United Nations AT/DEC/1409

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1409

Case No. 1480 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Dayendra Sena Wijewardane, Vice-President; Ms. Brigitte Stern;

Whereas, on 30 April 2006, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application requesting the Tribunal:

"11. …

(a) [to] rescind the termination of the Applicant's confirmed permanent appointment effective 31 December 2002 …;

(b) [to] find and rule that the Joint Appeals Board (JAB) in its recommendations erred as a matter of justice and equity in failing to recommend the Applicant's reinstatement with all outstanding salary, allowances and benefits from 1 January 2003 and in failing to recommend the award of appropriate and adequate compensation for the consequential harm done to the Applicant including lost employment, monetary losses (salary, allowances, benefits up to the normal retirement age and lesser amount of pension benefit due to early retirement …) and mental anguish as well for the violation of his rights …;

…

12. [and] … *to order*:

(a) that the Applicant be reinstated effective 1 January 2003 in a post suitable to his qualifications, experience, ability and that of his seniority with all outstanding salary, allowances and benefits …;

OR FAILING THAT

(b) the following payments within the total amount of about US$ 84,000.00 to be paid being partial compensation against the approximate monetary loss of a huge amount of US$ 221,000.00 … the Applicant, a local staff member, will sustain after 28 years of credible service …;

(i) revision of the date of separation to … 15 April 2003 …, even on leave with full pay (LWFP) from 1 January … to 15 April 2003 against … accrued annual leave ...;

(ii) 40 months' net salary;

(iii) 9 months' salary and allowances in lieu of written notice …; and

(iv) cash payment for the total accrued annual leave of 76.5 days …

…

13. [and finally] *to order*:

(a) that the Applicant be permitted to enroll in … after-service [health insurance] coverage for himself and spouse; and

(b) that the Applicant's early retirement benefits … be protected until … judgement [is rendered] on the Application."

Whereas the Applicant filed additional documentation on 14 June 2006;

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 9 November 2006, and once thereafter until 9 December;

Whereas the Respondent filed his Answer on 5 December 2006;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

"***Employment history***

… [The Applicant] joined UNDP, Bangladesh, in January 1975 as a Clerk/Typist on a temporary appointment. In September 1980, he received a permanent appointment as a Finance Assistant. According to [the Applicant], he arrived at the EGSL-8/Step-XI level on 1 March 2000.

Summary of Facts

… By a memorandum dated 4 March 2002, the Resident Representative informed all UNDP, Dhaka, staff of the merger of [two] … units under the newly-established Programme Support Unit (PSU) of the Programme Section.

… On 17 December 2002, UNDP, Dhaka, … received an email from UNDP-HQ, New York, informing [them] of reductions in General Service staff from thirty-four to thirty. According to [the Respondent], the 'final word' on staffing letters came on 19 December …, with

a formal announcement of corporate budget levels for 2002 from the Director of UNDP's Office of Budget Resources.

… By a letter dated 23 December 2002 …, [the Applicant] was notified of the following:

> 'As you are aware, during the current year, a major work process review and re-engineering exercise … undertaken. This resulted in re-organization and re-distribution of work ... The resultant effect is that the [your] unit has become redundant. Therefore, in keeping with UNDP's corporate policy of reducing costs, and as instructed by the Resident Representative, I am obliged to inform you that … the post encumbered by you will be abolished. Hence your permanent appointment will be terminated effective 31 December 2002 …
>
> …'

… The letter informed him that a termination indemnity equivalent to twelve months net salary and cash compensation for unused accrued annual leave up to 60 days would be paid consistent with Annex III of the Staff Regulations and Rules. In addition, [the Applicant] would be paid three months' salary and allowance in lieu of notice of termination. The letter was hand-delivered to [the Applicant], … who was convalescing at home from an illness [on 31 December 2002]. His termination became effective on that date.

… By a letter dated 5 January 2003 …, [the Applicant refused to agree to the termination of his permanent appointment].

…

… The [Resident Representative] responded by a letter of 8 January 2003[, placing on record that 'several previous attempts were made to discuss this matter with [him] in person, even before the final decision about [the] staff level had been made at … headquarters' and that the Resident Representative 'expect[ed him] to recognize that the indemnity … in connection with the abolition [was] advantageous to [him], and that the retirement option … [was] indeed in [his] own best interest, considering [his] level of pension entitlements as well as [his] current health concerns'.]"

On 6 February 2003, the Applicant requested administrative review of the decision to abolish his post and terminate his permanent appointment. On 4 October 2003, he lodged an appeal with the JAB in New York. The JAB adopted its report on 24 January 2006. Its considerations, conclusions and recommendation read, in part, as follows:

"***Considerations***

21. The Panel first considered [the] Respondent's receivability challenge. The Panel notes that [the] Appellant submitted a letter of appeal to the JAB on 27 June 2003, after some confusion prior to that as to where to file. The Panel also observes that the JAB Secretariat received the 27 June letter on 15 July …, and thereafter by an oversight responded only on 4 September …, notifying [the] Appellant that his letter was being treated as a preliminary statement of appeal, requesting submission of a complete Statement of Appeal within one month from that date. The Panel finds *therefore* that [the] Appellant's submission of that complete Statement meets the receivability requirements under staff rule 111.2 (a).

22. Proceeding to the merits of the case, the Panel first notes [the] Appellant's contention that the decision to abolish his post was predetermined to oust him arbitrarily from the Organization,

motivated in part by age discrimination. The Panel notes that reorganization decisions fall within the discretionary powers of the Administration. … In light of the evidence submitted by the parties, the Panel considers that the reason given for the termination of the Appellant's permanent contract, namely the abolition of [his] post, was genuine. The Panel finds no evidence of an attempt by the Respondent to improperly rid the Organization of [the] Appellant's services. The Panel also concludes that [the] Appellant failed to adduce any evidence of discrimination on the basis of age.

23. The Panel next considered Appellant's contentions regarding Respondent's termination of his appointment in light of staff rule 109. …

…

26. In contrast with a fixed-term appointee, … [staff] rule 109.1 (c), while not precluding the possibility of termination, preserves a permanent appointee's rights although his/her post has been abolished. In the instant case, the Panel reviewed the submissions of the parties and submitted interrogatories to [the] Respondent to ascertain what efforts were made and documented. Although Respondent contends that *bona fide* efforts were in fact made to find [the] Appellant a suitable alternate post, the 23 December letter makes no reference to any attempt to find such a post; rather, it implies that termination followed directly from abolition ... Whatever efforts UNDP did make, it gave itself less than one month (perhaps only a little over half a month when considering that the decision to abolish the post was finalized on 17 December) to make them. While in general the lack of success in finding a staff member a suitable post is not evidence that no such attempts were made (…), the hurried timeframe between the decision to abolish the post to the effective termination date of [the] Appellant's appointment casts doubt at the outset on UNDP's claim that efforts were *bona fide*.

27. … Moreover, the Panel questions the degree to which UNDP tried to comply with its obligations towards [the] Appellant, since apparently its efforts were coloured by [his] absences on sick leave: [the] Respondent states that '[a]s an additional factor, it must be mentioned that [his] health situation played a role in our overall assessment of his suitability for alternative employment'.

28. There is no evidence, documentary or otherwise, that UNDP ever sought, as [the] Respondent contends, to specifically discuss with [the] Appellant in January 2003 alternate employment, in either a core post or, as a temporary alternative, a non-core post. Respondent states that three job fairs were conducted at some time after 2000 to find alternative employment for staff members whose posts were slotted for abolition. While not clearly stated in the submission, [the] Respondent seems to indicate that [the] Appellant, at the EGS-8 level, was 'unplaceable' because he lacked the academic qualifications for conversion to the National Officer category. There was no evidence showing his academic qualifications or anything else was considered before coming to that conclusion, or that he was unwilling to compete for a G-7 post at the time his post was to be abolished, or that the matter was discussed with him either before or after he returned from sick leave. What was discussed with him, and what Respondent provides more documentation to show, was the offer of a separation package. From the 23 December letter informing him of his termination onwards, UNDP's efforts demonstrate that the Administration was keen to have him accept such a package. …

29. … The ubiquitous references in the case to his sick leave merit some discussion. Firstly, [the] Respondent argues that [the] Appellant's absence on sick leave stymied UNDP's numerous attempts 'during the last six weeks of 2002 for the purpose of discussing [with him] the likely abolition of his post and the various options available to him ...' Yet his attendance records show that he was present at work from 20 November through 9 December, and then again on 17 December; one would assume that someone could have reached him on one of those days. In addition, as stated above, it is difficult to see what option beyond a separation package was to be

discussed, even if [the] Appellant had been healthy at the time, since there is no indication that UNDP seriously considered him for another post.

30. Secondly, [the] Respondent's description of [the] Appellant's sick leave implies chronic absenteeism. [The] Respondent's statement quoted above regarding [the] Appellant's health situation as a factor in the overall assessment of his suitability clearly indicates that his illness featured in the decisions taken at that time. Having passed his periodic medical examination, [the] Respondent claims, [the] Appellant would nonetheless seek frequent sick leave. The Panel notes that [the] Appellant was sick for much of November and December of 2002. It appears that [he] may have taken sick leave for the same ailment prior to that. The Panel also notes that [the] Appellant was entitled generally to take such sick leave under staff rule 106.2, and that he provided relevant medical documentation certifying his illness in order to establish the entitlement. If UNDP found that documentation inadequate to establish the entitlement, [the] Respondent does not challenge it here. If [the] Respondent was at all concerned that his absence affected anything beyond his ability to receive the 23 December notice of his termination, there was no documentary support to show that such concerns were brought to his attention, either informally or in the formal context of a performance evaluation. Even had his illness become sufficiently chronic to compromise the work of UNDP Bangladesh and had his post not been abolished, disability, rather than termination, would have been the route to take. However, there is no record to show that disability was called for and so his illness could not alter his terms of appointment simply because his post was to be abolished. It was inappropriate to take his health into consideration as part of the 'assessment of his suitability for alternative employment'.

…

Conclusions and recommendation

33. In light of the foregoing, the Panel *unanimously concluded* that [the] Respondent failed to make a *bona fide* effort to find [the] Appellant a suitable post, in violation of [staff] rule 109. It therefore *unanimously recommended* that [the] Appellant be paid (a) 9 months net salary at the time of separation, (b) the separation package offered to him on 23 December 2002 (to the extent not already paid to him), …and that he be given (c) permission to enroll in … after-service [health insurance] coverage. The Panel also notes [the] Appellant's plea for protection of early retirement benefits. In this regard, the Panel recommends that, provided [the] Appellant submits any proof of birth date or other documentation required by the … Pension Fund prior to a request for article 29 benefits under [the] UNJSPF Regulations, the Personnel Action separating him from service be amended to reflect Leave Without Pay from 1 January … to 15 April 2003 to correspond separation with the statutory 55 years of age required under that article."

On 1 June 2006, the Secretary-General transmitted a copy of the report to the Applicant and informed him that:

"The Secretary-General agrees with the JAB's first conclusion that the contested decision was not improperly motivated. He notes that the JAB's second conclusion, namely, that UNDP did not comply with the requirements of staff rule 109.1(c) for trying to find alternative placement for you, did not take sufficiently into account UNDP's efforts ... However, taking into account the entire record and the totality of the circumstances, the Secretary-General has decided to accept the JAB's recommendation for compensation, but has also decided that the appropriate amount of compensation in this case should be in the amount of three (3) months' net base salary at the rate in effect at the time of your separation. The Secretary-General has also decided to accept the JAB's recommendation for the separation package, except for the permission to enroll in the … after-service [health insurance] coverage, as your eligibility for such enrolment lapsed 30 days after your separation from service. It is noted, in that regard, that you decided not to enroll in [such] coverage despite UNDP's attempts in December 2002 and January 2003 to persuade you to

> apply ... The Secretary-General has also decided not to accept the JAB's recommendation for early retirement benefits, as the implementation of such a recommendation would entail significant financial implications …"

On 30 April 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to abolish his post and terminate his permanent contract was tainted by prejudice.

2. The Respondent made no *bona fide* effort to find him a suitable alternative post.

3. He was victimized due to his ill health.

Whereas the Respondent's principal contentions are:

1. The abolition of the Applicant's post was a valid exercise of the Secretary-General's authority.

2. The Applicant failed to establish that the decision to abolish his post was motivated by prejudice or other improper motivation.

3. The Administration fulfilled its obligations under staff rule 109.1 (c) to find the Applicant a suitable alternative post;

4. The Applicant's request for compensation is excessive and should be denied.

The Tribunal, having deliberated from 3 to 25 July 2008, now pronounces the following Judgement:

I. At the time he was separated from service due to the abolition of his post, the Applicant was a locally recruited staff member of UNDP, Bangladesh, who had held a permanent appointment since September 1980. In 2002, reorganization of work in the Dhaka office was under discussion for budgetary reasons and, at a general staff meeting in March, the staff appears to have been informed that certain mergers of units were under consideration. These changes were expected to take effect in 2003. In late 2002, however, matters took on a sense of urgency and the logistical changes necessary for these mergers were hurriedly put into action in the last two weeks of December. On 31 December, the Applicant - who was at home, on sick leave - was hand-delivered a letter dated 23 December, advising him that his Unit would be merged with another Unit to form a new Programme Support Unit and that, accordingly, his post would be abolished effective 31 December.

II. The Applicant felt he was being unfairly ousted from his post and, on 5 January 2003, wrote saying that he did not agree with the termination of his permanent appointment "as it has not been done as per the staff rules". The letter of 23 December 2002 had offered him a separation package, consisting of:

(a) a termination benefit amounting to twelve months' net base salary (this corresponds with the entitlement due to the Applicant under staff regulation 9.3 (a) and Annex III to the Staff Regulations and Rules);
(b) cash compensation for 60 days accrued annual leave; and,
(c) three months' salary and allowances in lieu of notice.

In addition, the Applicant was reminded of his right to enrol in after-service health insurance for himself and his eligible family members within 30 days of his separation.

The Applicant expressed his disapproval of the way he was being treated by not accepting the separation package and it would appear from the Respondent's submission to the Tribunal that, to date, he has still not taken the benefit of the package. Rather, the Applicant seeks substantial compensation on the assumption that he had a right to continue working until his projected retirement age of sixty.

Following his rejection on 5 January 2003 of the proposed package, the Applicant, on 6 February (i.e. one month later), asked for administrative review of the decision to abolish his post. From that point, things appear to have become somewhat confused because, instead of having the benefit of such a review, he was informed of the bureaucratic steps being taken in distant New York, which appears to have lulled him into a belief that action was being taken in his case. Time passed and, in May, the Applicant made further inquiries, which led him to write to the JAB on 27 June. After yet further delays in regard to the acknowledgement of his letter of 27 June, on 4 October he finally filed an appeal.

III. Before the JAB, the Respondent challenged the receivability of the Applicant's case, on the basis that his appeal was filed 7 months after his request for administrative review. The JAB concluded that the appeal was receivable, however, on the basis that the JAB secretariat had responded to the Applicant's 27 June 2003 letter only on 4 September, at which time the Applicant was notified that his letter was "being treated as a preliminary statement of appeal [and submission of]… a full statement of appeal [was requested] within one month". As the Applicant complied with that one-month deadline, filing his appeal on 4 October, the JAB concluded that his submission met the receivability requirements of staff rule 111.2 (a).

The Tribunal agrees with this conclusion of the JAB and notes that the Respondent appears to have conceded this point.

IV. In its consideration of the merits of the appeal, the JAB concluded that there was no evidence that the motivation for the abolition of the Applicant's post was anything but a *bona fide* exercise of the discretionary power enjoyed by the Respondent to give effect to a genuine reorganization of the work that had been undertaken by the Organization. Staff regulation 9.1 provides:

> "(a) The Secretary-General may terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed, if the necessities of service require abolition of the post or reduction of the staff, if the services of the individual

> concerned prove unsatisfactory or if he or she is, for reasons of health, incapacitated for further service."

Accordingly, the Tribunal agrees with the conclusion arrived at by the JAB on this point and, consequently, the Applicant's claim that he is entitled to compensation for having been unfairly ousted from his post prior to his projected retirement at the age of sixty cannot be sustained. Like the JAB, the Tribunal finds no evidence that the abolition of the Applicant's post, even if somewhat hurriedly processed, was motivated by any prejudice, discrimination or other extraneous factor.

The Tribunal wishes to emphasize that the abolition of a post is always a traumatic experience for the incumbent. Those who are entrusted with the exercise of such discretion and the power to make such decisions are duty bound to exercise it with the objectivity, care, good faith and transparency demanded of them by the Staff Regulations and Rules as well as the jurisprudence of this Tribunal. However, in this case, the Tribunal is satisfied that the JAB came to the correct conclusion on the basis of the available material.

V. Notwithstanding the foregoing, the Tribunal considers that the true focus of this case is not whether the Applicant had a right to employment until retirement. Rather, it is whether the Respondent satisfied the obligations imposed upon him by staff rule 109.1 (c), which provides as follows:

> "*Abolition of posts and reduction of staff*
>
> (i) Except as otherwise expressly provided in subparagraph (ii) b below, if the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service. Due regard shall also be had to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution;
>
> (ii) a. The provisions of subparagraph (i) above insofar as they relate to locally recruited staff members shall be deemed to have been satisfied if such locally recruited staff members have received consideration for suitable posts available at their duty stations;
>
> b. Staff members specifically recruited for service with any programme, fund or subsidiary organ of the United Nations which enjoys a special status in matters of appointment under a resolution of the General Assembly or as a result of an agreement entered by the Secretary-General have no entitlement under this rule for consideration for posts outside the organ for which they were recruited."

The content of this obligation under the staff rule has been clarified in the jurisprudence of this Tribunal and can be shortly summarized to mean that once a *bona fide* decision to abolish a post has been made and communicated to a staff member, the Administration is bound – again, in good faith and in a non-

discriminatory, transparent manner - to demonstrate that all reasonable efforts had been made to consider the staff member concerned for available and suitable posts. In Judgement No. 679, *Fagan* (1994), for example, the Tribunal held that

> "the application of this provision … is vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1(c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation."

If there is any doubt raised by an Applicant on this score, then, it is for the Administration to prove that the incumbent was afforded that consideration. (See Judgement No. 1128, *Banerjee* (2003).) This is not discharged by a simple *ipse dixit* but by showing what posts existed; that the staff member was considered against them and found unsuitable; and, why that was so. It is natural that such demonstration is required as the circumstances under which the staff member is being separated are not of his making at all.

VI. The abolition of a post is ordinarily not a matter of emergency and ought to proceed on the basis of studied consultation and considered action. Whilst the Tribunal is satisfied in the instant case that there was care in the early stages of the proposed restructuring, the haste in which events occurred in late 2002 so telescoped the time-frame that even the normal period of notice could not be given to a staff member who had served a very considerable period of time in the service of the Organization. It is understandable, therefore, that the Respondent's explanations sound stilted and reveals obvious discomfiture. The JAB concluded that the Respondent had failed to show that the Applicant had been duly considered for suitable available posts. The Tribunal agrees with this conclusion which is persuasively explained by the JAB in a passage which the Tribunal will take the liberty of quoting in full:

> "In the instant case, the Panel reviewed the submissions of the parties and submitted interrogatories to [the] Respondent to ascertain what efforts were made and documented. Although [the] Respondent contends that *bona fide* efforts were in fact made to find [the] Appellant a suitable alternate post, the 23 December letter makes no reference to any attempt to find such a post; rather, it implies that termination followed directly from abolition ... Whatever efforts UNDP did make, it gave itself less than one month (perhaps only a little over half a month when considering that the decision to abolish the post was finalized on 17 December) to make them. While in general the lack of success in finding a staff member a suitable post is not evidence that no such attempts were made (…), the hurried timeframe between the decision to abolish the post to the effective termination date of [the] Appellant's appointment casts doubt at the outset on UNDP's claim that efforts were *bona fide*.
>
> … [The] Respondent makes no reference in this regard, dedicating most of the narrative to documenting the basis for the abolition of [the] Appellant's post and to the separation package offered. Regarding the latter, [the] Respondent makes much of [the] Appellant's unavailability

> and unwillingness to cooperate with the Administration to 'bring the matter to closure in an amicable manner'. For this reason, the Panel requested information and documentation regarding the efforts made to find [the] Appellant a post. In the six paragraphs [the] Respondent submitted in response, two narrated what efforts were undertaken in such cases in the past, and three described [the] Appellant's frequent absences on sick leave to buttress the claim that [the] Appellant was uncooperative. Discussion of efforts made by UNDP in [the] Appellant's case centred on one paragraph which stated that senior management had made inquiries with [two other organizations] concerning suitable posts for [the] Appellant ... These apparently responded that they had no vacant positions at his level, and that any future vacancy that might open up at the GS scale would be only at the GS-7 level, constituting a demotion for [the] Appellant in view of a long-service upgrade. [The] Respondent submits no contemporaneous material to support these claims. Moreover, the Panel questions the degree to which UNDP tried to comply with its obligations towards [the] Appellant, since apparently its efforts were coloured by [his] absences on sick leave: [the] Respondent states that '[a]s an additional factor, it must be mentioned that [the staff member's] health situation played a role in our overall assessment of his suitability for alternative employment."

It is, of course, noteworthy that the Secretary-General appears to have conceded this point, albeit in somewhat qualified terms. His letter of 1 June 2006 advised the Applicant:

> "The Secretary-General agrees with the JAB's first conclusion that the contested decision was not improperly motivated. He notes that the JAB's second conclusion, namely, that UNDP did not comply with the requirements of staff rule 109.1 (c) for trying to find alternative placement for you, did not take sufficiently into account UNDP's efforts ... However, taking into account the entire record and the totality of the circumstances, the Secretary-General has decided to accept the JAB's recommendation for compensation, but has also decided that the appropriate amount of compensation in this case should be in the amount of three (3) months net base salary at the rate in effect at the time of your separation."

Accordingly, it came as a surprise to the Tribunal to read the Respondent's position that, in fact, the provisions of the UNDP Personnel Manual are such that UNDP may be subject to a less exacting standard than that set out in staff rule 109.1 (c). Section 10800, sub-section 1.6 (a), of the UNDP Personnel Manual provides as follows:

> "1. Reduction of staff may be accomplished as a result of the necessities of the Organization to abolish a number of encumbered posts. In so doing, *wherever possible*, due regard is given to the availability of suitable posts in which the staff member's services can be effectively utilized. The order of retention is as follows:
>
> (i) Staff members on permanent appointments; and
>
> (ii) Staff members on fixed-term appointments.
>
> 2. Notwithstanding the above order, due regard is given in all cases to relative competence, to integrity and to length of service and the rights of all staff members will be fully respected." (Emphasis added.)

The Tribunal does not accept the Respondent's position that the words "wherever possible" qualify the Respondent's obligation. As stated above, the wording of the staff rule, and the jurisprudence of this

Tribunal, establish an unqualified obligation on the part of the Respondent to look for a suitable, alternative post for the affected staff member. It is not a case of looking "wherever possible"; there is an unequivocal duty to search for an alternative job, although the Tribunal recognizes that, ultimately, such search may prove in vain. There is no discretion on the part of the Administration as to whether to search or not. To this extent, the wording of the Manual, as interpreted by the Respondent in this case, is inconsistent with the existing staff rule.

VII. Finally, the Tribunal wishes to address the Applicant's contention that he has been discriminated against throughout the events outlined above, on the basis of his health. While the Tribunal was not satisfied that the Applicant was the deliberate target of malfeasance on the basis of his health (per paragraph IV, *supra*), it finds the repeated references to his condition and sick leave to be unnecessary and inappropriate. Once again, the Tribunal finds itself in agreement with the JAB:

> "[The] Respondent's description of [the] Appellant's sick leave implies chronic absenteeism. [The] Respondent's statement quoted above regarding [the] Appellant's health situation as a factor in the overall assessment of his suitability clearly indicates that his illness featured in the decisions taken at that time. Having passed his periodic medical examination, [the] Respondent claims, [the] Appellant would nonetheless seek frequent sick leave. The Panel notes that [the] Appellant was sick for much of November and December of 2002. It appears that [he] may have taken sick leave for the same ailment prior to that. The Panel also notes that [the] Appellant was entitled generally to take such sick leave under [s]taff [r]ule 106.2, and that he provided relevant medical documentation certifying his illness in order to establish the entitlement. If UNDP found that documentation inadequate to establish the entitlement, [the] Respondent does not challenge it here. If [the] Respondent was at all concerned that his absence affected anything beyond his ability to receive the 23 December notice of his termination, there was no documentary support to show that such concerns were brought to his attention, either informally or in the formal context of a performance evaluation. Even had his illness become sufficiently chronic to compromise the work of UNDP Bangladesh and had his post not been abolished, disability, rather than termination, would have been the route to take. However, there is no record to show that disability was called for and so his illness could not alter his terms of appointment simply because his post was to be abolished. It was inappropriate to take his health into consideration as part of the 'assessment of his suitability for alternative employment'."

Likewise, the Tribunal finds that, where the health of an employee is considered too poor to continue in his functions, the Administration should consider separation on health grounds. Where the Administration finds the frequency and/or duration of sick leave to be suspect, it has the option to scrutinize the medical claims or condition of the staff member. When, however, the Administration takes neither of these steps and the staff member has passed his periodic medical examination, the health of the employee ought not to have a bearing in administrative decision-making. Accordingly, raising the health of the Applicant as an *ex post facto* justification for the Administration's impugned decision-making in this case raises not only the spectre of discrimination but may compromise his privacy and the transparency of the entire procedure.

VIII. Having found that the Applicant's rights were violated in the abolition of his post, the Tribunal turns to the adequacy of the compensation offered, albeit not accepted by the Applicant. The Tribunal finds that the compensation recommended by the JAB of nine months' net base salary in addition to the separation package offered to the Applicant in 2002 was reasonable and appropriate under the circumstances, and makes its order accordingly.

IX. Finally, the Tribunal takes note of the fact that the Applicant refused to accept both the proffered separation package and the compensation the Secretary-General agreed to pay pursuant to the JAB report. It is not clear to the Tribunal whether the Applicant refused on principle or whether he was under the misguided impression that to accept would compromise his future appeals. Whilst making no finding of fault on this basis, the Tribunal takes this opportunity to remind staff members that it is in their interests to know their rights under the Staff Regulations and Rules, and to remind the Administration that inducing, or permitting, a staff member "to operate under misguided or mistaken beliefs … despite the knowledge of the [Administration] that [he/she] was so doing [may be considered a]… failure of communication constitut[ing] a violation of [the staff member's] right to due process". (See Judgement No. 1348 (2007).)

X. In view of the foregoing, the Tribunal:

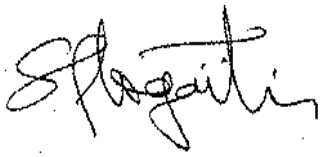
1. Orders the Respondent to pay to the Applicant compensation of a total of nine months' net base salary at the rate in effect at the date of Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected;

2. Orders the Respondent to pay to the Applicant the separation package as offered in 2002, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected;

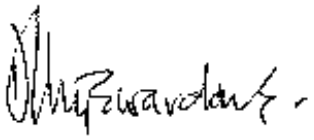
3. Orders the Respondent to allow the Applicant and his eligible family members to enroll in the after-service health insurance scheme with effect from the date of the Judgement, or, in the alternative, should the Secretary-General decide, within thirty days of the notification of this Judgement, in the interest of the United Nations, not to take any action, that the Applicant be paid the amount of US$ 25,000, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,

4. Rejects all other pleas.

(Signatures)



Spyridon **Flogaitis**
President



Dayendra Sena **Wijewardane**
Vice-President

Brigitte **Stern**
Member

Geneva, 25 July 2008

Maritza **Struyvenberg**
Executive Secretary