
Case No.: UNDT/NY/2009/008/
JAB/2007/073

Case No.

On 1 January 2004, he was reassigned to New York as a Project Manager, Vaccine Security, at the P-5 level in the Programme Division against a project funded post. This fixed-term contract was due to expire on 31 December 2006, but the applicant was ultimately treated by UNICEF as a staff member on an abolished post (i.e., an ASM). In the applicant's last performance evaluation report (PER), covering the year 2005, he received the rating 5 out of 6 for "frequently exceeded expectations" in all assessed categories (professional competence, quality of work, quantity of work, work relationships and communication skills).

5. On 27 July 2006, the applicant received the following letter from the Director of the Programme Division ("the Director"):

Dear [name of the applicant],

As you are aware, the post you currently encumber (PAT # 22224) is funded through the Vaccine Fund. At this juncture, we have been informed that funding has been only confirmed through 31 December 2006. Therefore, I regret to inform you that due to lack of funding your services will be terminated on 31 December 2006. This decision is final and not subject to further review.

Attached is a copy of Chapter 18 of the Human Resources

Case No.

Relevant legal provisions of the Manual

10. Aside from the provisions listed below, the parties also referred to other parts of the Manual in their submissions and these are mentioned explicitly where relevant in the present judgment.

- c) providing, at staff members' request, references to other UN agencies and potential outside employers;
- d) providing, where possible, a resource list of local and/or international recruitment, placement and employment agencies; and
- e) accommodating, where possible, staff members' requests for

a) concurrently with their formal notice period, will be separated from service on expiration of appointment at the end of their formal notice period; or

b) after the end of their formal notice period, will be separated from service on termination of appointment due to abolition of post on the date of expiration of their formal notice period.

Applicant's submissions

UNICEF Manual, Chapter 18

11. Instead of allowing the applicant's contract to expire, UNICEF decided the post encumbered by the applicant would be abolished, and applicant's case is governed by the Manual, Chapter 18.

12. Chapter 18 of the Manual was as an integral part of the applicant's contract of employment and the applicant relied on these provisions when he signed his contract with UNICEF. The respondent accepted the obligations in Chapter 18 when it published the Manual and made the Manual's terms a part of each staff member's appointment.

13. Chapter 18 was adopted to provide an ASM with the necessary support in order to be reemployed as soon as possible. Chapter 18 procedures provided staff members with the assurance that abolishment of posts due to a sudden lack of funding—a feature of the UNICEF employment system—would be tempered by the beneficial treatment of Chapter 18. The provisions of Chapter 18 were to be regarded as a veritable hedge against the occasional oscillations of the UNICEF employment practice. In effect, the provisions constituted a safety net against the pitfalls of temporary unemployment and constituted a deliberate and positive process through which ASMs could be soon reemployed in the Organization.

14. It would be unfair to ASMs for UNICEF to maintain that the relevant provisions of Chapter 18 are without legal effect. If this were the case, this should have been communicated to the staff members when they entered into their

employment relationship, otherwise this would constitute bad faith. No such notice or information was provided to the applicant.

The applicant did not receive the required assistance under Chapter 18

15. Paragraphs 18.2.16(a), (b) and 18.2.19 impose an obligation on UNICEF to make meaningful and effective efforts to have an ASM employed as soon as possible. These cited provisions of the Manual declare, in part, that: UNICEF will make every effort to place the staff on abolished post under “the selection processes of para. 18.2.18”; “assist staff in identifying and applying for suitable available posts”; and ensure that “every effort will be made to keep affected staff members informed of the suitable vacant posts against which their name is included for review”. UNICEF therefore had an obligation to proactively assist the applicant to provide him with a comparable post within UNICEF.

16. In his letter of 27 July 2006, the Director explicitly stated to the applicant that “we will assist you in identifying and applying for suitable vacant posts in the Organization in accordance with Chapter 18”. The letter shows that respondent was aware of its obligations under Chapter 18. However, the Administration failed to provide the assistance: it did not make any efforts to identify suitable posts for the applicant and it did not assist the applicant in applying for any posts.

17. The respondent’s contention that he met the Chapter 18 requirements of assistance by extending the applicant’s contract for three months is untenable; extending the applicant’s contract fell far short of the focused and proactive actions required of the Administration.

18. It was a breach of the applicant’s contract when the applicant was not offered any meaningful recruitment assistance from UNICEF.

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23. Given the situation that the applicant was placed in (he had just bought a house when he was notified about the abolishment of his position), he looked to the provisions of Chapter 18 not only to alleviate his financial situation, but to help him obtain a comparable post as soon as possible.

The applicant had a legitimate expectation of contract renewal

24. Based on the applicant's excellent performance evaluations, he had a reasonable expectancy of renewal. UNICEF's inability to renew the applicant's contract was due to a supervening event that in turn obligated it to assist him with finding a post within or outside the organization.

The applicant was qualified for all the 20 vacancies for which he applied

25. For all the 20 posts, the applicant was qualified in terms of academia, job-related skills and work-related experience.

Respondent's submissions

The non-renewal was due to lack of funds

26. The expiration date of the applicant's appointment was precisely 31 December 2006, and the foreseen lack of funds would not have any impact on the contractual relationship between the applicant and UNICEF. I e

39. Although rejecting the notions of “automatic placement” and “employment assurance”, the respondent recognises that Chapter 18, specifically para. 18.2.21 creates an obligation to offer a post to an ASM “in the event that a suitable post is found”. However, this provision must be read in conjunction with para. 18.2.17, to determine which posts are to be considered “suitable posts”, which establish that a post is suitable only if it complies with all the elements included in subparagraph a) to e) of para. 18.2.17 (see above).

Considerations

The status of the Manual in relation to the applicant’s employment contract

40. Art. 2.1(a) of the Tribunal’s Statute stipulates that “all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance” form part of the employment contract and the terms of appointment. Accordingly, the Manual (as well as UNICEF Administrative Instruction CF/AI/1999-007) clearly formed part of the applicant’s contract with UNICEF, and the respondent was bound by its provisions when dealing with the issues that arose as a result of the abolishment of his post, particularly its Chapter 18. In this regard, the Tribunal specifically notes that the meaning given to Chapter 18 within this Judgment may not be the same interpretation in other situations concerning UN staff on abolished post, since Chapter 18 provisions only apply to UNICEF staff covered by the Manual (the Manual has been abolished and is no longer in force).

The meaning of Chapter 18 of the Manual

41. The respondent is correct when stating that the provisions of Chapter 18 need to be construed in light of fundamental UN employment rules and principles as outlined in Chapter 4 of the Manual—such an interpretation follows from the basic regulatory hierarchy of the UN rules. Similar to the rest of the UN, the need to ensure the highest standards of efficiency, competence and integrity was therefore

also an overriding principle for UNICEF when handling the applicant's case and interpreting Chapter 18.

42. However, this does not negate the fact that special preferential rules are set forth in the Manual, Chapter 18, for UNICEF staff members whose positions are abolished, namely the ASMs. While such rules do not guarantee lifetime employment (the applicant's argument at its extreme), the rationale for providing preferential treatment to ASMs only seems reasonable for an organisation such as UNICEF where, as described by the respondent, its staff is exposed to job insecurity because of its project-based financial foundation.

43. Additionally, although not explicitly stated among the introductory principles of the Manual, such preferential rules would seem necessary for UNICEF in order to ensure staff welfare and employee retention—issues that are crucial to securing and maintaining workplace efficiency, competence and integrity. Thus, no conflict appears between UN employment principles and the Chapter 18 provisions for preferential treatment to ASMs. On the contrary, the concepts appear to be complementary.

Did UNICEF comply with its obligation under the Manual to offer meaningful recruitment assistance to the applicant?

44. The UN Administrative Tribunal in several judgments has ruled that the Organization has a duty to make “a good faith effort” to find a suitable, alternative position for a staff member whose post is being abolished. See, for instance, Judgment No. 943 *Yung* (1999), in which the UN Administ

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49. The identification of “suitable” vacant posts for the ASM was defined in para. 18.2.17 and the requirements were those listed as subparagraphs a) to e) of para. 18.2.17.

50. The respondent, in essence, contends at this juncture that it could not identify *any* suitable posts for the applicant, because all of the “suitability” elements in para. 18.2.17 had to be met and that the applicant did not qualify for any UNICEF post with these requirements. On its face, given the Fund’s world-wide operations and the applicant’s long career with it, this seems to be an unlikely contention.

51. As to the applicant, UNICEF had an obligation under the Manual to “identify” “suitable” vacancies for the ASM and to help him in “applying for” suitable posts (see the Manual, para.s 18.2.16, 18.2.17 and 18.2.19). The applicant did apply for 20 different posts, but these were all ones that he himself had identified as being

that his candidature would be placed against those available posts at his level for which he was qualified. There is no evidence that this assistance was provided. The Representative suggested that the Applicant apply for posts within and without the United Nations. The Applicant applied for two posts in Islamabad: Education Officer and Assistant Project Officer, Monitoring and Evaluation. For each post it was determined that he did not have the basic requirements for the post, although no rationale was given by the special APC for those conclusions. The Respondent states that the Applicant was considered for other vacant posts but another candidate was always more suitable. There is no support in the record for this conclusion.

54. Third, under para. 18.2.17, as soon as an ASM received notice of her/his post being abolished, UNICEF “will automatically put forward” the ASM as a candidate to be reviewed, along with other applicants, for “suitable core and non-core posts” that have been so identified. Under this paragraph, UNICEF was required to advance forward the name of the ASM, and it had no choice on the matter. On this point, UNICEF did advance the applicant’s name forward, but this was not as a result of UNICEF identifying suitable core and non-core posts; the applicant’s name was put forward only as a result of his own efforts in the application process. In other words, UNICEF did not meet this requirement under para. 18.2.17.

55. In conclusion, the Tribunal finds that UNICEF did not meet the requirements under 18.2.16, 18.2.17 and 18.2.19 of “identifying” “suitable posts” for the applicant and in helping the applicant in “applying” for these posts.

Was the selection process for the 20 posts flawed?

56. To decide this issue, it is first necessary to determine the process which UNICEF was required to follow when evaluating each of the applicant’s applications and then it must be determined whether the applicant was given the required preferential treatment under Chapter 18.

The mandatory process when assessing an ASM

57. Chapter 18 outlined a range of actions which UNICEF was required to take with regard to an ASM. As mentioned above, under para. 18.2.17, UNICEF was required to automatically put an ASM forward as a candidate to be reviewed, along with other applicants, for suitable core and non-core posts. In order to be deemed suitable for the post, the requirements in 18.2.17 had to be met. While 18.2.17, subparagraphs a) to c) and e) addressed objective requirements concerning the post in question, subparagraph d) dealt with the qualifications which the ASM should

present, as provided in the Staff Rules (1979) and the Staff Regulations (1979) (UNDT/2010/147, paras. 10-12, 14-17) (with the related skills

were (or anywhere else for that matter). The question, therefore, must be answered through interpretation.

66. This Tribunal finds that the ambiguous language of para. 18.2.17 as to the meaning of “along with other applicants” can only be understood as referring to other ASMs. This finding flows from the clear and unconditional language of para. 18.2.21, as well as from the internationally-recognized principle of *contra proferentem*. Further, such an interpretation is the most—and only—reasonable solution, having regard to the meaning of Chapter 18. If this were not the interpretation given, how else could the UNICEF staff member on an abolished post (the ASM) be given the job assurance which clearly was provided by Chapter 18? The answer is that no other, alternative interpretation of 18.2.17 is possible.

67. In conclusion, under Chapter 18, the preferential treatment given to ASMs, insofar as a post was found “suitable” for an ASM, was that she/he was only to compete with other ASMs applying for the job and not with any other type of applicants.

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Health, L-4, Jakarta, VN-06-681), the respondent admitted that the applicant in this case was not given Chapter 18 priority by stating the following:

Respondent admits that the short list did mention that candidate 57 was on an abolished post while it did not do so with regards to the applicant; however, this is immaterial at this stage of the recruitment process;

The fact that the Human Resources officer who prepared the short list added the reference to the abolished post for candidate 57 and did not do so for the Applicant, although worth noting (and Respondent has taken due note for future cases) has in no way jeopardized the applicant's consideration;

Finally, the respondent admits that the candidate selected for this post was not, technically speaking, an internal candidate. He had served as a consultant with the UN in numerous occasions. Respondent apologizes for the inadvertent oversight, but rejects any bad faith or ill intent, as regrettably suggested by the applicant.

70. As stated by the UN Administrative Tribunal, in Judgment No. 943 *Yung* (1999), UNICEF must follow its own rules:

While the Tribunal does not substitute its judgment for the discretion of the Respondent, he must follow his own rules. By failing to select a candidate who either fulfilled the advertised criteria or could do so within three months UNICEF failed to follow its own rules, including staff rule 109.1, and apparently discriminated against the Applicant.

The errors cannot be considered merely as inadvertent oversight or as immaterial deficiencies in the applicant's case.

Did the applicant have a legitimate expectancy of contract renewal?

71. The Tribunal need not address this legal contention, since several, alternative breaches of the Manual have been determined.

To what damages is applicant entitled?

72. The Tribunal requires further information from the parties on the issue of compensation and will request the same in a separate Order.

Conclusion

73. The Tribunal holds that UNICEF breached its obligations to the applicant under his terms of employment.

74. The Tribunal will call for further submissions on the issue of compensation in a separate Order before deciding that issue.

(Signed)

Judge Marilyn Kaman

Dated this 18th day of August 2010

Entered in the Register on this 18th day of August 2010

(Signed)

Hafida Lahiouel, Registrar, New York