UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/064
Judgment No.: UNDT/2017/072
Date: 6 September 2017
Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in Charge

KATAYE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Sètondji Roland Adjovi

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. On 6 September 2016, the Applicant, a Personal Assistant at the FS-5 level with the United Nations Interim Security Force for Abyei ("UNISFA"), filed an application before the Dispute Tribunal in Nairobi, contesting the 27 December 2015 and 23 March 2016 decisions to reassign her to other functions in UNISFA.

2. In the application, the Applicant requested the Tribunal to find the decisions reassigning her were unlawful, to reinstate her back to her operational title of Personal Assistant to the Head of Mission ("HoM") and, "in extreme situation", to be moved to the posts of Administrative Assistant or Human Resources Assistant which she is rostered for within the United Nations. The Applicant also requested 24 months of salary compensation for the continuous harm to her health, mental and emotional depression that she suffered. She mentioned that her career has suffered from this situation because she has not had any electronic performance appraisal system ("e-PAS") report completed for two consecutive periods.

3. The Respondent submits that the application is not receivable *rationae temporis* because it was filed beyond the 90 day time limit for contesting the 27 December 2015 and 23 March 2016 decisions. Should the Dispute Tribunal find the Application receivable, the Respondent submits that it is without merit and should be rejected.

Factual and procedural background

4. The Applicant joined the Organization in August 2000. She joined UNISFA as a Personal Assistant at the FS-5 level on 21 July 2012, assigned to the Office of the Head of Mission ("OHoM").

5. In February 2015, a new HoM was appointed to UNISFA. On 17 June 2015, he internally transferred the Applicant to the Office of the Chief, Supply Chain and Service Delivery ("SCSD") as an FS-5 level Administrative Assistant.

6. On 27 December 2015, the Officer-in-Charge of the SCSD and the Mission Support Division informed the Applicant that he decided to rotate the Applicant from the SCSD office to the Supply, Centralized Warehousing and Property Management Section ("SCWPMS") effective 1 January 2016.

7. On 29 December 2015, after the Applicant objected to the move, the then Chief of Mission Support directed the Officer-in-Charge of the SCSD not to implement the decision pending further discussions with the Applicant.

8. On 14 February 2016, the Applicant requested a management evaluation of the 27 December 2015 decision to move her to the SCWPMS, as a continuation of the decision of 17 June 2015. As a remedy, she requested to be reassigned back to the OHoM as a Personal Assistant or, alternatively, to be reassigned within her rostered job descriptions and/or profiles of Administrative Assistant or Human Resources Assistant.

9. On 22 March 2016, a newly appointed Chief of Mission Support met with the Applicant to discuss a possible reassignment to the Training Unit as an FS-5 level Administrative Assistant. The Applicant responded that while the reassignment sounded attractive, the Personal Assistant position would provide her with better job security.

10. On 23 March 2016, the Chief of Mission Support decided to temporarily loan the post that the Applicant encumbered to the Training Unit where she was to perform the functions of an Administrative Assistant at the FS-5 level, from 23 March 2016 until 30 June 2016. On the same date, the Management Evaluation Unit ("MEU") informed the Applicant that her 14 February 2016 request was moot since the 27 December 2015 decision was not implemented and then was superseded by the 23 March 2016 decision to temporarily loan her post to the Training Unit.

11. On 24 March 2016, the Applicant submitted a request for management evaluation of the decision to reassign her to the Training Unit.

12. On 29 March 2016, the Applicant filed an application for suspension of the implementation of the 23 March 2016 decision to reassign her to the Training Unit. The Mission subsequently suspended the implementation of the decision pending the outcome of the management evaluation.

13. Following the outcome of her application for the suspension of action dated 29 March 2016, the Applicant embarked on amicable settlement negotiations with the MEU and UNISFA. However, the parties did not agree on a settlement.

14. On 7 June 2016, the Under-Secretary-General for Management ("USG/DM") informed the Applicant that the Secretary-General had upheld the 23 March 2016 decision to reassign her to the Training Unit.

15. In its 7 June 2016 letter, the USG/DM stated that UNISFA explained that the Applicant was being reassigned to the Training Unit because the post of HoM was currently vacant and that, as a result, there would be no work for her in that office. The MEU further observed that the decision to reassign the Applicant to the Training Unit would not in any way impact on her career development and/or employment, and that the reassignment was only temporary which would be revisited at the end of the budget cycle at the time (2016-2017).

16. On 5 July 2016, UNISFA decided to implement the 23 March 2016 decision to temporarily reassign the Applicant from SCSD to the Training Unit along with her current encumbering post from 5 July 2016 until the end of the budget cycle in June 2017 when the decision was to be revisited.

17. On 26 July 2016, the Applicant went on sick leave.

18. On 6 September 2016, the Applicant filed the present application with the Tribunal.

19. On 17 October 2016, the Respondent filed his reply.

20. Following the decision taken at the Plenary of Dispute Tribunal Judges held in May 2016, to balance the Tribunal's workload, the present case was selected to be transferred to the Dispute Tribunal in New York.

21. By Order No. 461 (NBI/2016) of 26 October 2016, the parties were instructed to express their views, if any, on the transfer of the present case by 2 November 2016.

22. On 2 November 2016, the Applicant responded that, while, in principle, not objecting to the transfer, she requested an expeditious settlement of her case and indicated that, in her view, this might only be possible if the case remained in Nairobi.

23. By Order No. 474 (NBI/2016) of 7 November 2016, the Tribunal noted that neither party objected to the transfer and, pursuant to art. 19 of the Dispute Tribunal's Rules of Procedure, transferred the case to the Dispute Tribunal in New York. The New York Registry registered the case under Case No. UNDT/NY/2016/064.

24. On 22 November 2016, the case was assigned to the undersigned Judge.

25. By Order No. 10 (NY/2017) of 17 January 2017, the Tribunal ordered the Applicant to file, by 31 January 2017, a response to the receivability issues raised by the Respondent in his reply and provide certain additional information and documentation. The parties were further instructed to file separate statements by 31 January 2017, informing the Tribunal if (a) additional evidence would need to be produced and, if so, stating its relevance, (b) the case may be decided on the papers, and (c) the parties were amenable for an informal resolution of the case either through the Office of the Ombudsman or through *inter partes* discussions. If the parties were not amenable to informal resolution, they agreed that no further evidence were to be requested, and that the Tribunal could decide the case on the papers before it, they were instructed to file their closing submissions by 21 February 2017.

26. On 31 January 2017, the parties filed their submissions as per Order No. 10 (NY/2017).

27. By Order No. 23 (NY/2017) of 6 February 2017, the Tribunal instructed the parties to attend a Case Management Discussion ("CMD") on 21 February 2017 in the court room in New York.

28. During the 21 February 2017 CMD, the Tribunal noted that, in the Applicant's 31 January 2017 submission, the Applicant had informed the Tribunal that she had been assigned back to her original job. At the inquiry of the Tribunal, Counsel for the Applicant explained that the Applicant had resumed her old functions on 20 February 2017. Counsel for the Respondent stated that he did not believe that the case was amenable for informal negotiations, noting that the Applicant had been granted the relief she had sought; the only remaining claim, therefore, concerned damages and the Respondent did not find that the Applicant had suffered any economic loss. Counsel for the Respondent further requested to be offered the opportunity to comment on the medical records the Applicant had submitted in evidence. In response, Counsel for the Applicant argued that the Applicant had suffered both direct economic losses and non-pecuniary damages. The Tribunal stated that it strongly believed that both parties would benefit from the case being resolved amicably and encouraged them to enter into informal negotiations, either through the United Nations Ombudsman and Mediation Services or *inter partes* discussions. The Tribunal ordered Counsel for the Respondent to consult with his client and file a submission on or before 24 February 2017 on the possibility of entering into settlement discussions. If this was rejected by the Respondent, the Tribunal would thereafter issue an order to set a deadline for closing submissions.

29. On 24 February 2017, the Respondent informed the Tribunal that he maintains his view that this case is not amenable for an informal resolution.

30. By Order No. 38 (NY/2017) of 27 February 2017, the Tribunal instructed the parties to file their closing submissions by 17 March 2017.

31. On 17 March 2017, the parties filed their closing submissions.

Applicant's submissions

32. The Applicant's principal contentions, submitted in her application, are as follows (footnotes omitted):

> … [The Applicant] is employed under UNISFA as the [Personal Assistant, "PA"] to the Head of Mission and has served in this position for fourteen (14) years until 18th June 2015 when she received the first memo directing her to move to Supply Chain Services, followed by a second memo dated 27th December 2015 purporting to move her again for the second time within a period of five (5) months to a subsection in the Supply Chain Services, both moves to positions which were not provided in the then budget nor in the current budget cycle. Those moves do not provide her the job security she had in her position in the office of the HoM [as] none of them has been provided in the then or current budget.
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> … [The Applicant] was unlawfully moved from her position as the PA to the Head of Mission […] without prior consultations and any justification. It is conclusive to say that the organisation had ulterior motives when moving her from one position and department to the other. […]
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> … The posts which the organisation has on several occasions purported to move [the Applicant] to, do not fall within her operational title of the PA to the HoM.
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> … [The Applicant] is rostered for the posts of Administrative Assistant and Human Resource Assistant. However, if the organisation decided to move [the Applicant] to any of her other rostered positions, the Mission failed to reassign her in regularly budgeted posts. From the 17th June 2015 through the 7th June 2016 MEU letter, all the moves are done where there is no provision of the Administrative Assistant positions within the then or current budget at the FS-5/11 which is her current level/rank. Thus, creating job insecurity for [the Applicant], bearing in mind that continuing contract is primary secured by provision for post with a budget.
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> … In addition, while [the Applicant] is moved as Administrative Assistant to Training Unit, the head of the receiving Section provided her with ToR for a Training Assistant claiming that he does not have work for an Administrative Assistant. Knowing that [the Applicant] does not have any experience in training, she is going to be ineffective

and unproductive and as a result, her career growth and development will be compromised, as is already being compromised by the unlawful decision be the organisation. The Tribunal has ruled that harm to career prospects may constitute irreparable harm *(See Villarmoran UNDT/2011/126).*

… Further, [the Applicant] does not have any training or experience in any of the posts the organisation has on several occasions purported to move her to and so if she is moved there, she is going to be ineffective and unproductive and as a result, her career growth and development will be compromised, as is already being compromised by the unlawful decision by the organisation. The Tribunal has ruled that harm to career prospects may constitute irreparable harm *(See Villarmoran UNDT/2011/126).*

… [The Applicant] does not know what her duties, roles and responsibilities are going to be if she moved to the positions proposed by the organisation and therefore submits that she will be basically earning without work which is against the policy and the interests of the organisation *(See UNDT/2011/187).*

… Moreover, for a staff with a continuing contract as [the Applicant], the organization has an obligation to assist her in identifying a position which is suitable to her qualifications and experience. […]

… In the 7th June 2016 MEU decision, and more specifically at pages 3-4, MEU cited *Allen, UNDT/2010/2012*, affirmed by *2011-UNAT-187,* "It is for the Administration to determine whether a measure of such a nature is in its interest or not. However, the decision must be properly motivated and not tainted by improper motive, or taken in violation of mandatory procedures". However, obviously, [the Applicant] has been abused and moved with ulterior motives from the very first transfer of 17th June 2015. The facts being the unlawful reclassification of her post, dated 27 June 2015 only ten (10) days after and a fraudulent recruitment on her post on 1 August 2015 while she is still against it. This is a violation of provision 4.2.3.1 of the Staffing Table and Post Management (SOP) which states among other conditions of posts on loan, the original functional title and level of the post should not be changed. For these reasons, the series of transfers made against [the Applicant] are inseparable and she calls on the Tribunal to consider her case holistically.

… The Tribunal in *Benchebbak Order No. 142 (NBI/2011)* pronounced the established test for unlawfulness in the exercise of discretion requires the Applicant to show that the contested decision was influenced by some improper consideration, was procedurally or substantively defective or was contrary to the Administration's

obligation to ensure that its decisions are proper and made in good faith. The Tribunal has also held that the prerequisite of *prima facie* unlawfulness does not require more than serious and reasonable doubts about the lawfulness of the contested decision *(See Wang UNDT/2012/080).*

… It is obvious that the purported moves against [the Applicant] are violations of the provisions contained in the Staff UN Rules and Regulations, especially ST/SGB/2012/1 in its Regulation 4.2 which state that *"the paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity."* In the present case, no necessity has been shown by the administration when making the successive decisions for the reassignment of [the Applicant] while, as shown above, such moves would not serve the interests of the organisation.

… As a matter of fact, there has been a new development. While [the Applicant] is on sick leave that was regularly and duly approved by UN medical services, on the 25th August 2016, she unexpectedly received an e-mail from the Current Chief, Mission Support notifying her that the organisation was about to place her on a Leave without pay. It should be noted that as per UN rules, [the Applicant] had informed the Human Resource and her supervisor of her health condition and the related leave already on the 28th July 2016. On the basis of her message, the Chief Medical Officer came back to her on 4th August 2016 asking her to submit her sick leave request through Umoja, which she did and the sick leave was approved electronically on the 23rd August 2016. Thus the mission cannot be seen to be claiming that it was not aware of [the Applicant's] health status. Therefore, for the Chief, Mission Support to write to her purporting to place her on an unpaid leave, which is regularly the responsibility of the Human Resources, proves once again, the persistent conspiracy on [the Applicant's] post and the continuous harassment on her person.

… The overall situation is awkward and [the Applicant] submits that there is a motive behind the way she is being treated and the manner in which her case is being managed by the organisation.

33. On 31 January 2017, the Applicant filed submissions in response to Order No. 10 (NY/2017) contending that (footnotes omitted):

… A. Response on Receivability […]

… The Respondent has raised the receivability in a way that portrayed a case different from the one submitted to the Tribunal. For the sake of clarity, the Applicant made her case on the reassignment of 23 March 2016. That reassignment was used by MEU to reject the request for management evaluation against the reassignment of December 2015. It [is] therefore logical to consider those two, and that was the submission of the Applicant (Section V of the Application). The only date which should matter for the determination of the receivability here is therefore the date relevant to the reassignment of 23 March 2016. However, the situation started with the reassignment of 17 June 2015 and the Applicant has provided information about that decision to allow a full picture for the Tribunal, and it is wrong for the Respondent to allege here that the Applicant has challenged that decision and should be considered time-barred. But the chain of events hence the continuity between those three decisions cannot be ignored: it is a fact that has adversely affected the health and career of the Applicant.

… Having considered the response from MEU on 8 June 2016 and discussed with her legal team, the Applicant got sick again and communication with her legal team was not easy. Despite that challenge the application was filed on 6 September 2016, Nairobi time. If one considers that the Applicant was only able to discuss the response on 8 June 2016, the application was still filed within the 90 days. Notwithstanding, the Applicant will hope that the Tribunal will bear with her, considering the exceptional circumstances that she has been going through because of the consistent harassment from the Administration. It is important to incidentally note here that the hostile attitude of the management at the Mission is continuous feature and even during that sickness period the Applicant was harassed about resuming work.

… All other arguments that the Respondent submitted on the receivability are irrelevant because factually wrong as far as this case is concerned.

… The Applicant therefore submits that the Tribunal rejects the arguments of the Respondent on receivability and considers the merits of the case.

… B. Whether the Applicant was consulted prior to each reassignment […]

… On the issue of consultation prior to the reassignments, the Applicant submits that at no given time was she consulted prior to the administrative reassignments of 17 June 2015, and 27 December 2015 respectively.

… For the reassignment on 23 March 2016, as stated in the application (Section VII, para. 8), the Applicant was invited into a meeting with the new Chief of Mission Support. She got the reassignment immediately after the meeting without any consideration of her views. Unfortunately, the Applicant had to decline the offer of reassignment because it would have jeopardized her job security because the post could be abolished quickly. […]

… C. Additional Information / New Developments […]

… Now, the Applicant wishes to bring these new developments to the attention of the Tribunal. They further the suspicion of harassment that the Applicant has alleged in her application.

… On 20 November 2016, the Mission wrote an Inter-Office Memorandum to the Applicant informing her that the Chief of Mission Support had decided to curtail her reassignment to the Training Unit with immediate effect and that, upon her return from sick leave, she should report immediately to the Office of the Head of Mission where she would resume her original functions as Personal Assistant.

… Thereafter, on 25 November 2016, her primary practitioner medically cleared the Applicant to resume work and on 28 December 2016 the Medical Services Division certified her to resume duties with immediate effect from 1st January 2017.

… The Applicant subsequently organized her commercial flight to travel back to duty by the earliest flight. And, on 13 January 2017, she arrived in Entebbe expecting to connect by the next available UNISFA flight and wait for the visa renewal since it had expired while she was on her sick leave. However, her [electronic movement of personnel] to board UNISFA flight was rejected on 14th January 2017 with the notification that due to the new guidelines on visa issuance/renewal. The Administration has imposed that she should wait at home at her own cost/expenses while her absence days will be deducted from her annual leave. This message only reached the Applicant when she was already in the mission area in Entebbe while the Administration to which the Medical Services Division's fax was addressed had not stopped the Applicant from starting her travel from her home country. It is worth noting here that the so-called new guidelines were notified to all staff through an e-mail generated by the office of Chief, Mission Support on 3 November 2016 when the Applicant was still away under medical leave and without access to her official mailbox. There is no doubt that the Applicant could not have access to the information and the Administration did not notify her specifically despite the clearance dated 28 December 2016 to resume work.

> … On 16 January 2017, the Applicant wrote to the Administration […] requesting it to consider her specific circumstances and approve / authorize her access to the Mission pending the renewal of her expired visa since she did not have any previous information about the new guidelines on visa arrangements, bearing in mind that she was already in the mission area and eager to resume her duties thus not to lose her annual leave days and incur unnecessary financial expenses from her own pocket. That request was however rejected the same day through an email.
>
> … This new development is already jeopardizing a work environment which was already hostile and has negatively affected the health of the Applicant, while the reassignment could have been an excellent move on the part of the Administration to reestablish good management of this situation. The Applicant will be grateful if the Tribunal could consider this further development even though it might be appropriate for the Applicant to follow the usual course of action to challenge this decision as well. Such consideration will be in the interest of justice. […]

Respondent's submissions

34. The Respondent's principal contentions, submitted in the reply, are as follows (footnotes omitted):

> … (i) The Application is not receivable *rationae temporis*
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> … An application is receivable if filed within 90 calendar days of the applicant's receipt of the outcome of his or her request for management evaluation ([Dispute Tribunal] Statute, art. 8(1)(i)(a)). When the management evaluation is received after the 45-calendar day deadline, but before the expiration of 90-day deadline for seeking judicial review before the Dispute Tribunal, the receipt of the management evaluation outcome will result in setting a new deadline for seeking judicial review before the Dispute Tribunal (*Lemonnier*) [2016-UNAT-679].
>
> … The challenge to the 27 December 2015 decision to move the Applicant to the SCWPMS is time-barred. The Applicant received the outcome of her management evaluation request of 14 February 2016 on 23 March 2016. The 90-day deadline for filing an application before the Dispute Tribunal was therefore 21 June 2016. This Application was not filed until 6 September, almost three months out of time. The challenge to the 27 December 2015 decision is also not

receivable, because it is moot. The 27 December 2015 decision was never implemented.

… The challenge to the 23 March 2016 decision to reassign the Applicant to the Training Unit is also time-barred. The Applicant received the management evaluation of that decision on 7 June 2016, making the deadline to file an application before the Dispute Tribunal 5 September 2016. The Application was filed one day late.

… Both Tribunals have held that time limits should be strictly enforced (*Al-Mulla*; *Czaran* (citing *Mezoui*; *Ibrahim*; *Christensen*; *Odio-Benito*; *Larkin*); *Haydar*) [2013-UNAT-394; UNDT/2012/133, *aff'd*, 2013-UNAT-273 (*citing* 2010-UNAT-043; 2010-UNAT-069; 2012-UNAT-218; UNDT/2011/019; UNDT/2011/028); UNDT/2014/045]. Decisions regarding timeliness should be made without regard to the merits of the case (*Kita* (citing *Samardzic*) [UNDT/2010/025 (*citing* UNDT/2010/019)]). This is true even when an application is filed one day late (*Rüger*; *Ocokoru*) [UNDT/2016/015; 2015-UNAT-604].

… The Dispute Tribunal is not competent to adjudicate the Application. It cannot waive the filing deadline on its own motion. The Application is not receivable *rationae temporis* and, in the interest of judicial economy and efficiency, it should be dismissed without consideration of the merits (*Cooke*) [2013-UNAT-380].

… (ii) The Applicant's challenge to the 17 June 2015 decision to reassign her to SCSD is not receivable *rationae materiae*

… Requesting management evaluation is a mandatory first step in the formal process (*O'Neill*; *Gehr*; *Tetova*; *Wamalala*) [2011-UNAT-182; 2012-UNAT-331; 2012-UNAT-229; 2012-UNAT-332]. To the extent that the Applicant challenges the Head of Mission's 17 June 2015 decision to move her to SCSD, it is not receivable. The Applicant states that she requested management evaluation of the 27 December 2015 decision to move her to the SCWPMS "as a continuation of the decision of 17th June 2015." However, the Applicant never sought management evaluation of that decision.

… The 17 June 2015 decision was a discrete decision made by the former HoM. The 27 December 2015 decision was a second discrete decision made by the [Officer-in-Charge of] SCSD, months after the HoM had left the mission. There is no basis for concluding one decision was a continuation of the other. The Dispute Tribunal lacks jurisdiction to review the 17 June 2015 decision for lack of management evaluation.

… (iii) The Applicant's claims of harassment and abuse of authority are not receivable

… The Applicant contends that the impugned decisions constituted an abuse of authority and harassment. The Dispute Tribunal lacks competence to investigate complaints of abuse of authority and harassment (*Messinger*) [2011-UNAT-123]. A staff member who asserts that he or she has been aggrieved must follow the procedures set forth in ST/SGB/2008/5 (*Messinger*; *Bajnoci*) [2011-UNAT-123, UNDT/2012/028]. The Applicant has not done so. Hence, the Dispute Tribunal lacks jurisdiction to review her abuse of authority and harassment claims. […]

… Should the Dispute Tribunal find the Application receivable, the Respondent makes the following submissions on the merits.

… (i) The 23 March 2016 decision was lawful

… The Applicant acknowledges that she never requested management evaluation of the 17 June 2015 decision. She equally acknowledges that the 27 December 2015 decision was never implemented. Accordingly, the only live issue is the 23 March 2016 decision, reassigning the Applicant to the Training Unit.

… Staff regulation 1.2(c) provides that "staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities of the United Nations." Both Tribunals have repeatedly affirmed the Secretary-General's authority to reassign staff members (*Hepworth*; *Rees*; *Allen*) [2015-UNAT-503; 2012-UNAT-266; 2011-UNAT-187].

… In this case, the Applicant was reassigned to the Training Unit after she had objected to other proposed reassignments and to accommodate her request to be assigned functions more in line with her job profile. During consultations regarding the reassignment to the Training Unit, the Applicant expressed that she considered the reassignment "attractive." She was reassigned as an FS-5 Administrative Assistant at the same grade and level to perform functions consistent with her qualifications. The 23 March 2016 decision was lawful.

… (ii) The 23 March 2016 decision did not threaten the Applicant's job security.

… First, the Applicant was moved with the post she encumbered. The reassignment did not result in any change in the funding source for the Applicant's appointment. Contrary to her allegations, the Applicant was not placed against a post that was not on the staffing table or in the budget. The 23 March 2016 memorandum notifying

the Applicant of her reassignment stated that she and the post she encumbered would be loaned to the Training Unit in accordance with the standard operating procedures for post management. She continues to encumber the same regular budget post since she was first recruited to UNISFA. As the Dispute Tribunal held in *Gandolfo*, "the lawfulness of the contested decision is further supported by the fact that the Applicant in addition to only being temporarily reassigned will still be encumbering his current post." [Order No. 101 (NY/2013)]

… Second, the Applicant serves on a continuing appointment. Unlike a fixed-term appointment, which expires at the end of its term, a continuing appointment is open-ended (staff rule 4.14). It expires on the staff member's retirement date. The move to the training unit did not threaten the Applicant's job security.

… (iii) The Applicant has suffered no harm.

… There is no support for the Applicant's claim that she has suffered irreparable harm. A reassignment to other functions within the same duty station at the same grade and level causes no material harm or economic loss (*Chocobar*) [Order No. 102 (GVA/2015)]. A reassignment decision forms part of a day-to-day practice in every Administration. It does not necessarily include a negative assessment of the staff member. The 27 December 2015 decision to move the Applicant to the SCWPMS was never implemented, so she could not have suffered harm from that decision. The 23 March 2016 decision move to the Training Unit was in direct response to the Applicant's request to perform functions in line with her current job profile. The Applicant's sole objection to the decision is based on her misguided belief that the decision negatively affects her job security.

… Although the Applicant did not receive a performance evaluation for the 2015-16 performance cycle, she has not demonstrated any harm to her career. The UNISFA administration is taking steps to ensure the Applicant will be evaluated during the current 2016-17 performance cycle.

… (iv) The Applicant also has not shown that any of the impugned decisions were ill-motivated.

… There is a presumption that official acts are regularly performed (*Rolland*) [2011-UNAT-122]. The burden of proving improper motivation lies with the staff member making the allegation (*Assad*) [2010-UNAT-021]. Although she claims the moves were "awkward" and suggests that there was "a motive", the Applicant has not supported her claims. UNISFA reassigned the Applicant to

the Training Unit as an Administrative Assistant only after consulting with her and in direct response to her preference in functions.

Consideration

Applicable law

35. Articles 2, 3, and 8 of the Statute of the Dispute Tribunal state in relevant parts:

> **Article 2**
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> 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary General as the Chief Administrative Officer of the United Nations:
>
> (*a*) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance;
>
> (*b*) To appeal an administrative decision imposing a disciplinary measure;
>
> (*c*) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.
>
> **…**
>
> **Article 3**
>
> 1. An application under article 2, paragraph 1, of the present statute may be filed by:
>
> (*a*) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;
>
> (*b*) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;
>
> …
>
> **Article 8**
>
> 1. An application shall be receivable if:

(*a*) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(*b*) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(*c*) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and;

(*d*) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

…

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

36. Articles 7, 34 and 35 of the Tribunal's Rules of Procedure state in relevant parts:

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

2. Any person making claims on behalf of an incapacitated or deceased staff member of the United Nations, including the Secretariat and separately administered funds and programmes, shall have one calendar year to submit an application.

3. Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.

…

5. In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 above. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request. The request shall not exceed two pages in length.

…

Article 34 Calculation of time limits

The time limits prescribed in the rules of procedure:

(a) Refer to calendar days and shall not include the day of the event from which the period runs;

(b) Shall include the next working day of the Registry when the last day of the period is not a working day;

(c) Shall be deemed to have been met if the documents in question were dispatched by reasonable means on the last day of the period.

…

Article 35 Waiver of time limits

Subject to article 8.3 of the statute of the Dispute Tribunal, the President, or the judge or panel hearing a case, may shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require.

37. Staff rules 11.2 and 11.4 of ST/SGB/2014/1 (Staff Rules and Staff Regulations of the United Nations), which were applicable at the relevant time, state in relevant parts:

Rule 11.2

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

Rule 11.4

United Nations Dispute Tribunal

Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

38. Staff regulation 1.2(c) state in relevant parts:

Regulation 1.2

General rights and obligations

...

(c) Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them;

…

39. Staff rule 3.14 states:

Rule 3.14

Hardship allowance

(a) Staff in the Professional and higher categories and in the Field Service category, and staff in the General Service category considered internationally recruited pursuant to staff rule 4.5 (c) who are appointed or reassigned to a new duty station may be paid a non-pensionable hardship allowance.

(b) The amount of this allowance, if any, and the conditions under which it will be paid shall be determined by the Secretary-General taking into account the degree of difficulty of life and work at each duty station as per the classification of duty stations established by the International Civil Service Commission.

40. Staff rule 6.2 states in relevant parts:

Rule 6.2

Sick leave

(a) Staff members who are unable to perform their duties by reason of illness or injury or whose attendance at work is prevented by public health requirements will be granted sick leave. All sick leave must be approved on behalf of, and under conditions established by, the Secretary-General.

Maximum entitlement

(b) A staff member's maximum entitlement to sick leave shall be determined by the nature and duration of his or her appointment in accordance with the following provisions:

(i) A staff member who holds a temporary appointment shall be granted sick leave at the rate of two working days per month;

(ii) A staff member who holds a fixed-term appointment and who has completed less than three years of continuous service shall be granted sick leave of up to 3 months on full salary and 3 months on half salary in any period of 12 consecutive months;

(iii) A staff member who holds a continuing appointment, or who holds a fixed-term appointment for three years or who has

> completed three years or more of continuous service shall be granted sick leave of up to nine months on full salary and nine months on half salary in any period of four consecutive years.
>
> …
>
> **Certified sick leave**
>
> (d) Sick leave taken by a staff member in excess of the limits set in paragraph (c) above requires approval in accordance with conditions established by the Secretary-General. When those conditions are not met, the absence shall be treated as unauthorized in accordance with staff rule 5.1 (e) (ii).
>
> **Sick leave during annual leave**
>
> (e) When sickness of more than five working days in any seven-day period occurs while a staff member is on annual leave, including home leave, sick leave may be approved subject to appropriate medical certification.
>
> …
>
> **Obligations of staff members**
>
> …
>
> (i) A staff member shall not, while on sick leave, leave the duty station without the prior approval of the Secretary-General.

Receivability framework

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

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

a. The application is receivable *ratione personae* if it is filed by a current or a former staff member of the United Nations, including the United Nations Secretariat or separately administered funds (arts. 3.1(a)–(b) and 8.1(b) of the Statute) or by any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered funds and programmes (arts. 3.1(c) and 8.1(b) of the Statute);

b. The application is receivable *ratione materiae* if the applicant is contesting "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment" (art. 2.1 of the Statute) and if the applicant previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

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

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

Receivability ratione personae

44. The Applicant is a staff member having a continuous appointment with UNISFA being currently a Personal Assistant at the FS-5 level and in accordance with art. 3.1 of the Dispute Tribunal's Statute the application is therefore receivable *ratione personae*.

Receivability ratione materiae

45. In her application, the Applicant challenges the 27 December 2015 and 23 March 2016 decisions to reassign her to other functions in UNISFA which are administrative decisions subject to a management evaluation request.

46. In regard to the 27 December 2015 decision to reassign the Applicant to other functions in UNISFA, the Applicant filed a management evaluation request before the MEU on 14 February 2016, within 60 days from the date of notification and therefore the claim in respect to the 27 December 2015 decision is receivable *ratione materiae*.

47. In regard to the 23 March 2016 decision to reassign her to other functions in UNISFA, the Applicant filed a management evaluation request before the MEU on 25 March 2016, within 60 days from the date of notification and therefore the claim in respect to the 23 March 2016 decision is receivable *ratione materiae*.

Receivability ratione temporis

48. In regard to the 27 December 2015 decision to reassign the Applicant to other functions in UNISFA, the Tribunal will analyze the receivability issue invoked by the Respondent, namely that the Applicant failed to file her application within the mandatory 90-day deadline for filing an application before the Dispute Tribunal.

49. The United Nations Appeals Tribunal has consistently held that the Dispute Tribunal does not have jurisdiction, pursuant to art. 8.3 of its Statute, to waive or extend the deadlines for management evaluation requests (see *Costa* 2010-UNAT-036; *Trajanovska* 2010-UNAT-074; *Sethia* 2010-UNAT-079; *Ajdini et al*. 2011-UNAT-108).

50. The Tribunal notes that the Applicant received the outcome of her management evaluation request of 14 February 2016 on 23 March 2016. The 90-day mandatory deadline for filing an application before the Dispute Tribunal expired

therefore on 21 June 2016. The present application was filed late on 6 September 2016. The Applicant was required to file her application by 21 June 2016 in respect of her challenge to the 27 December 2015 decision. As she did not do so, the Applicant's appeal to the 27 December 2015 decision is to be rejected as not being receivable *rationae temporis*.

51. In regard to the 23 March 2016 decision to temporarily loan the Applicant's post to the Training Unit until 30 June 2016, the Tribunal will further analyze the receivability issue invoked by the Respondent, namely that the Applicant failed to file the application within the mandatory 90-day deadline for filing an application before the Dispute Tribunal.

52. The Tribunal notes that the Applicant received the outcome of her management evaluation request of 23 March 2016 on 7 June 2016. The 90-day deadline for filing an application before the Dispute Tribunal was therefore 5 September 2016. The present application was filed on 6 September 2016, which according to the Respondent's reply, was one day late.

53. The Dispute Tribunal's Rules of Procedure state that, in the calculation of time limits, the time limits shall include the next working day of the Registry when the last day of the period is not a working day (art. 34). The Tribunal notes that Monday, 5 September 2016 was observed as an official holiday at the New York Registry. Therefore, the 90-day deadline for filing an application before the Dispute Tribunal fell on 6 September 2016, being the next working day of the Registry. The present application was filed in time on 6 September 2016. The Applicant's appeal to the 23 March 2016 decision is, therefore, receivable *ratione temporis*.

54. The Tribunal concludes that the application regarding the contested decision issued on 23 March 2016 is receivable.

Merits

55. In the light of the foregoing, the Tribunal will further analyze, pursuant to art. 2 of the Statute of the Dispute Tribunal, the 23 March 2016 decision.

56. The Tribunal notes that, as results from the contested decision on 23 March 2016, the Chief of Mission Support decided in accordance with staff regulation 1.2(c) and section 4.2.3 of the Standard Operating Procedures on Staffing Table and Post Management of United Nation Peace Operations ("SOPs") to:

> … temporarily loan the post [the Applicant was] currently encumbering to the Training Unit where [she] will perform the functions of Administrative Assistant at the FS-5 level […]. In accordance with section 4.2.3 of the SOPs, the duration of this loan is limited to the current budget cycle (30 June 2016). Any further extension of the temporary loan through the 2016-2017 budget year will also be subject to the provisions of section 4.2.3 of the SOPs (i.e., the Mission will again be required to follow the steps set out in that section).

57. The implementation of the 23 March 2016 decision to reassign the Applicant to the Training Unit was subsequently suspended by the Administration pending the outcome of the management evaluation, following the Applicant's filing of an application for suspension of action with the Tribunal. On 7 June 2016, the USG/DM informed the Applicant that the Secretary-General had upheld the 23 March 2016 decision to reassign her to the Training Unit.

58. On 5 July 2016, UNISFA issued an interoffice memorandum addressed to the Applicant, informing her that "UNISFA will now implement the decision to temporarily reassign [the Applicant] from SCSD to the Training Unit along with the post [she] [is] currently encumbering effective the date of this memorandum".

59. The Tribunal underlines that, in accordance with the consistent jurisprudence, it is for the Administration to determine whether a measure of such a nature is in its

interest or not. For instance, the Appeals Tribunal stated in *Rees* 2012-UNAT-266, at para. 58:

> … […] However, the decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures. An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's competence and skills; and, whether he or she had substantial experience in the field.

60. In *Hepworth* 2015-UNAT-503, the Appeals Tribunal held that "[t]raditionally, the reassignment of staff members' functions comes within the broad discretion of the Organization to use its resources and personnel as it deems appropriate".

61. The exercise of the discretion is reviewable according to the test laid down in *Awe* 2016-UNAT-667:

> 26. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered. The Tribunal can also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.
>
> 27. It is for the Administration to determine whether a measure of such a nature is in its interest or not. However, the decision must be properly motivated, and not tainted by an improper motive, or taken in violation of mandatory procedures. An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member's grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's competence and skills; and, whether he or she had substantial experience in the field.

62. The recent jurisprudence of the Appeals Tribunal reconfirms that the reassignment of staff members' functions comes within the broad discretion of the Organization (*Awe* 2016-UNAT-667, para. 25). In *Beidas* 2016-UNAT-685, the Appeals Tribunal reiterated that it is within the Administration's discretion to reassign a staff member to a different post at the same level and such a reassignment is lawful if it is reasonable in the particular circumstances of each case and if it causes no economic prejudice to the staff member (para. 18).

63. The Tribunal considers that the decision issued on 23 March 2016 was valid until 30 June 2016, as clearly results from its content. Therefore, on 5 July 2016, the Administration unlawfully implemented and extended until the end of June 2017 the 23 March 2016 decision without observing that this decision was no longer valid, since the duration of the Applicant's temporary loan to the Training Unit expired on 30 June 2016. The Administration did not issue, before or on the 30 June 2016 expiration date, a decision to extend the initial temporary loan beyond the expiration date, or issue a new decision to loan the Applicant's post to the same unit starting from 1 July 2016, as required by the SOPs to which reference was made in the 23 March 2016 decision. The Tribunal underlines that, after its expiration, a decision cannot any longer produce legal effects and therefore cannot be implemented and/or extended and that any such action constitutes itself a breach of procedural fairness.

Relief

64. The Tribunal notes that the Applicant indicated in her application that she is seeking the Tribunal to order (footnotes omitted):

> … The reassignments unlawful and dismiss them accordingly;
>
> … The organisation to reinstate [the Applicant] back to her operational title of Personal Assistant to the HoM both physically and electronically (Umoja System);
>
> … In extreme situation, if she has to be moved from the position of Personal Assistant to the HoM, the Applicant to be moved to

> the posts of Administrative Assistant or Human Resource Assistant which she is rostered for within the UN and that are already provided for within the current budget cycle and at her current level.
>
> … Compensation for the continuous harm she has suffered and continues to suffer to her health, mental, and emotional depression as a result of the unlawful decision by the Organisation. Her career has also suffered from this situation because she does not have any e-PAS for two consecutive periods. Bearing in mind the totality of the harm, she is of the view that twelve (24) months' salary would be an appropriate compensation for the irreparable harm suffered so far.

65. The Tribunal notes that the Administration revisited by its own initiative, during the proceedings in the present case, the implementation of the 23 March 2016 decision, and on 20 November 2016, the Applicant was assigned back to her original job as Personal Assistant at the FS-5 level to the OHoM with immediate effect and she was informed that upon her return from sick leave she was to report to the OHoM. In this regard, the Applicant had informed the Tribunal that she had been assigned back to her original job in her 31 January 2017 submission. At the 21 February 2017 CMD, at the inquiry of the Tribunal, Counsel for the Applicant explained that the Applicant had resumed her old functions on 20 February 2017.

66. It results that the Applicant has been granted, in part, the relief that she seeks when she was assigned back to her original job on 20 November 2016.

67. In regard to the Applicant's request for compensation, at the 21 February 2017 CMD, Counsel for the Respondent stated that, as the Applicant had been granted the relief she had sought; the only remaining claim, therefore, concerned damages and the Respondent did not find that the Applicant had suffered any economic loss. In response, Counsel for the Applicant maintained that the Applicant had suffered both direct economic losses and non-pecuniary damages.

68. The Tribunal notes that the Applicant was fully paid for period of her certified sick leave.

69. In her closing submission filed on 17 March 2017, the Applicant clarified that she requested compensation for "loss in terms of her earning because she was not in duty station for the hardship allowance". The Tribunal notes that the Applicant states that she undertook trips abroad in relation to her medical condition and, therefore, was not at the duty station during the relevant period. Staff rules 3.14 and 6.2 states in relevant parts that:

> **Rule 3.16**
>
> **Hardship allowance**
>
> (a) Staff in the Professional and higher categories and in the Field Service category, and staff in the General Service category considered internationally recruited pursuant to staff rule 4.5 (c) who are appointed or reassigned to a new duty station may be paid a non-pensionable hardship allowance.
>
> (b) The amount of this allowance, if any, and the conditions under which it will be paid shall be determined by the Secretary-General taking into account the degree of difficulty of life and work at each duty station as per the classification of duty stations established by the International Civil Service Commission.
>
> **…**
>
> **Rule 6.2**
>
> **Obligations of staff members**
>
> …
>
> (i) A staff member shall not, while on sick leave, leave the duty station without the prior approval of the Secretary-General.

70. The Tribunal further notes that the Applicant has provided no evidence to indicate that she requested and received approval of Secretary-General for her to leave the duty station while on sick leave. Therefore, the Tribunal is of the view that the Applicant had no right to be paid such an allowance for the period she was on certified sick leave and not present in the duty station and the request for compensation regarding the loss in earning is to be rejected.

71. In regard to the compensation for moral harm, the Tribunal notes that the implementation of the 23 March 2016 decision to reassign her to the Training Unit was suspended by the Administration pending the outcome of the management evaluation following the Applicant's filing of an application for suspension of action with the Tribunal. On 7 June 2016, the MEU informed the Applicant that the Secretary-General had upheld the 23 March 2016 decision to reassign her to the Training Unit.

72. As mentioned above on 5 July 2016, UNISFA issued an interoffice memorandum addressed to the Applicant, informing her that "UNISAF will now implement the decision to temporarily reassign [the Applicant] from SCSD to the Training Unit along with the post [she] [is] currently encumbering effective the date of this memorandum. The above movement is a temporary reassignment to the Training Unit which will be revisited at the end of the budget cycle in June 2017".

73. The 23 March 2016 decision, therefore, produced no legal effect until it was implemented on 5 July 2016. At the date of its implementation and extension until end of June 2017, the 23 March 2016 decision was no longer valid since it expired on 30 June 2016. It results that the Administration by unlawfully implementing the 23 March 2016 decision created emotional distress to the Applicant as also supported by the evidence presented by the Applicant.

74. Regarding the period from 5 July 2016 until 1 January 2017, the date when the Applicant was medically certified to resume her duties, the Tribunal notes that the Applicant has submitted medical records certifying that she was sick due to stress related to the issues in her working environment, namely the Administration's decision to move the Applicant from her job as Personal Assistant with the OHoM to Administrative Assistant with the Training Unit.

75. In the present case, there is no clear evidence of the Applicant's explicit consent to the 23 March 2016 decision to temporarily loan the Applicant together with her post until 30 June 2016 to the Training Unit. Although there was no

imminent risk of the Applicant losing her continuing contract of employment, the lack of clarity on the reasons and terms of the change to her job to two different departments within a period of one year after being internally transferred from her initial post caused considerable stress. The Tribunal notes that, in both situations, the only justification for the decisions was a general statement in relation to "operational requirements".

76. It is clear that the change in the Applicant's job as Personal Assistant with the OHoM to Administrative Assistant to the Training Unit created significant uncertainty and insecurity for the Applicant's future career, and the Administration was aware of the Applicant's distress.

77. The Tribunal is of the view that the medical records indicate that the Applicant suffered emotional distress as a direct result of the unlawful implementation and extension of the 23 March 2016 expired decision for the period 5 July 2016 until 20 November 2016, when the Applicant was notified of the decision to reassign her back to the OHoM, together with her post. Consequently, the Applicant's request for compensation pursuant to art 10.5(b) of the Statute of the Dispute Tribunal is to be granted in part for the period 5 July 2016 until 20 November 2016.

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

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

79. Taking into consideration all the circumstances of the present case together with the medical evidence and in accordance with the latest jurisprudence of the Appeals Tribunal (see *Kallon* 2017-UNAT-742), the Tribunal considers that

the present judgment together with USD2,250 in compensation to the Applicant represents a reasonable and sufficient relief for the four months and two weeks' emotional stress identified above (in comparison, in *Benfield-Laporte*, the Appeals Tribunal, for instance, upheld the Dispute Tribunal's award of USD3,000 in compensation for a six-month procedural delay).

Conclusion

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

a. The appeal against the 27 December 2015 decision to rotate the Applicant from Office of Supply Chain Services to Supply Centralized Warehousing and Property Management Section is rejected as not receivable;

b. The appeal against the 23 March 2016 decision is granted in part; the Respondent is ordered to pay the amount of USD2,250 to the Applicant as compensation for emotional distress caused by the unlawful implementation and extension of the 23 March 2016 decision; the rest of the claims are rejected.

Observation

81. The Tribunal observes that different reasons and/or legal terms were used to describe the Applicant's change of job since June 2015.

82. Initially, the then HoM decided in consultation with the Applicant to internally transfer her to the Office of the Chief Supply Chain and Service Delivery ("O/CSCSD") because "with the recent restructuring of the Mission Support component […] there [was] a need for extra administrative support to augment the capacity of the O/CSCSD". It is unclear if the Applicant expressly agreed to be internally transferred and if O/CSCD issued "an appropriate job description" as indicated in this decision.

83. On 27 December 2015, the then Officer-in-Charge of the Mission Support Division decided to rotate the Applicant due to "operational requirement" to the SCWPMS effective 1 January 2016.

84. On 23 March 2016, reasoned by operational requirements, the Applicant's post was temporarily loaned to the Training Unit until 30 June 2016.

85. The 5 July 2016 interoffice memorandum referred to a temporary loan of the Applicant together with her post to the Training Unit as a temporary reassignment, and decided to implement the decision and to extend it, mentioning that it will be revisited at the end of the budget cycle in June 2017.

86. The Tribunal underlines that it is a general principle of contract law that any change of a bilateral and consensual contract, including the employment contract, must be agreed by both parties.

87. A change of the employment contract can refer to the following elements: the duration of the contract, place of work, type of work, working conditions, salary, working time, and resting time. A change of the employment contract usually consists of a temporary or permanent change of the location and/or type of work and can be determined by the need for a better organization of the work or social-economic necessities, but also by personal interests of the employees. The employment contract can be modified:

> a. Consensually by the agreement of the parties or unilaterally by the employer. The consensual agreement to modify the contract, which is the general rule, has no restrictions but must respect the general principles of law, which are against any imposed unlawful transactions and/or restrictions to the employee's essential elements of contract—the location of work, type of work and salary. As an exception from the general rule, the employer can only unilaterally decide without the consent of the employee to temporary modify the location and type of work in the interest of the Organization, for

a better organization of work, as a disciplinary measure for example a demotion, or as a protection measure for staff members' health benefit;

b. In relation to the type of work and/or location of work in the same or different organizational units, duty stations, missions or occupational groups;

c. Temporarily or permanently.

88. Section 2.1 of ST/AI/2010/3 (Staff selection system) states:

> The present instruction establishes the staff selection system ("the system") which integrates the recruitment, placement, promotion and mobility of staff within the Secretariat. 94. Section 2.2 of ST/AI/2010/3 states (emphasis added):
>
> The system provides for the circulation of job openings, including anticipated staffing needs in missions through a compendium of job openings [footnote omitted] and specifies the lateral mobility requirement applicable for promotion to the P-5 level.

89. As results from secs. 1.1, 2.1, 2.2, 2.3, 3.1, 3.6 and 3.7 of ST/AI/2010/4/Rev.1 ("Administration of temporary appointments"), the purpose of a temporary appointment is to enable the Organization to effectively and expeditiously manage its short staffing needs and it may be granted for a single or cumulative period of less than one year. The temporary appointment must ("shall") have an expiration date specified in the letter of appointment, must ("shall") not be used to fill needs that are expected to last for one year or more and, when a need for service for more than three months but less than one year is anticipated, a temporary job opening shall be issued by the programme manager. The selected candidate shall be offered a temporary appointment unless s/he already holds another type of appointment. Candidates holding a permanent or continuing appointment will retain their permanent or continuing appointment and will be assigned to the position to be temporarily encumbered. Candidates holding a fixed-term appointment will retain their fixed-term appointment and will be assigned to the position to be temporarily encumbered for a period not exceeding the duration of their fixed-term appointment.

90. Section 1(q) of ST/AI/2010/3 defines a lateral move, to which ST/AI/2010/3 does not apply in accordance with sec. 3.2(l), as: "movement of a staff member to a different position at the same level for the duration of at least one year. … Temporary assignments of at least three months but less than one year, with or without post allowance shall also qualify as a lateral move when the cumulative duration of such assignments reaches one year". Lateral movements of staff by heads of department/office/mission can be taken in accordance with sec. 2.5.

91. It results that, in all situations which involve recruitment, placement, promotion or mobility of staff within the Secretariat under ST/AI/2010/3 or a transfer, lateral move and/or a lateral assignment, a job opening must be created.

92. In accordance with sec 3.2(b) and (l) of ST/AI/2010/3, the staff selection system is also not applicable to lateral movements of staff made by a head of department/office/mission in accordance with the discretion set out in sec. 2.5 of ST/AI/2010/3 or to temporary appointments. The Tribunal observes that ST/AI/2010/4/Rev.1 (Administration of temporary appointments) is also not applicable to lateral movements. Therefore, the Tribunal underlines that currently there is no legal and transparent legal procedure established for lateral moves and transfers, since they continue to be exempted together with transfers from the staff selection procedure and to be important parallel procedures.

93. Section 2.5 from ST/AI/2010/3 states:

> Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body. Heads of mission retain the authority to transfer staff members, under conditions established by the Department of Field Support, within the same mission, to job openings at the same level without advertisement of the job opening or further review by the central review body.

94. The Tribunal also observes that the legal provisions mentioned above are using contradictory terminology. The Tribunal observes that the last sentence from sec. 1(q) of ST/AI/2010/3, which entered into force on 22 April 2010: "lateral move: movement of a staff member to a different position at the same level for the duration of at least one year … temporary assignments of at least three months, but less than one year … shall also qualify as a lateral move" is in contradiction with sec. 2.3 of ST/AI/2010/4 Rev.1, which entered into force on 26 October 2011, and states: "a temporary appointment shall not be used to fill needs that are expected to last for one year or more" (the same rule is applicable to the temporary assignments). Therefore, currently there are in force two mandatory provisions which are annulling each other.

95. Moreover, there is no definition of the following used terms: "appointment", "recruitment", "movement", "transfer", "assignment" and, consequently, "lateral transfer", "lateral move", "lateral appointment/assignment". There is also no specific mention and/or distinction regarding the nature of such change(s) of the position, functions, supervisor, responsibilities, department/office, duty station and/or of the occupational group. Also, there is no provision to establish if the head of department can take discretionary measures based only on a voluntary request from an interested staff member(s), like in the case of a lateral reassignment or transfer, as indicated in section 4.1 from the Hiring Manager's and Recruiter's manuals, or s/he can exercise this discretionary authority without the consent of the staff member in certain situations mentioned above.

96. The Tribunal observes that in the case of a temporary assignment, which is unclear if it is identical to a lateral assignment, a selected staff member who already has a permanent or continuous appointment will retain this status and will be assigned to the position to be temporarily encumbered. The Tribunal considers that it is unclear if, in the case of a lateral move, a staff member with a permanent or continuing appointment is also retaining this status or not for its duration (one year or longer),

taking into consideration the elements included in the definitions for "vacant position" and "temporary vacant position" in ST/AI/2010/3.

97. The Tribunal underlines that there are essential legal distinctions between a "temporary assignment", "temporary reassignment", "temporarily loan" and a "transfer" of an employee, which are determined by the duration of such a measure, the change of the type and/or location of work, and the parties' involvement. While temporary assignments/reassignments have a limited/temporary duration, and are discretionary unilateral changes made by the employer, and do not require the staff member's consent, a transfer is permanent, and requires the consent of the heads of the two different employers, together with the voluntary request or consent of the concerned staff member. They represent two different legal concepts with different legal effects on the contractual status of the staff member.

98. The Tribunal observes that the confusion between lateral move and lateral transfer still persists even when the Tribunal found in *Kozlov & Romadanov* UNDT/2011/058 (not appealed), issued on 30 March 2011, after ST/AI/2010/3 entered into force at para. 59:

> … It may be helpful to differentiate distinct terminological concepts of "lateral transfer" under ST/AI/2002/4, Annex I, sec. 1(a) and footnote (a), versus "lateral move" for mobility purposes (ST/AI/2002/4 "Definitions"—Lateral moves, versus the required selection procedures for internal vacancies (see ST/AI/2002/4 "Definitions"— Internal candidacies)). It is clear from ST/AI/2002/4 that a lateral transfer under Annex I, sec. 1(a), is not the same as a lateral move.

99. Also the Tribunal underlines that loans are different from secondments and is unclear if they are both to be considered lateral moves or not.

100. In *Parisi* UNDT/2014/062 (not appealed), the Tribunal stated:

> 40. … A secondment is a movement of a staff member from one organization (releasing organization) to another (receiving organization) in the interest of the receiving organization for a fixed

> period of time during which the staff member will normally be paid by, and be subject to, the staff regulations and rules of the receiving organization. …
>
> 41. … A loan is a movement of a staff member from one organization to another for a limited period, during which he will be subject to the administrative supervision of the receiving organization, but will continue to be subject to the staff regulations and rules of the releasing organization.

101. It appears from sec. 1(q) of ST/AI/2010/3 that they are to be considered as lateral moves and ST/AI/2010/3 is also not applicable to these important changes of the employment contract.

102. The Tribunal observes that secs. 1(q) and 3.2(l) of ST/AI/2010/3, according to which a lateral move, and implicitly a temporary assignment, can be taken based on sec. 2.5, are exceeding sec. 2.5. As presented above, a transfer is a permanent modification of a contract, while a lateral move and temporary assignment are temporary changes. The Tribunal underlines that a lateral move cannot be at the same time a temporary and permanent modification of the employment contract. In this sense, staff rule 4.8 (ST/SGB/2013/3) makes a clear and mandatory distinction between assignment and transfer and states: "a change of official duty station shall take place when a staff member is assigned from one duty station to another for a period exceeding six months or when a staff member is transferred for an indefinite period".

103. The head of department retains discretion only to transfer a staff member to a vacant post, at the same level as the one of the transferred staff member as clearly stated by sec. 2.5, and this discretion cannot be extended or expanded for temporary modifications such as lateral moves and/or temporary assignments, since these changes are not transfers.

104. Further, the Tribunal observes that the 23 March 2016 decision was taken after ST/AI/2016/1 entered into force on 1 January 2016. However, it is unclear if the staff selection system governed by ST/AI/2010/3 was still applicable to

the Applicant's case or if the Applicant's temporary reassignment related to a job network that has transitioned to the new staff selection and managed mobility system which entered into force from 1 January 2018. The Tribunal further observes that ST/AI/2016/1 (Staff selection and managed mobility system) defines lateral move as follows:

> *Lateral move*: service of a staff member in two different positions at the same grade level, performing the functions of the position selected for a continuous period of at least one year:
>
> (a) Service in a previous position at the same grade level must have been for the duration of at least one year;
>
> (b) The new position may be in the same or a different department or office, in the same or a different duty station and in the same or a different job family;
>
> (c) Within the same department or office, a lateral move is recorded only if the responsibilities of the staff member are substantially different. A change in supervisor without a change in functions does not represent a lateral move;
>
> (d) Inter-agency loans or other movements to and from other organizations of the United Nations system at the same or higher grade level are recognized as "lateral moves";

105. As follows from the mandatory provisions sec. 2.5 (g), the filing of vacant positions available for less than one year is excepted from the staff selection and mobility system introduced by ST/AI/2016/1 and therefore the definition of lateral move included in this administrative instruction does not apply and cannot be extended to any temporary contractual changes.

106. In order to ensure that both the staff selection process and the procedure for temporary reassignments, lateral moves and transfers are substantively fair, and perceived to be so according with staff rules 4.8 and 4.9, and to prevent any potential confusion and/or abuse of discretion by hiring managers and/or heads of department in not applying the staff selection system and/or managed mobility system as it is intended, the Tribunal recommends that additional procedural provisions be adopted

in the area of lateral moves and transfers as soon as possible, including for temporary appointments.

(*Signed*)

Judge Alessandra Greceanu

Dated this 6th day of September 2017

Entered in the Register on this 6th day of September 2017

(*Signed*)

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