Introduction

1. The Applicant, a former staff member who held a permanent appointment with the United Nations Children's Fund ("UNICEF"), filed an application on 16 March 2023 contesting two decisions: firstly, the decision to separate him "by termination without applying appropriate priority consideration for suitable available posts", and secondly, the decision not to select him for the post of Director, Brussels Office, Public Partnership Division ("PPD").

2. On 17 April 2023, the Respondent filed a reply urging the Tribunal to dismiss the first contested decision on the ground that it was not receivable *ratione materiae* because "the Applicant failed to submit a timely request for management evaluation". The Applicant submitted that the contested decision was receivable.

3. The parties filed submissions on receivability of the first contested decision and on the merits of both decisions.

4. For the reasons set out below, the application is allowed in its entirety.

Facts and procedure

5. On 1 November 2023 the Tribunal convened a Case Management Discussion ("CMD") to identify, discuss and agree on the claims and issues in the case. The parties agreed that the case may be decided on the papers.

6. On 1 December 2023, the parties filed their respective closing statements.

7. The Applicant joined UNICEF in March 2003 as a Deputy Director, at the D-1 level, in the Private Fundraising and Partnerships ("PFP") Division based in Geneva. In May 2012, he was granted a permanent appointment retrospectively from 30 June 2009.

8. In 2013, the Applicant was

for another one year after receipt of the notice. The 30 September 2022 notice, on the other hand, stated clearly that the post that the Applicant encumbered was "not subject to further extension"**.** This phrase is missing in the 29 December 2021.

35. It is a well-established legal principle that to be reviewable, an administrative decision must be final. A reviewable decision is one that "is of an administrative nature, adversely affects the contractual rights of a staff member and has a direct, external legal effect… The rationale for this principle is the idea that judicial review should concentrate pragmatically on consequential decisions of a final nature" (see, *O'Brien* 2023-UNAT-1313, para. 24, and also *Michaud* 2017-UNAT-761, para 50).

36. According to the evidence, before September 2022 the Applicant had received at least four notices of separation (on 1 July 2019, in July of 2020, on 30 November 2020, and on 29 December 2021) and on those prior occasions he was not separated. For context, below are the relevant parts of the notice of 29 December 2021:

> … On behalf of the Executive Director, I am pleased to offer you a temporary assignment as a Senior Adviser with the Public Partnerships Division in New York. You will retain your permanent appointment and current level and step (D-1, Step 13). The Terms of Reference of this assignment are attached. This assignment is from 1 January 2022 until 30 December 2022.
>
> I understand your willingness to accept this temporary assignment and that you accept the conditions of this assignment. During your assignment as Senior Adviser we encourage you to apply to suitable vacancies in line with your profile and skillset. In addition, you will be afforded the same status and preferential treatment as staff on abolished posts in accordance with PROCEDURE/ DHR/2018/001.
>
> Should you not be successful in securing a new appointment before the end of this assignment, you will be separated from the organization. At that time, you will be entitled to a termination indemnity.
>
> …

37. To appreciate the distinction, relevant text of the 30 September 2022 notice is reproduced below:

Merits

Issue

40. The two contested decisions are based on staff rule 9.6(e) in effect at the time and two UNICEF legal issuances governing the treatment of staff facing abolition of post. The issue can be summarized as whether the Respondent fully complied with his legal obligations of (a) making proper, reasonable and good faith efforts to place the Applicant in a suitable and available post where his services could be

first notified that his post was scheduled for abolition, he was informed that his name would be "added on shortlists of vacancies of potentially suitable posts". UNICEF's rules require it to "assist staff members whose posts are abolished in identifying available and potentially suitable posts at their grade level" and this obligation is "mirrored in the jurisprudence". This is a shared responsibility, and the Applicant met his obligations by "assiduously applying for posts and expressing interest in posts within … and outside the SSRRE". However, no such assistance was provided after the Applicant's displacement on 1 July 2019.

45. The Applicant submits that in his case, "this was particularly important as he was subject to the SSRRE, a process where he could be transferred to any post" included in the exercise and not only to those in which he had expressed interest. However, according to the Applicant, the evidence shows that "no priority consideration was provided" to him and "he was only considered for the posts where interest was expressed".

46. The Applicant also asserts that UNICEF is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. He adds that this means considering such staff member before other staff to whom priority does not apply, and that priority consideration "is not met by inclusion in a competitive recruitment process". Moreover, priority consideration also applies to vacancies advertised before the termination was anticipated. The argument by UNICEF that no priority consideration accrued from 1 July 2019 represents an admission that they did not provide such priority consideration. Whereas UNICEF committed in writing to provide the Applicant with "the same status and preferential treatment as staff on abolished posts", it failed to meet its obligations.

47. According to the Applicant, the evidence regarding UNICEF's individual selection processes shows that no priority consideration was provided to him. His closing statement contains a list of instances, including SSRRE processes, where he was subjected to a competitive selection process or otherwise treated in the same manner as "non-priority candidates".

> conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General [*Sanwidi* 2010-UNAT-084, para. 42].

56. Pursuant to this role, the Tribunal must consider whether in arriving at the decision, the Administration considered relevant matters only. The Tribunal will exceed its jurisdiction if it goes beyond this exercise and begins to consider the correctness of the Administration's choice among the various options open to it and substitutes its own decision for that of the Administration (see *Sanwidi*).

57. When reviewing a decision contesting a matter arising directly from o

62. The Respondent's legal obligations are expressly provided for in the Staff Regulations and Rules and in UNICEF's subsidiary legislation governing the situations under consideration. These situations are outlined below:

Priority consideration for placement after the abolition of post leading to termination of his permanent appointment

63. The relevant statutory provision is staff rule 9.6 in effect at the time of the contested decision. It states that (emphasis in original):

> **Termination for abolition of posts and reduction of staff**
>
> (e) … if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:
>
> (i) Staff members holding continuing appointments;
>
> (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
>
> (iii) Staff members holding fixed-term appointments.

64. The guiding jurisprudence interpreting this provision is *Timothy*, holding that:

> … Staff Rule 9.6(e) specifically sets forth a policy of preference

Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given. [See *Timothy*, para 32, citing *El-Kholy* and *Haimour & Al Mohammad* 2016-UNAT-688, paras. 23 and 24.

83. The Respondent did not adduce any evidence to show that the Human Resources Business Partner ("HRBP") assisted the Applicant in any form nor that the HRBP kept the Applicant informed of any post for which he had applied and was being reviewed. This omission is an example of lack of transparency in dealing with a staff member, which constitutes a material irregularity.

84. Furthermore, the failure to place the Applicant in an appropriate tier for selection purposes, jeopardized his chances of being given priority consideration as a staff member holding a permanent appointment facing abolition of post, contrary to secs. 5.1 and 6.1, CF/AI/2016-005 cited above.

85. The Respondent conceded to have incorrectly identified the Applicant as a staff member not facing abolition of post. Therefore, his candidature for the position of Deputy Representative, Operations, Kabul, Afghanistan (SSRRE position) was not given full and fair consideration as the provisions meant to protect him were not activated by virtue of the misrepresentation. This omission is a material irregularity.

86. The Tribunal finds that the Respondent has failed to minimally show that the Applicant as a staff member holding a permanent appointment facing abolition of post was accorded proper, reasonable and good-faith consideration to be retained in employment. The Respondent failed to either place the Applicant in a suitable and vacant position in which his services could effectively be utilized or to select him for a post for which he was shortlisted without subjecting him to a competitive selection process.

87. The Applicant has successfully rebutted the presumption of regularity. Accordingly, the Tribunal must allow the application.

Relief

88. The Applicant seeks rescission of the termination decision and that he be reinstated against a suitable available vacant post. Regarding alternative compensation, the Applicant argues that he held a permanent appointment, thus the contr

would have received had the illegality not occurred. The yardstick for the period of compensation is equivalent of two

d. The compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 2nd day of October 2024

Entered in the Register on this 2nd day of October 2024

(Signed)

Isaac Endeley, Registrar, New York