

Before

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Re: is

OF THE UNITED NATIONS

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JUDGMENT ON LIABILITY AND  
RELIEF

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Counsel for the Applicant:  
Boys Aboge

Counsel for the Respondent:  
Karen Madeleine Farkas, UNHCR

## Introduction

1. The Applicant, a former United Nations High Commissioner for Refugees (UNHCR) Education Officer, challenges a decision dated 29 July 2014 which he describes as “Abolition of Office”. In his Application, filed with the United Nations Dispute Tribunal (UNDT) on 29 April 2015, he alleges that the contested decision was unlawful and/or improper because

- a. There were procedural errors in the abolition of his post as a result of which he suffered loss.
- b. The exercise of discretion to abolish the post was driven by bias, abuse of office by the Head of Operations and other extraneous factors for the ulterior motive of disadvantaging him.

## Procedural history

2. The Respondent filed his Reply on 4 June 2015 in accordance with Order No. 349 (NBI/2015), the parties filed submissions on the facts and issues for determination and their views on the necessity for an oral hearing. Neither party requested an oral hearing and indicated that the Tribunal should proceed by way of the papers.

3. The Applicant filed supplementary submissions on 17 March 2016. Order No. 173 (NBI/2016), dated 28 March 2016, the Tribunal requested further submissions on the issue of accord and satisfaction. On 1 April 2016, the Respondent filed additional evidence and submissions in relation to accord and satisfaction. On 5 April 2016, the Applicant filed his submissions on the issue of accord and satisfaction and on 12 April he filed additional submissions on his motion for production of evidence as directed by Order No. 186 (NBI/2016).

4. On the basis of the pleadings and documents filed by the parties, the Tribunal decided that no hearing was required for the fair and expeditious disposal of this case.





been submitted to UNHCR HQ and approved by the UNHCR Country Representative.

14. The Applicant sought a meeting with the Head of Operations to discuss the abolition of his post. He states that at this meeting on 12 July 2014 and other meetings with the Senior Protection Officer, he was told the decision had been made in Geneva and that their “hands were tied”.

15. In an email to the Head of Operations on 29 July 2014 the Applicant said, “I am writing to remind you of our earlier discussions regarding the expiry of my contract. As you indicated to me kindly confirm that I will be able to complete my assignment by 31 March 2015, as in my letter of contract”.

16. On 29 July 2014, the Representative wrote a letter to the Applicant that said: “We have now received the final results of the staffing review exercise and I am now writing to officially inform you of the approval by Headquarters of the discontinuation of the position effective 1 January 2015”.

17. For unknown reasons, this letter was not sent or handed to the Applicant until three months later.

18. On 1 October 2014, an email was circulated to all staff at Dadaab and Alinjugur enclosing a vacancy notice for the temporary appointment of an Education Assistant (TA) G4. This was later withdrawn.

19. Meanwhile, unaware of the decision that had been made on 29 July 2014; the Applicant continued to have several discussions with the H.

20. The Head of Operations did not respond to this letter, however on 9 October 2014, the Applicant's manager wrote to him undertaking to explain the rationale behind the proposal.
21. On 23 October, the Applicant wrote to the Human Resources Officer, copied to the Head of Operations, the Representative and his manager that: "this issue has caused me a lot of anxiety without anybody telling me the correct position. Please talk to me".
22. On 24 October the Human Resources Officer sent him an email which attached the 29 July letter and stated: "I trust the attached letter was hand delivered to you by SOD HR Unit, which was tasked to do so". The HRO asked him to pass by [V's] office "who will review your entitlements upon your separation".
23. On the same day the Senior Administrative Finance Officer wrote to the Applicant about calculation of his entitlement to termination indemnities and invited him to see her for the "detailed discussion on your position and your entitlement".
24. On 27 October 2014, the Applicant was handed the 29 October 2014 letter from the Representative informing him of the approval of the discontinuation of his position and that further to the decision he would be separated from service, effective 1 January 2015. He signed it on that day.
25. The Applicant requested management evaluation of this decision on 15 November 2014. In summary, he claimed that the decision to discontinue his

note that he was concerned by the manner in which the Applicant was notified of the decision and acknowledged that the Applicant was not accorded the fore notice period set out in relevant UNHCR policies.

27. The Deputy High Commissioner informed the Applicant that in view of the procedural irregularity, he would be paid compensation in an amount representing his full salary and entitlements for the period commencing on 1 January 2015 until 31 March 2015 corresponding to the remaining period of his foreshortened fixed term appointment (less the amount of termination indemnities the Applicant had received upon separation)

28. On 26 May 2015 the Applicant received a payment totaling KES1,724,707.74 (equivalent to JSD18231.58)

29. On 2 June the Head of Payroll signed an Attestation which read, in part: "I, the undersigned, certify that (the Applicant) ex staff member of UNHCR received KES (X) as final emolument[...]"

30. On 5 June 2015 following correspondence with payroll 0Q8(r)-8(e)-3(s)5(p)9(o)443d24-3

and acknowledged that the Applicant was not accorded the foreseen notice period set out in relevant UNHCR policies.

33. The action by the Respondent to deploy an urgent drive to pay what the Applicant referred to as a 'paltry' three months' salary was an attempt at concealing liability against the Applicant after the procedural irregularities.

34.



40. The exercise of the discretion to abolish the post~~was~~ was by bias, abuse of office by the Head of Operations and other extraneous motives for the ulterior purpose of disadvantaging him.

41. The Head of Operations dishonestly denied knowing of the origins of the

### Summary of Respondents submissions

47. The exchange of correspondence between the Applicant and the Administration about the payment of compensation to him following management evaluation is evidence that *prima facie*, accord and satisfaction has been reached in this case.

48. There are two main procedural requirements for discontinuation of a post: a) notification to a staff member that a review of his or her encumbered position is being proposed before the submission of the proposal is made and discussions with the staff member; and b) formal notification to the staff member of the decision on the proposed discontinuation six months prior to its implementation

49. The Respondent notes that the decision of post discontinuation was not implemented in full compliance with the UNHCR Procedural Guidelines for Changes in status of position as the Applicant was not given the required six months' notice period.

50. In recognition of this the Applicant was granted compensation amounting to his full salary and entitlements for the period commencing 1 January 2015 until 31 March 2015 corresponding to the remaining period of his foreshortened fixed

53. The discontinuation of the encumbered position and the placement of educational matters under the supervision of the livelihoods posts was a valid exercise of the Organization's power to restructure some or all of its departments or units including the abolition of posts, the creation of new posts and the redeployment of staff. It took place in the context of a partial reorganization of the Protection Pillar at the sub





Budget Committee effectively took place simultaneously with the notification and discussions with the manager.

63. A central and repeated requirement of IOM/027/2509M/027/2009 is that a change to the status of a position is not to be implemented less than six months after notification to the affected staff member of the approval by the Budget Committee. There are two policy reasons for this time frame: the mitigation of potential costs to the Organization and the requirement to ensure an agreed employment solution for the staff member.

64. If properly observed, the procedure for notifying and discussing the proposal with the affected staff member at an early stage gives the manager the opportunity to be both fair and transparent about the proposal before it is submitted to the Budget Committee.

65. *Tsoneva* 2013-UNAT-339 was decided under the same UNHCR Guidelines that apply in this case but in different factual circumstances. In that case, the Director had said

the motivation for the decision. The delay in conveying the decision of the Budget Committee to him added to his suspicions. The Respondent has not adequately explained the delay, particularly as the Applicant was working and living at the UNHCR compound where the Administration Office that issued the letter was situated and, as his email correspondence demonstrates, he was regularly asking the Head of Office to tell him what was happening.

69. The Tribunal holds that the Administration was ~~not~~ fair, just, or transparent in its dealings with the Applicant over the discontinuation of his position. The procedure adopted for ~~the~~ discontinuance of the Applicant's position was not in accordance with the relevant rules, regulation and procedures. The Administration failed to comply with the Guidelines concerning the timing of the written notification of ~~the~~ proposal to the Applicant, discussions with the manager and submission of the proposal to the Budget Committee. The failure to immediately notify him of the decision of the Budget Committee also reduced the mandatory six months for implementation to ~~three~~ months.

Were the reasons given to justify the discontinuation of the position supported by the evidence and the facts and a proper exercise of the managerial discretion?

70. The rationale given to the Applicant by the Representative in his written notification of the proposal to discontinue the Applicant's position was that it was pursuant to a staffing review of the Kenya Operation. The outcome of that review was reflected in the Representative's request to the Budget Committee for position changes dated ~~25~~ June 2014<sup>4</sup>

71. In relation to the discontinuance of the Applicant's position, the request referred to the implementation of an interagency education strategy by having two national G6 posts reporting directly to a ~~3~~ Livelihoods Officer who was to coordinate the implementation of the education strategy and strategic responsibilities.

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<sup>4</sup> See paragraphs 1414 above.

72. Although the Applicant doubts that this is a durable solution, this decision is a matter of policy which is in the sole discretion of the Organization. There is no evidence to rebut the presumption that these reasons were other than genuine or that they were not a proper exercise of the managerial discretion to restructure a department or unit.

Has the Applicant discharged his burden of proof to establish that the contested decision was tainted by malice, discrimination or other extraneous factors?

73. The jurisprudence of the Tribunals places the burden on the staff member to prove that the non-renewal of his/her fixed-term appointment was arbitrary or motivated by bias, prejudice or improper motive.

74. As evidence of extraneous factors, the Applicant relies on the series of undoubted deficiencies in the procedure which led to the discontinuance of his position. These include the undue haste in notifying him of the proposal and



unrelated to the decision to discontinue the Applicant's position and was lat

the Applicant's standard length assignment that ran until March 2015 and therefore not compensation for the purposes of this case.

84. If the correct procedure had been followed by the Administration, the Applicant would have received a full six months' notice from the date of the decision of the Budget Committee that his contract would be terminated on 1 January 2015. Instead he received just three months' notice. The payment of the three months' salary plus benefits beyond his 1 January 2015 following management review covered a period for which he did not work and accordingly can be characterized as compensation for this lack of notice rather than payment of what was due as part of his contract.

85. However, the obligations of the Administration to the Applicant went beyond giving the required period of notice. The Guidelines provide that "once

88. The Tribunal finds that the lengthy delay in notifying the Applicant of the decision and the failure of his Head of Office and manager to communicate with him adequately made the Applicant distrust the motives for the decision and caused him distress. He also lost the valuable opportunity to ~~en~~ agree an employment solution to which he was le

#### Decision

89. The Tribunal finds that:

a. For the foregoing reasons, the contested administrative decision was unlawful and is rescinded.

b. As the contested decision concerns termination of the Applicant's employment the Respondent may elect to pay to him compensation as an alternative to rescission. In this case this compensation would normally be the entitlements to which he would have been due up to the end of his fixed-term appointment. Beyond that point the Applicant had no expectation of renewal. The Tribunal notes that this amount has already been paid and received by the Applicant.

c. In addition, the Applicant is entitled to compensation for the harm caused to him. The Tribunal accepts that he suffered ~~unw~~ stress as a result of the failure of the Administration to act in a fair and transparent manner and also lost the proper opportunity to benefit from the UNHCR policy of ensuring an agreed employment solution upon the early termination of his contract due to discontinuation. For this harm the Applicant is awarded the sum of USD3,000.

d. The total sum of compensation is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate ~~ap~~ applicable as at that date shall apply. If the total sum is not paid within the 60 day period, an additional five per cent shall be added to the ~~United States~~ Prime Rate until the date of payment

*(Signed)*

Judge Coral Shaw

Dated this 16<sup>th</sup> day of June 2016

Entered in the Register on this 16<sup>th</sup> day of June 2016

*(Signed)*

Abena Kwakye Berko, Registrar, Nairobi