

21. On the same day, the Chief of Office, OHCHR, contacted the Applicant via email to schedule a meeting on 24 November 2014 with the High Commissioner and the Deputy High Commissioner, in light of her request for reconsideration of the decision not to renew her FTA. The Applicant's then Counsel, by email of 20 November 2014, declined the meeting, requesting that it be postponed until the Applicant, who was purportedly on "service-incurred" sick leave, had recovered.

22. On 24 November 2014, the High Commissioner signed a memorandum dated 20 November 2014, deciding to laterally transfer Ms. P., a permanent appointment holder who at that time was Head, South Africa Regional Office, to post No. 509992, against which the Applicant had been placed effective 15 August 2014. MSS, UNOG, had issued a recommendation for Ms. P. to be reassigned to Geneva, in light of her need to access medical facilities.

23. By memorandum dated 3 December 2014 from the Director, FOTCD, to the Chief, Programme Support and Management Services ("PSMS"), through the Deputy High Commissioner and High Commissioner, the Director, FOTCD, recommended the extension of the Applicant's fixed-term appointment for a period of two years, stressing that the "recommendation for an extension of the

¹ The Applicant submitted a medical certificate on 11 May 2015, indicating that she would be on full time sick leave until 31 May 2015. On 13 May 2015, she submitted a new medical certificate, indicating that she was able to return to work at half time (50%) as of 18 May 2015. This second medical certificate forwarded to MSS was not approved prior to the Applicant's separation from service on 21 May 2015.

appointment should also go together with a recommendation for a lateral transfer of [the Applicant] to the P-5 post of Regional Representative, Pacific Regional Office”. The Deputy High Commissioner signed the memorandum on 4 December 2014, and the High Commissioner on 10 December 2014.

24. By email of 10 December 2014, the High Commissioner acknowledged receipt of an email from the Applicant and “[took] the opportunity to underline that, in [their] meetings, while [he] undertook to look at [her] situation and try to find a suitable position for [her], [he] never made any promise to [her] in respect of any particular position”. He referred to the terms of the job opening for which the Applicant had been selected, stressing that “it [was] beyond [his] or anyone else’s control that the regular incumbent of this position returned and resumed his functions”. He further stressed that a vacant and suitable position at the P-5 level had been identified and offered to her, and that he hoped that the Applicant would accept this offer and continue to work for OHCHR. The High Commissioner also expressed his concern about the Applicant having made allegations with respect to her contractual situation being linked somehow to the request to interview her in connection with an investigation concerning WIPO, and that no such link existed. He recalled that he had formally indicated that he had no objection to the Applicant participating in such an interview.

25. By email also of 10 December 2014, the Chief, Human Resources Management Section, OHCHR, informed the Applicant that “the High Commissioner ha[d] agreed for an extension of two years of [her] fixed-term appointment and also a lateral move to the Regional Office of OHCHR in Suva, Fiji as the Regional Representative for the Pacific”. He also referred to an earlier phone conversation on this matter.

26. By memorandum dated 12 December 2014, a Human Resources Officer, HRMS, UNOG, informed the Applicant that the High Commissioner had approved her lateral transfer from Geneva to Fiji, within FOTCD, and that the decision would be implemented as soon as possible. Attached thereto was an addendum providing the Applicant with all entitlements applying to her transfer.

27. The Applicant, by email of 16 December 2014 to the Human Resources Officer, HRMS, UNOG, informed the latter that her treating physician and MSS, UNOG, had certified that in view of her health situation she could not leave Geneva.

28. By email of 18 December 2014, the Human Resources Officer, HRMS, UNOG, informed the Applicant that in view of her sick leave, which had been certified by MSS, UNOG, her appointment, which was due to expire on 31 December 2014, had been extended, for administrative purposes only, until 13 January 2015, to cover her sick leave period.

29. By email of 22 December 2014 from the Deputy High Commissioner to the Applicant, she was informed that “[a]s earlier indicated [the Office] could confirm a two-year contract extension as OHCHR Representative based in Suva, Fiji”.

30. On the same day, the Applicant filed a request for management evaluation against the decision of 29 October 2014 not to renew her fixed-term appointment beyond its regular expiration date of 2 December 2014, and the decision contained in the email of 10 December 2014 from the High Commissioner, conveying “that the High Commissioner ha[d] agreed for an extension of two years of [her] fixed-term appointment and also a lateral move” to Fiji. She also mentioned that she had been informed on 18 December 2014 that, at that time, her appointment had been extended for administrative reasons to cover her certified sick leave until 13 January 2015.

31. On 16 January 2015, the Human Resources Officer, HRMS, UNOG, reiterated the terms of ST/AI/2005/3 (Sick leave), and noted, *inter alia*, that if the Applicant were to continue on sick leave, she would have exhausted all her sick leave entitlements (full and half pay) on 21 May 2015.

32. On 10 February 2015, in reply to the Applicant’s request for management evaluation, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the contested decision.

33. By email of 11 February 2015, the Human Resources Officer, HRMS, UNOG, in response to a query from the Applicant, recalled that the latter had not been transferred from WIPO to OHCHR, but had been recruited by OHCHR on initial appointment. Since she had completed less than three years of continuous service, her sick leave entitlement was three months on full salary and three months on half salary. The Applicant was informed, again, that she would, accordingly, have exhausted her sick leave entitlements at full and half pay on 21 May 2015.

34. By email of 27 February 2015, the Applicant requested the High Commissioner to reconsider her transfer to the post of Head of OHCHR, Fiji, raising, *inter alia*, political considerations in view of her prior position as representative of the Australian Government, as well as her and her son's medical condition.

35. The Applicant filed a claim for compensation under Appendix D to the Staff Rules on 3 March 2015. The Compensation Claims Service ("CCS"), UNOG, requested the Applicant to submit additional documents on her claim, which she informed them she was unable to do since they were in the possession of OHCHR and she had no access to them. By email of 19 May 2015, the Officer Responsible for Compensation Claims, CCS, UNOG, asked the Applicant instead to submit an explanatory letter, duly signed and dated, so that he could seek the required information on her behalf. The Applicant never submitted the requested letter. However, during her testimony to the Tribunal, the Applicant stated that she had talked to CCS, and that she was advised that CCS would try to get the information from OHCHR. Counsel for the Respondent stated during the hearing that if the requisite information is submitted, the Applicant's claim for Appendix D could still be considered.

36. On 13 April 2015, the Applicant wrote a letter to the High Commissioner, OHCHR, requesting her immediate reinstatement to a P-5 position at OHCHR, Geneva. On 27 April 2015, she wrote to the Secretary-General, equally requesting her immediate reinstatement to a P-5 level position at OHCHR, Geneva, or,

failing this, access to external arbitration. In both letters, she raised her concern that she was subjected to retaliation as a “UN whistle blower” with respect to issues she had reported at WIPO.

37. By letter dated 30 April 2015, the Director of Office, Office of the Chef de Cabinet, responded to the Applicant’s letter of 27 April 2015, stressing that the only recourse mechanism available to her was within the United Nations internal justice system. With respect to her concern to have been the subject of retaliation, she was informed that she could file a formal request for protection with the United Nations Ethics Office. Finally, he stressed that the offer for the Applicant to take up a P-5 position in Fiji was still standing.

38. By email of 6 May 2015, the Applicant asked the Human Resources Officer, HRMS, UNOG, “to be provided with [her] contract as soon as possible”. On the same day, the Human Resources Officer, HRMS, UNOG, responded to the Applicant that “to the best of her knowledge, [the Applicant had] so far indicated that [she] did not wish to take [the] position in Fiji”, and that “[she had been] placed on sick leave before the end of [her] contract in December 2014 and [her] appointment [had] been since then extended month by month, for administrative purposes, upon receipt of medical certificates ... solely to allow [her] to use [her] sick leave entitlements”. She finished her message stressing that “[a]s already conveyed in several of [their] exchanges, [the Applicant] [would] have exhausted all [her] entitlements to sick leave (with full and half pay) on 21 May 2015” and that “[a]fter that day, [UNOG] [would] initiate [her] separation”.

39. By email of the same day, the Applicant informed the Human Resources Officer, HRMS, UNOG, that if the only option to separation was accepting the assignment to Fiji, she had no choice, so she requested to be forwarded the contract.

40. On 6 May 2015, the Human Resources Officer, HRMS, UNOG, responded to the Applicant in the following terms:

You are currently on certified sick leave until 13 May 2015. In order to take your new functions, you have to contact [“MSS”] as you need to be medically cleared for your new assignment. Once MSS has given the green light, you will have to book your flight ... and send us your itinerary so that we can issue your travel authorization. You will receive your contract upon assumption of your new functions in Fiji.

41. On 7 May 2015, the Applicant’s then Counsel sent a letter to the High Commissioner, OHCHR, noting that “[b]y [said] letter, [the Applicant] expressly accepted [the High Commissioner’s] offer of an extension of two years of her fixed-term appointment at OHCHR”. He further requested the High Commissioner to stay the Applicant’s transfer to Fiji on account of her and her son’s health condition, and that, in the absence of a response, he would consider that said request had been implicitly denied and that he would take necessary action through the internal justice system.

42. On 8 May 2015, the Applicant wrote to the Human Resources Officer, HRMS, UNOG, requesting her to indicate on whose authority she had asserted that she would receive her contract only upon assumption of her new functions in Fiji, and to provide her with a two-year fixed-term contract extension by 11 May 2015.

43. On 11 May 2015, the Applicant filed a request for protection against retaliation by the High Commissioner for Human Rights, the OHCHR Senior Management, and the UN Secretariat Senior Management, with the United Nations Ethics Office, under ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations). Under “protected activity”, the Applicant referred to her having reported misconduct by the Director-General and Deputy Director-General, WIPO. She described the retaliation as the “attempted illegal separation from OHCHR and subsequent forced transfer to Fiji, sudden and unexpected non-renewal of standard two-year fixed-term contract at OHCHR at the same time

as [she] was called to testify as a key witness in a major investigation involving wrong doing at the top of WIPO and on which [she] had blown the whistle”. In her evidence to the Tribunal, the Applicant stated that she had waited for several months after she had been informed of the non-renewal before filing a complaint of retaliation with the Ethics Office, because Ambassadors had advised her to wait to see whether they could make the High Commissioner change his mind. She further informed the Tribunal that she later received a response from the Ethics Office to her complaint for retaliation, which “basically said that they were not going to recommend an investigation”.

44. By email of the same day, the Applicant informed the Human Resources Officer, HRMS, UNOG, that according to the recommendation of her doctor, she expected to be able to return to work part-time in Geneva by 21 May 2015, and that, depending on her recovery, she might be able to return to work full-time in Geneva. She therefore requested to be provided the two-year extension of her FTA, “as agreed by the High Commissioner on 10 December 2014, with Geneva as duty station”.

45. On 12 May 2015, the Chief Medical Doctor, MSS, UNOG, confirmed that in view of the Applicant’s health condition, she could not be deployed anywhere outside Geneva, particularly to Fiji.

46. On 13 May 2015, the Applicant informed the Human Resources Officer, HRMS, UNOG, that her treating doctor had certified that she could return to work half-time with OHCHR Geneva as of 18 May 2015, and yet again requested a copy of her two-year fixed-term contract. The Human Resources Officer, HRMS, UNOG, responded by email to the Applicant on the same day, reiterating that her fixed-term appointment had been extended for administrative purposes only to enable her to use her sick leave entitlements, and that it would be extended until 21 May 2015, the date at which the Applicant would have exhausted all her sick leave entitlements.

47. Also on 13 May 2015, the Applicant filed a second request for management evaluation of her “threatened separation from service, with effect from 21 May 2015, while on service-incurred medical leave” and the “refusal to grant [her] request for a stay (on medical grounds) of [her] lateral transfer to Fiji”. Additionally, on the same day, the Applicant filed an application for suspension of action of said decisions with this Tribunal.

48. The Officer-in-Charge, Management Evaluation Unit (“MEU”), responded to said request by letter of 15 May 2015, noting that it was not receivable. In view of the foregoing, the Tribunal, by Order No. 105 (GVA/2015) of 18 May 2015 rejected the request for suspension of action, for lack of jurisdiction.

49. On 18 May 2015, the Applicant filed the present application, and a request for interim measures of the contested decisions, which the Tribunal rejected by Order No. 109 (GVA/2015) of 21 May 2015.

50. By Order No. 217 (GVA/2016) of 9 November 2016, the Tribunal scheduled a hearing on the merits for 15 through 18 November 2016. During the hearing, it heard evidence from several witnesses, including from the High Commissioner, OHCHR. At the end of the hearing in November 2016, it was agreed that proceedings would resume at a later date to allow two additional witnesses to appear. The resumed hearing with two additional witnesses took place on 8 and 9 March 2017.

51. Upon instruction of the Tribunal, the parties filed their closing submissions on 2 and 17 May 2017. Although she had been invited to file final submissions in response to the Respondent’s closing submissions by 25 May 2017, the Applicant did not do so.

Parties’ submissions

52. The Applicant’s principal contentions, as contained in the application and as stated by her counsel appearing before the Tribunal are:

- a. The decision to transfer her to Fiji and to separate her from service is illegal because she is on service-incurred sick leave and not fit for deployment outside of Geneva. She cannot be transferred to Fiji so long as such health restrictions persist for her and her son;
- b. The reassignment decision was done without prior consultation with her. This violated the principle of equal treatment;
- c. The initial decision not to renew her appointment, although withdrawn and replaced by the transfer decision, was procedurally irregular since she had an objective expectancy of contract renewal; it is evidence of retaliation/reprisal as a consequence of her protected whistle blower activities, the transfer decision is tainted by such retaliation or, potentially, by her ethnicity and her well-known ties to Israel;
- d. The renewal of her FTA was subject to a single contingency, which had two parts, namely that Mr. C. still had a lien on the position for which she was recruited, and that it was possible for him to exercise that lien should he return to Geneva. That contingency never occurred;
- e. The lien of Mr. C. to the post expired most likely as early as January 2014, but certainly by summer of 2014, when he came back in August 2014, and before he left again in September 2014;
- f. Upon the return of the incumbent of the post she had encumbered, the Applicant was moved to a different post, while continuing to perform the same duties and functions she had performed previously;
- g. Mr. C. did not take his former position, nor was the Applicant informed that he was taking her post. Rather, Mr. C. took the P-5 post that had been vacated by Mr. C-G. when the latter was promoted to the D-1 level. This was confirmed in a communication by Mr. C-G. to the whole team. The Applicant expected to receive notice shortly that her appointment was being renewed;

h. Ms. P. who had to leave her assignment in South Africa was accepted for the P-5 post in Fiji and was ready to go on that assignment;

i. It was only when she requested permission to give evidence in the WIPO investigation that she was informed that Mr. C. had returned to his liened post;

j. The Applicant then exercised her contacts with Ambassadors, particularly the Somali Ambassador, who tried to meet with the High Commissioner and met with the Director-General, UNOG, to discuss the Applicant's case;

k. Just after she had been informed that OHCHR "was going to get rid of her", she was notified that OHCHR had decided to put her on the P-5 post in Fiji; that position was explicitly presented to her as a transfer, not as a new appointment; she was not looking for a new appointment, but for the expected renewal of her FTA; the offer of transfer to Fiji was conditional for her to actually fly to Fiji first, before she could see or sign her contract for the transfer;

l. While she was on medical sick leave, her medical practitioner informed her that if she felt comfortable in transferring to Fiji, there would be no medical impediment to her accepting the transfer. Had the Organisation been transparent about the transfer and the reason why she had to report to Fiji first, she would not have remained under enormous psychological stress, and could have taken the Fiji position; those decisions rendered her medically unfit to blindly accept the transfer to Fiji;

m. Her former post and its functions were not abolished, and remain fully funded; hence, any claims of financial difficulties are inapposite; the non-renewal decision was taken prior to the announcement of any decision resulting from the alleged financial crisis at OHCHR;

n. Her performance cannot be a reason for non-renewal, since she had no performance evaluations since she entered the OHCHR, at no fault of her;

o. The non-renewal decision constitutes a violation of the principle of equal treatment, since she was the only staff member whose fixed-term appointment was not renewed at OHCHR in recent memory;

p. She was given little more than 30 days' notice of the non-renewal, which was unreasonable, particularly in light of her expectation of contract renewal;

q. Since there is no legal reason for the threatened and ultimately withdrawn non-renewal, it can only be inferred that the decision was based either on personal prejudice against her, or was a result of retaliation or reprisal for her actions as a whistle blower at WIPO;

r. The High Commissioner called her a "backstabber" in a town hall meeting for having contacted the Israeli delegation with respect to the renewal of her contract; his behaviour at the town hall showed a personal involvement and hostile orientation against the Applicant;

s. Ms. P. went on retirement shortly after taking up a P-5 post in Geneva. The Applicant was recommended for the post by the person responsible for the recruitment process, but the High Commissioner decided to recruit another candidate;

t. The way she has been treated by OHCHR suggests that the decisions have been based on improper motives and not on valid legal reasons, including the interests of the Organization. Actions leading to her non-renewal and reassignment to Fiji were for "unknown but suspicious reasons (likely tainted by malice and prejudice against the Applicant, or in retaliation/reprisal for her protected whistle blower activities or because of her ethnicity, Jewishness, and known association with Israel";

u. The Applicant requests:

i. An interim order of extensive discovery to determine the facts and circumstances that led to the impugned transfer decision, as well

as to the prior and later withdrawn, irregular decision not to renew her contract;

- ii. Withdrawal of the impugned transfer decision to Fiji;
- iii. Assignment to a two year fixed-term post commensurate with her grade, skills and experience in Geneva, retroactively from 2 December 2014;
- iv. An award of moral damages of two years net base salary for anxiety, humiliation and stress resulting from the impugned decision;
- v. Interest of 5% on the amounts above, from 10 December 2014 through the date of satisfaction of a judgment; and
- vi. Such other relief as the Tribunal deems appropriate.

53. The Respondent's principal contentions are:

- a. Pursuant to staff regulation 4.5(c), the Applicant's FTA did not carry any expectancy of renewal, and the decision not to renew the FTA was based on legitimate grounds, namely the return of its regular incumbent to the post;
- b. Mr. C., the incumbent of the post for which the Applicant was recruited, went on mission assignment and not on secondment; hence, ST/AI/404 and not ST/AI/2010/3 are applicable to his situation; the lien to his post was properly extended, and the Applicant's placement on another post was done for administrative reasons, and to honour the terms of her FTA;
- c. The Applicant did not prove that the non-renewal decision was motivated by extraneous factors; particularly, there was no link to the investigation at WIPO in which the Applicant participated; there was equally no evidence of religious discrimination, as alleged by the Applicant;

d. She waited over six months to file a request with the Ethics Office, and the latter closed the case; hence, there was no finding of retaliation;

e. Since she knew that her appointment carried no expectancy of renewal, and that it was limited in time for the purpose of replacing the regular incumbent, she did not suffer any harm;

f. While it was not obliged to offer the Applicant an alternative placement, OHCHR offered her a post in Fiji, and that lateral transfer was proposed in good faith; she failed to accept that offer, unconditionally, and was not medically cleared for it; she thus did not fulfil the requisite conditions for the transfer;

g. The principle of equal treatment was not violated; the Administration had the obligation to propose alternative positions to another staff member on a permanent appointment and to follow the recommendations of the Medical Service in transferring that staff member to Geneva;

h. The Applicant's claim that she was on service incurred sick leave is equally unfounded; no such determination was made; the extension of her appointment was made for the purposes of her sick leave utilization, in accordance with sec. 3.9 of ST/AI/2005/3 and sec. 4.9 of ST/AI/2013/1; she was separated after exhaustion of her entitlement, which was calculated in accordance with staff rule 6.2(b)(ii), as she had completed less than three years of continuous service;

i. The Applicant had no expectancy of renewal; moreover, she retained her right to return to service with the Australian government at the end of her secondment; her claim for damages should be rejected;

j. The Applicant did not adhere to the principles of independence and impartiality in requesting that member states lobby officials within the Organization in order to secure the renewal of her contract, and also for step calculation; these improper actions of the Applicant should be considered in rendering the judgment;

k. The Applicant's requests for damages should be rejected; she was on secondment from the Australian government and resigned from that employment on 27 February 2015; at that point, she was well aware that her contract with OHCHR had expired and that she was merely extended for the purpose of allowing her to exhaust her sick leave entitlements; she did not mitigate the damages she allegedly suffered; and

l. The application should be rejected in its entirety.

Consideration

54. Since the two applications filed by the Applicant (see paras. 1 to 4 above) concern the same issues of fact, the Tribunal finds it appropriate to issue a single judgment on them.

Case No. UNDT/GVA/2015/129

55. The Applicant contests the non-renewal of her fixed-term appointment beyond 2 December 2014, and what she characterises as the High Commissioner's decision to extend her appointment for two years and to laterally transfer her to Fiji.

56. The Tribunal recalls that staff rule 4.13 provides that:

Fixed-term appointment

(a) A fixed-term appointment may be granted for a period of one year or more, up to five years at a time, to persons recruited for service of a prescribed duration, including persons temporarily seconded by national Governments or institutions for service with the United Nations, having an expiration date specified in the letter of appointment.

(b) A fixed-term appointment may be renewed for any period up to five years at a time.

(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14 (b).²

57. Similarly, according to staff regulation 4.5(c) “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”.

58. This is confirmed by the established jurisprudence of the Appeals Tribunal, which ruled that a fixed-term appointment has no expectancy of renewal or of conversion to any other type of appointment (*Syed* 2010-UNAT-061; *Appellee* 2013-UNAT-341). The Appeals Tribunal further held in *Ahmed* 2011-UNAT-153 that:

47. [U]nless the Administration has made an “express promise ... that gives a staff member an expectancy that his or her appointment will be extended”, or unless it abused its discretion, or was motivated by discriminatory or improper grounds in not extending the appointment, the non-renewal of a staff member’s fixed-term appointment is not unlawful.

59. Thus, a non-renewal decision can be challenged on the grounds that it was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation (*Morsy* 2013-UNAT-298; *Asaad* 2010-UNAT-021; *Said* 2015-UNAT-500; *Assale* 2015-UNAT-534). The burden of proving improper motivation lies with the staff member contesting the decision (*Asaad* 2010-UNAT-021; *Jennings* 2011-UNAT-184; *Nwuke* 2015-UNAT-506; *Hepworth* 2015-UNAT-503), and a conclusion that the Administration had hidden motives not to renew a fixed-term appointment has to be based on evidence and not solely on speculation (cf. *Pirnea* 2013-UNAT-311).

60. Moreover, according to the jurisprudence of the Appeals Tribunal, expectancy for renewal requires an express promise that cannot be based on mere verbal assertion, but has to be in writing (cf. *Igbinedion* 2014-UNAT-411). In *Munir* 2015-UNAT-522, the Appeals Tribunal held that a legitimate expectation

² Staff Rule 4.14 applies to continuing appointments and is not relevant to this matter.

of renewal has to be “based on ... a firm commitment to renewal revealed by the circumstances of the case”.

61. The decision not to renew the Applicant’s appointment beyond its expiration date on 2 December 2014 was notified to her by email dated 29 October 2014. In that email, the Chief, Human Resources, OHCHR, informed her of the reason for the non-renewal of her appointment in the following terms:

[T]his decision is based on the fact that you were appointed against a position which was temporarily vacant as the incumbent was on assignment to another Department of the Secretariat. The incumbent has now returned from his assignment.

...

Please contact Ms. [E.D.] at UNOG to make all the necessary administrative arrangement for your separation.

62. Having reviewed the parties’ submissions, the evidence on file and that provided at the hearing, the Tribunal is satisfied that the reason provided by the Administration to justify the non-renewal of the Applicant’s appointment beyond 2 December 2014 is substantiated.

Contingency of the Applicant’s FTA: return of Mr. C. to post No. 501057

63. The Tribunal first notes that the job opening for which the Applicant applied, and was ultimately selected, namely JO OHCHR-24481-R-Geneva, clearly spelled out the purpose of the recruitment as follows: “[t]his position is vacant due to the temporary assignment/secondment of the regular incumbent to another office/organization. The selection and extension of the appointment of the selected candidate will be contingent on the return of the incumbent who maintains a lien against this post”.

64. The incumbent of post No. 501057, for which the Applicant had been selected under JO OHCHR-24481-R-Geneva was Mr. C.. The Administration admitted that the Applicant’s letter of appointment did not contain a special condition recording the above JO terms, which was an oversight on its part. However, the Applicant accepted in her submissions to the Tribunal that as per the

terms of the JO, the extension of her appointment was subject to the contingency of Mr. C.'s return to the position for which she had been recruited. She also confirmed that she had been recruited against post No. 501057. She argued, however, that that condition had not been met. The Applicant submitted that Mr. C.'s lien to the post for which she had been recruited had been relinquished, if not in January 2014, then on 23 June 2014 or at the latest by July 2014. As a consequence, Mr. C. could no longer legally claim a lien, and the Administration could not rely on its subsistence upon the return of the incumbent to justify the non-renewal of her FTA.

65. The release of Mr. C. was pursuant to ST/AI/404 (Assignment to and return from mission detail). That administrative instruction provides in para. 7 that:

7. [I]t is most important that staff in the Professional ... categories proceeding on mission detail be assured that they can return to their current post. Accordingly, for a period of up to two years, in conjunction with a staff member's mission assignment, releasing departments/offices are responsible for ensuring that the posts of detailed staff members holding permanent or long-term appointments are blocked. These posts are to be filled only through temporary recruitment of replacement staff, if necessary, or through temporary staff redeployment (including a special post allowance, when called for). If it is proposed that the mission detail be extended beyond two years, it will not be possible to grant any extension unless there is a specific written agreement to continue blocking the post in the parent department. The implementation of this agreement will be monitored by the Office of Human Resources Management.

66. Quite distinctly, administrative instruction ST/AI/2010/3 (Staff selection system) provides in sec. 6.7:

A staff member who is considered an internal Applicant and who is on secondment to a separately administrated United Nations fund or programme, specialized agency or organization of the United Nations common system shall be granted a lien against a specific post for up to two years. ... After two years should the staff member wish to remain on secondment, the lien on the specific position shall be surrendered but the staff member retains return rights to the Secretariat up to a maximum of five years.

67. Section 1(z) of ST/AI/2010/3 distinguishes temporary assignments, mission assignments, special leave, secondment and/or loans. Secondments are governed by the Inter-Organizational Agreement concerning Transfer, Secondment or Loan of Staff among Organizations applying the United Nations Common System of Salaries and Allowances. The present case is not one of secondment, but one of mission assignment.

68. The Tribunal notes that under sec. 6.7 of ST/AI/2010/3, in cases of secondment, a lien against a specific post shall only be granted for up to two years, after which it shall be surrendered. No discretion is granted to the Administration for extending the lien beyond the two years. Quite distinctly, para. 7 of ST/AI/404 allows the Administration to extend the mission assignment beyond the two years period, and continue blocking a specific post in the parent department, provided there is a specific written agreement to continue blocking that post. The case at hand is one of mission assignment and falls under ST/AI/404. Therefore, ST/AI/2010/3, relied upon by the Applicant, is not applicable to the case at hand.

69. According to ST/AI/404 and administrative practice, the lien to a post in case of mission assignment is discussed between the releasing department, in this case OHCHR, and the receiving department, which, in the case at hand, is DPKO. By subjecting the extension of the mission assignment beyond two years to a written agreement to continue blocking the post, the administrative instruction seeks to ensure that the staff member whose mission assignment is extended can return to his or her post in the parent department. This is a system designed for the advantage of both the staff member and the Organization.

70. The Tribunal carefully examined Mr. C's link and return to post No. 501057. The record shows that Mr. C. was released from OHCHR and went on mission assignment as Chief, Human Rights Officer, MONUSCO, at the D-1 level, for an initial period of one year, by memorandum dated 13 December 2011 from the Officer-in-Charge, Field Personnel Operations Service, Field Personnel Division, Department of Field Support, to the Chief, Human Resources, OHCHR.

The memo is entitled “Request for Release of [Mr. C] (Index No. [#####]) on Assignment to the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)”. The Chief, Human Resources, OHCHR, approved the request “with immediate effect” on 28 December 2011, confirming by his signature that the staff member would be reabsorbed upon return from assignment.

71. The mission assignment of Mr. C. to MONUSCO was extended several times, namely from 23 January 2012 until 22 January 2013, then until 22 January 2014, and finally until 14 August 2014. The record further shows that Mr. C. was informed, by email of 21 November 2013, that the Deputy High Commissioner and the Chief, Human Resources, OHCHR, had agreed that he would be able to keep his lien to the P-5 post until 22 June 2014. Further, by signature on a memorandum of 30 May 2014 to the attention of the Deputy Special Representative of the Secretary-General (“SRSG”, Rule of Law), entitled “Request for extension of appointment/assignment/secondment of international staff member”, Mr. C. accepted the recommendation of the extension of his mission assignment from 22 June 2014 to 14 August 2014. By signature of 6 June 2014 on the same memorandum, the Deputy SRSG approved the extension of the assignment until 14 August 2014. Also, during the hearing, the Human Resources Assistant, Human Resources, OHCHR, who appeared as a witness, read into the official case record an email dated 26 June 2014 by which the Chief, Human Resources, OHCHR, informed Ms. B. A. S., from the Department for Field Support (“DFS”), Headquarters, that OHCHR had agreed to the extension of the mission assignment. In that email, the Chief, Human Resources, OHCHR, noted that he would appreciate if in the future, such requests were made ahead of time. The Chief, Human Resources, OHCHR, gave evidence confirming that the above communications represent the written agreement of OHCHR to extend the assignment of Mr. C. and the lien to his post until 14 August 2014.

72. Furthermore, a personal action on file indicates that effective 15 August 2014, Mr. C. returned from his mission assignment at MONUSCO to OHCHR and was, as of that date, placed against the post he had encumbered

(No. 501057). The record further shows that as of that date (15 August 2014), the Applicant was administratively placed against another post, namely post No. 509992. That post had become vacant in September 2014, when its incumbent, Mr. C-G., was promoted to the D—1 level.

73. The Applicant submitted that as a matter of fact, she had been placed against Post No. 509992 earlier, namely on 23 June 2014. In this respect, the Tribunal took note of email communications from July 2013, in respect of which the Human Resources Assistant, Human Resources, OHCHR, gave evidence explaining that if DFS, which manages MONUSCO and hence managed Mr. C. during his mission assignment, did not extend Mr. C's assignment in the system in a timely fashion, Mr. C. would be automatically brought back to post No. 501057 by the integrated management system ("IMIS"), and he would thus replace the Applicant on that post within IMIS. The Applicant was informed in July 2013 that these movements could happen and that, as a consequence, she may not be in the payroll for July 2013, but if that were to be the case she would receive a salary advance. She expressed strong objections against this. Fortunately, since the extension of Mr. C.'s mission assignment through 22 January 2014 was made in due time, the Applicant ultimately was on regular payroll in July 2013.

74. The Human Resources Assistant, Human Resources, OHCHR, explained that whenever DFS did not act in a timely manner, HRMS, UNOG, would have no choice but to temporarily administratively place the Applicant against another post to ensure that she was in the payroll and received her full salary. This is being done regularly for other staff in a situation similar to that of the Applicant.

75. The above temporary administrative placements are what happened on 23 June 2014 and 1 August 2014 (cf. PA Nos. 4443410 and 4449819), when the Applicant was temporarily placed against P-5 post No. 509992, which was temporarily vacant, to ensure keeping her in the payroll. It was done with the intention to place the Applicant back against "her" post, namely post No. 501057, once the situation regularized.

76. The Tribunal is satisfied from the evidence given by the Human Resources Assistant, Human Resources, OHCHR, that he moved the Applicant, temporarily against post No. 509992 in light of the experience in 2013, to avoid a controversy with the Applicant, who had made it clear at the time that she would be very unhappy if she were not in the payroll. The Tribunal notes that this situation was later corrected, by PA No. 4460366, which placed the Applicant again against post No. 501057; the PA states, under remarks “[modify post incumbency] to place s/m against correct P-5 through 14.08.14”. The above administrative arrangement was undertaken to ensure the Applicant stayed on the payroll, and no more. It did not have any significance in respect of the actual incumbency of the post, and the lien that Mr. C. kept with post No. 501057.

77. The Tribunal is also satisfied that the actions done on 23 June 2014 and on 1 August 2014 were different from that which happened on 15 August 2014. Indeed, PA No. 4456955 of 15 August 2014 states under remarks “[modify post incumbency] through expiration of appointment against 509992 upon return of [Mr. C.] from assignment”. There is no ambiguity that effective from 15 August 2014, the Applicant was administratively placed against post No. 509992, given that Mr. C. had returned from mission assignment and had to be placed against post No. 501057.

78. The Tribunal is satisfied that MONUSCO and OHCHR agreed on extending the mission appointment of Mr. C. beyond the two year period, namely until 14 August 2014, and that OHCHR continued blocking post No. 501057 for the return of Mr. C.. Relevantly, the contemporaneous personal action for Mr. C. shows that he was placed against post No. 501057 upon his return to OHCHR on 15 August 2014.

79. The extension of Mr. C.’s mission assignment to MONUSCO beyond the two years properly fell within the Administration’s discretion under ST/AI/404. The Tribunal is satisfied that even if one were to conclude that the above-quoted para. 7 of ST/AI/404 was violated in that no written agreement existed to continue blocking post No. 501057, that would have no impact on the Applicant’s case.

Indeed, a violation of the requirement of a written agreement to continue blocking the post in the parent department, in case of extension of the mission assignment, does not make such blocking legally non-existent or void. Further, the legality or not of the continued link of Mr. C. to post No. 501057 is not the administrative decision contested by the Applicant (which is the non-renewal of her FTA beyond 2 December 2014), and, in any event the Applicant has no legal standing to contest it.

80. The fact is that Mr. C.'s mission assignment was extended, and that he did keep a lien against post No. 501057, until he returned to it on 15 August 2014. That is the date on which the Applicant was placed, administratively, against another post, as described above. As of 15 August 2014, the Administration placed the Applicant against post No. 509992 in order to honour her FTA, which expired on 2 December 2014. Thereafter, Mr. C. went on temporary duty assignment to MONUSCO from 11 September 2014 until 17 October 2014, when he returned "for good" to his post at OHCHR. The Tribunal is thus satisfied that Mr. C.'s lien with post No. 501057 did not expire. It follows that his return to that post was a valid reason to justify, insofar as such may be required, the non-renewal of the Applicant's FTA, which had always been subject to the contingency of the return of the incumbent of the post in question.

Applicant continued to exercise functions of Head, Africa I Section

81. The Applicant further argues that since after 15 August 2014, she continued to exercise the *functions* of the post for which she was initially hired (Head of Africa I Section), while Mr. C. was charged with Heading Africa II Section, she kept "her post", as confirmed by the email of Mr. C-G of 15 September 2014. She said that she was not informed that the return of Mr. C. had triggered a change of incumbency on her position.

82. The Tribunal is of the view that the fact that, upon his return, Mr. C. was asked to perform the functions of Head of Africa II Section, rather than Section I, does not contradict the fact that he had returned as the incumbent of the post for which the Applicant had been hired, and that he was put back against that post,

administratively, as of 15 August 2014. The Administration is free, for operational or strategic reasons, to assign the staff member who returns to a particular post to which he or she had kept a lien, to other functions, without transferring him/her against another post, administratively. In the case at hand, the assignment of Mr. C. as of 15 August 2014 to perform the functions as Head of Africa II Section was done for operational reasons.

83. Indeed, the Tribunal heard evidence from the former Director, FOTCD, that that decision was taken because most of the Human Rights components and the peace missions were in the French speaking parts of Africa, and since Mr. C. had been working in DRC, his experience and knowledge could be better used for that region, rather than to put him back on his previous responsibility to deal with the East and Southern part of Africa. As the Applicant had been expressly recruited in replacement of Mr. C. for a determined period during his mission assignment, this did not give her a right to be extended against another post (post No. 509992), even if she continued to exercise the functions of the post for which she had been recruited. Indeed, in light of the recruitment of the Applicant under the above-referenced terms of the FTA, the Administration had no obligation whatsoever to extend that FTA upon the return of Mr. C. to post No. 501057. Therefore, the Organization could use the post against which the Applicant had been placed upon the return of Mr. C., to honour other contractual obligations.

84. In the present case, the Administration had to honour its obligations vis-à-vis another staff member, Ms. P., who, for medical reasons, had to leave her assignment in South Africa, and for whom a new assignment had to be found. MSS, UNOG, had recommended that she be preferably assigned to Geneva. The Director, FOTCD, in his evidence to the Tribunal also confirmed that Ms. P.'s preference had been Geneva. It was the Administration's discretion, if not duty, to place Ms. P., a permanent staff member, against an available post that was commensurate with her level and skills, and for which she was medically fit (see *Nakhlawi*). Whether or not Ms. P. could also have gone to Fiji is immaterial, and it was the Administration's discretion to place her on a suitable available post in Geneva, for medical or other reasons.

85. No such obligation existed in respect of the Applicant who had been recruited under an FTA, for a determined period, and for the express purpose of the replacement of an incumbent who had returned to his post. Once this incumbent returned, as described above, the Administration acted in good faith when it placed the Applicant against another available post, for the remainder of her FTA. The fact that the Applicant was placed against that available post (post No. 509992), did not result in any legal obligation for the Administration to keep her against that post beyond the duration of her FTA. Rather, upon the expiration of her FTA, and since the incumbent of the post for which she had been recruited had returned to it, the Administration was justified not to renew the Applicant's FTA. The reason for the recruitment of the Applicant no longer existed.

Expectancy of renewal

86. The Tribunal is satisfied, on the basis of the evidence, that no express promise for contract renewal had been given to the Applicant. The Applicant in her testimony to the Tribunal confirmed that she had no proof in writing of any commitments to extend her FTA. See *Munir supra*.

87. The Tribunal notes that following the notification of 29 October 2014, informing the Applicant of the non-renewal of her FTA, a memorandum was issued on 3 December 2014 by the Director, FOTCD, to the Chief, PSMS, through the High Commissioner and Deputy High Commissioner. That memorandum recommended the extension of the Applicant's FTA for two years, stressing that such extension "should also go together with a recommendation for a lateral transfer of [the Applicant] to the P-5 post of Regional Representative, Pacific Regional Office". On 10 December 2014, the High Commissioner clarified in an email to the Applicant that while the incumbent of the post for which she had been recruited had returned, a vacant and suitable position at the P-5 level had been identified and offered to her, expressing his hope that she would accept the offer and continue to work for the OHCHR.

88. By a later email of the same day, the Chief, Human Resources, OHCHR, wrote to the Applicant that “the High Commissioner ha[d] agreed for an extension of two years of [her] fixed-term appointment and also a lateral move to the Regional Office in Suva, Fiji, as the Regional Representative for the Pacific”. The Applicant was thus on notice that her FTA would not be renewed, unless she were to meet the requirements and accept the offer of appointment to Fiji. Indeed, there was no ambiguity that the contract renewal was subject to the offer of appointment for a new position in Fiji, which, on its part, was conditional upon the Applicant meeting all the conditions for that offer, as per the relevant administrative rules. As will be further developed below, the Applicant failed to fulfil these conditions and, hence, the offer of appointment did not materialize in a new contract (cf. paras.101 to 106 below). The Tribunal, therefore, concludes that no firm commitment to renewal existed in the present case and that the Applicant had no legitimate expectation to have her appointment renewed.

Extraneous factors

89. Having analysed the available evidence, the Tribunal concludes that the Applicant did not meet the burden of proof with respect to the allegation that the non-renewal decision was based on extraneous factors, namely on her religion and/or her status as a “whistle blower” at WIPO. With respect to the latter allegation, the Tribunal notes that while the Applicant had been called as a witness in an external investigation at WIPO on 21 October 2014, the High Commissioner was officially informed thereof only by email from the Director, IAOD, WIPO, of 5 November 2014, that is, after the Applicant had been notified on 29 October 2014 that her FTA was not going to be renewed.

90. Furthermore, the Tribunal was impressed with the detailed and concise evidence provided by the High Commissioner for Human Rights at the hearing, which left no doubt that the decision not to renew the Applicant’s appointment was based on objective reasons. The Tribunal found the High Commissioner to be an entirely credible witness. From his evidence, it was apparent that at the time of the contested decision, he was fully aware of the Applicant’s situation and gave

full and genuine consideration to her case. The evidence by the High Commissioner equally established to the Tribunal's entire satisfaction that the decision was in no way influenced by the Applicant's status as a witness in the WIPO investigation, or was in any other way related to the role she played in events that occurred within that Organization. The Tribunal finds that the Applicant's allegations were purely speculative, and were entirely refuted by the evidence heard in the course of the hearing.

91. Moreover, the Tribunal notes that the Applicant stated in her application that she was "the only known openly Jewish senior staff member at OHCHR and the only staff member with known ties to Israel", and that she

understands that in September and October 2014, the Government of Israel, requested the High Commissioner for Human Rights to appoint [her] to a short-term assignment as head of the Secretariat covering the Human Rights Council's Gaza Commission of Inquiry. [She] did not apply for this position. [She] suspects that she may have suffered retaliation as a result of the Israeli Government's actions. In a Town Hall meeting on 31 October 2014, when questioned by a staff member about the Applicant's status, the High Commissioner's defensive response was to assert that the Applicant had inappropriately insinuated that religion was behind her non-renewal. The High Commissioner denied that his religion was a factor in the non-renewal. However, the fact that the High Commissioner raised the issue of religion at all in the context of the Applicant's non-renewal and in a public forum, gives the Applicant grounds to believe that she is being marginalised or discriminated (sic) on the basis of her ethnicity and Jewishness or in retaliation for the Government of Israel's actions".

92. These allegations are serious and are therefore examined below in some detail.

93. During evidence in chief, the High Commissioner was asked by Counsel for the Respondent about a meeting he had with representatives of the Israeli government. The transcript records of his testimony reflects the following in that connection:

Respondent's Counsel: Okay. Were you also contacted by representatives from Israel with regard to Ms. Brown's contractual situation?

High Commissioner: I was, it wasn't exactly like that, no. I had a meeting with representatives of the Israeli government, a confidential meeting, it was not on my schedule, put on my schedule at their request, and at the end of a discussion on another issue all together, [the Applicant's] situation was raised by one member of the Israeli delegation, who, although I knew, it was not a long association that I had with that particular member.

94. Later in the High Commissioner's testimony, the following is recorded with respect of the town hall meetings:

Respondent's Counsel: Okay. And did you mention during this town hall meeting that Member States had contacted you with regard to fixed-term contracts at OHCHR?

High Commissioner: I believe I alluded to comments by a Member State, yes.

Respondent's Counsel: Okay. And did you make any comments with regard to religion and, if so, in what context did you make these comments?

High Commissioner: The context was again it came at the end of this confidential meeting that I had and I was asked whether I could help Ms. Brown. I said I, you know being new to the office and not knowing how it functions exactly, I'd look into it and the comment came in the form of, it wouldn't look good if you as an Arab Muslim were not to be helping a Jewish member of the staff or something along those lines, and I was surprised, not least because at that stage I believe, understood that she was not an Israeli national, she was an Australian national and for an Israeli delegation to be saying that surprised me and because it has no, has no bearing on the way that personnel issues should be, should be examined.

Respondent's Counsel: Okay. And did you ever mention [the Applicant's] name during this town hall meeting?

High Commissioner: No.

95. During cross examination, the High Commissioner's testimony on this point is recorded as follows:

Applicant's Counsel: And just to be clear is your, is your (evidence) that you did or did not at the town hall meeting specially address the matter of [the Applicant's] non-renewal.

High Commissioner: No it was, the question was a general question referring to outside influence and having only just whether it be by day or two days or three days, been approached at the end of a long conversation with a request for help which, which I was happy to look into, recognizing that my knowledge was very limited but I was hardly going to you know push them away undiplomatically but the point is that we have an independent office and I make the decision and you influence the exercised on the office and has his Honour question put the question to me, was I irritated and by this I was irritated by the insinuation that somehow my, my own background could affect my decision and when the staff member raised the question of outside influence I took to remind the staff that, that I would hope that they come to see me before they go to a diplomatic mission and that shouldn't have to hear it in full from a diplomatic mission beforehand.

Applicant's Counsel: Do you recall making a statement at the town hall meeting?

High Commissioner: Yes.

Applicant's Counsel: To the effect that, that in some way associated, made the association between your religion and [the Applicant's] religion or presumed religion.

High Commissioner: Well the question was directed more at my religion and that's why I found the whole thing sort of irritating. I was elected by all members of the General Assembly, all governments elected me, if there was any question about the prejudicial instincts that I may have that would have all come out and the long record I have had of service on these issues and so clearly if there was a staff member with whom I had interacted on occasion but not frequently because I only had been in the office for few weeks, who resorted to a particular, going to a particular mission which was not her own mission of nationality, then it, the suggestion was that by going to that particular mission there was some other connection and when the senior government representative raised it at the end of the discussion, it was almost one person and we stood up and we were practically I, that insinuation was not something that I very much I felt comfortable with, it didn't affect my desire to try to find and understand how I could help and I had to defer that decision or the machinery of that to the Deputy High Commissioner. But when prompted in the staff meeting, yes I took to respond to it, as a general condition.

Applicant's Counsel: Okay. Your testimony here as it is the introduction of religion, to your testimony is that introduction of religion as a topic came from some member of the audience, it's just really a very simple question, is that true? That an audience member raised this issue of religion, not you?

High Commissioner: I don't believe so.

Applicant's Counsel: Okay, let's just ...

High Commissioner: I don't believe so.

96. Earlier in the course of evidence, Mr. A.K. had testified about the town hall meeting as follows:

Applicant's Counsel: And did you hear any discussion at that town hall meeting about [the Applicant's] position?

A.K.: Yes because before the town hall meeting, this was the town hall – hello?

Applicant's Counsel: Yes.

A.K.: Yeah that was at the town hall meeting very much, very much oriented to inform the staff about the cuts in the financial situation. So the situation was quite tense and before the meeting there was a preparatory meeting or discussion that I attended with the High Commissioner and the senior management, including the Deputy High Commissioner. And during that meeting, the High Commissioner said that he had received some telephone calls from ambassadors asking him to maintain [the Applicant] in the office. The impression I got was that he didn't – he was not very happy with these calls. And then during the staff, the town hall meeting or staff meeting, he then even without mentioning any name he then was referring to these telephone calls and perhaps also to put it in the bigger picture that he, when he came into this position, one of the first thing he said to the staff, and it was that he was – he didn't, he was not very happy, with the UN that people were always talking to people outside of the office. And so he was – so I, when I heard this I thought, well this is just going to give him another reason for not trusting the staff. And that I think was the way he also presented it.

97. At its highest, the evidence discloses that the High Commissioner was irritated about being contacted by diplomates concerning a staff member. The evidence proves no more than this.

98. The Tribunal is concerned that the Applicant made allegations with respect to religious and ethnicity bias against her on the part of the High Commissioner. The Applicant did not substantiate them and the oral evidence by the High Commissioner clearly showed that no such bias existed and that, hence, it could not in any way constitute the basis for the contested decision. The Tribunal finds it necessary to observe that allegations of bias based on religion, race, ethnicity or nationality should not be made lightly in the context of the United Nations. Such allegations are extremely serious. They should be based upon objective and ascertainable facts, not speculation drawn from unsupported inferences. Further, the Tribunal notes that the fact that the High Commissioner was irritated by the fact that the Applicant had approached various Ambassadors and asked them to interfere with her contractual situation at the OHCHR was understandable and justified. It is noted that such irritation was justified given staff rule 1.1(j), whereby:

(j) Staff members shall not seek to influence Member States, principal or subsidiary organs of the United Nations or expert groups in order to obtain a change from a position or decision taken by the Secretary-General, including decisions relating to the financing of Secretariat programmes or units, or in order to secure support for improving their personal situation or the personal situation of other staff members or for blocking or reversing unfavourable decisions regarding their status or their colleagues' status.

99. The Applicant stated in her evidence, at page 65 of the transcript, that she contacted Ambassadors on the day she was advised of the non-renewal of her contract:

Applicant: I think it was 28th when Anders told me or 29th, yeah 28th the day Anders told me or 29th I contacted when I was with them I, functions and evenings so I saw them, and I told many of them that this is what was happening including ...

Applicant's Counsel: So who were the key, the key Ambassadors who seem to take a lead in trying to help?

Applicant: The key ambassadors were, were the US Ambassador was involved at one point but, the Somali Ambassador, Yusuf

Ismail Baribari, the Estonian Ambassador, the Israeli Ambassador, the Australian Ambassador was aware as well.

100. The High Commissioner also expressed that he reminded staff at a town hall meeting that rather than seeking the support of Member States, it would be better for staff to come and talk to him. It appears indeed that the Applicant unduly used her network of Ambassadors in order to resolve her administrative situation within OHCHR.

Alleged extension of contract and transfer to Fiji

101. With respect to the alleged decision to extend the Applicant's FTA and also to transfer her to Fiji, the Tribunal notes that no such decisions existed. Indeed, the Administration, without any obligation to do so, in good faith, offered the Applicant another post, at the P-5 level and with Fiji as a duty station, to allow her to stay in the employment of OHCHR.

102. The Tribunal recalls that pursuant to sec. 4.4 of ST/AI/2013/1/Corr.1 (Administration of fixed-term appointments):

4.4 A proposed renewal of appointment shall not create any obligations on behalf of the Organization if it is not accepted by the staff member on a timely basis. The Organization initiates a renewal of appointment by issuing a letter of appointment indicating the new expiration date and change of department, office or duty station, if any. The staff member shall be requested to sign the letter of appointment accepting the new expiration date and conditions of appointment. Failure to sign and return the letter of appointment within 14 calendar days of receipt shall nullify any proposed renewal of appointment, and the staff member's fixed-term appointment shall expire on the expiration date specified in the currently valid letter of appointment.

103. Relevantly, sec. 5 of that administrative instructions provides on *Fitness for duty* that:

In order to determine a candidate's fitness to assume the assigned functions, he or she shall be subject to medical clearance prior to the issuance of the letter of appointment or renewal of appointment, as provided in the administrative instruction on medical clearances (ST/AI/2011/3).

104. As such, while the Applicant was indeed offered a new appointment in Fiji, that offer was subject to the Applicant fulfilling certain conditions, including, importantly, a medical clearance. Under the relevant rules, such medical clearance is a condition precedent to the issuance of the letter of appointment or renewal of appointment. If the condition is not fulfilled, there is no contract renewal and the Respondent is not required nor in a position to issue a letter of appointment or renewal of appointment. This is what happened in the present case. Simply put, as the Applicant was not medically cleared, her contract renewal with Fiji as the duty station did not materialize. As a consequence, there was no decision to transfer the Applicant.

105. Rather, the Applicant was offered a contract renewal, as an assignment in Fiji subject to her meeting the conditions for that appointment. As such, the Applicant's taking up functions in Fiji was conditional upon the renewal of the appointment which did not occur, for lack of medical clearance. While the Applicant argues that the enormous psychological stress she was under was the result of the various decisions by the High Commissioner, she admitted that a medical condition prevented her from reporting to Fiji. The Tribunal cannot enter into a consideration of the reasons for the lack of medical fitness of the Applicant. The fact of the matter is that she was not medically fit to assume the functions of the P-5 post she had been offered in Fiji. Further, whether or not the Applicant accepted the proposed renewal of her contract with duty station Fiji, in a timely manner hence, creating an obligation on behalf of the Organization (cf. sec. 4.4 of ST/AI/2013/1), does thus not need to be examined by the Tribunal.

106. The Tribunal is satisfied that in order for the proposed renewal of appointment and proposed reassignment to give any rights to the Applicant, she had to first satisfy all the conditions including those arising from the relevant rules of the Organization (cf. in this respect *Gabalton* 2011-UNAT-120, for external candidates). Since that was not the case, the Applicant did have no contractual rights from the proposed contract renewal and reassignment to Fiji. The Applicant's allegations with respect to the alleged "stay of transfer", including any allegations of bias, must thus equally fail.

107. The Tribunal notes that the Applicant's FTA was renewed after 2 December 2014 solely to allow her to exhaust her sick leave entitlement, in accordance with para. 3.9 of ST/AI/2005/3. No other rights of the Applicant resulted from these renewals granted for purely administrative purposes.

108. In conclusion, the Tribunal finds that the reason provided to the Applicant for the non-renewal of her FTA was clearly established, and that she had no expectancy of renewal. The Organization went beyond its obligations in trying to find another assignment for the Applicant, upon the expiration of her FTA. This case is one where the Organization showed good faith in its dealing with a staff member and assumed and discharged a duty of care, beyond the usual. The fact that the Applicant did not meet the conditions for the new post offered to her, which would have allowed the Organization to keep her in the employment of OHCHR, was not within the Organization's control.

Case No. UNDT/GVA/2015/133

109. In her second application, the Applicant contest, *inter alia*, "her threatened separation from service, with effect from 21 May 2015, while on service-incurred medical leave".

110. The Tribunal notes that while the Applicant filed a claim under Appendix D, no determination was made as to her being on service incurred sick leave. This is independent from the question whether the CCS should or could have obtained lacking required information, in the absence of a signed explanatory letter from the Applicant, on her behalf. While it may be possible that such a determination be made, if the additional information were to be obtained, the fact of the matter remains that it has not yet been made. The Applicant's FTA was not renewed, not terminated. Therefore, the provisions of ST/AI/1999/16 (Termination of appointment for reasons of health) are not applicable to the Applicant's case. The Tribunal recalls that she was separated on 21 May 2015, upon the exhaustion of her sick leave entitlements, in accordance with sec. 3.9 of ST/AI/2005/3 and sec. 4.9 of ST/AI/2013/1.

111. As far as the Applicant contests in her second application the “Respondent’s refusal to grant [her] request for a stay (on newly asserted medical grounds) of her lateral transfer to Fiji”, and without otherwise entertaining any considerations as to the receivability of that claim, the Tribunal refers to its conclusions under paras. 101 to 106 above and notes that since there was no decision to transfer the Applicant, there could not be a decision to stay such transfer on newly asserted medical grounds or otherwise.

112. Finally, with respect to the Applicant’s contesting the decision by the MEU to reject her request for management evaluation and suspension of action, the Tribunal notes that it lacks jurisdiction to review the outcome of the Applicant’s requests at the MEU. Indeed, the Tribunal’s jurisdiction is strictly limited to examine the legality of the administrative decision that was the subject of a management evaluation request, and does not extend to the MEU findings (*Hassanin* UNDT/2014/006). The Applicant’s application in this respect is therefore not receivable, *ratione materiae*.

Conclusion

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

- a. The application in Case No. UNDT/GVA/2015/129 is dismissed.
- b. The application in Case No UNDT/GVA/2015/133 is dismissed

(Signed)

Judge Rowan Downing

Dated this 27th day of June 2017

Entered in the Register on this 27th day of June 2017

(Signed)

René M. Vargas M., Registrar, Geneva