Introduction

1. The applicant began his career in the United Nations as an information officer (P-3) with UNICEF in April 1987. In January 2001 he was seconded to UNDP assuming the position of Chief, Internal Editorial Section (P-5), Communications Office of the Administrator, UNDP New York. In January 2005 he was made a permanent UNDP staff member. The Communications Office was restructured in early 2005 and the applicant's position was abolished. He participated in the ensuing job fair. He was not selected for the two posts for which he had applied and, on 7 July 2005, he was notified of his status as a "displaced staff member" (a staff member whose position has been made redundant). The applicant then commenced appeal proceedings in respect of the termination of his appointment. These proceedings were settled by agreement on 3 April 2006. As a result, he was put on Special Leave Without Pay (SLWOP) from 1 April 2006 to 2 April 2007, the date of separation. It

these notifications and of the possibility that an application time could be so short. The applicant also alleged that, in breach of the settlement agreement, there was no actual advocacy undertaken on his behalf in respect of any vacant post which he was qualified to fill. The applicant also submitted, in substance, that he should not have been treated merely as a member of the class of unassigned internal candidates but that the obligation to give him "dedicated" assistance included the obligation to bring to his attention suitable vacancies, including in particular those of 26 October 2006.

3. On the other hand, the respondent contends that all reasonable steps were taken to fulfil its undertaking and that the substantial cause of the applicant's being unable to obtain another appointment is that he has not applied for any suitable positions.

Notification of ad hoc posts

4. It is convenient to first deal with the vacancies advertised on 26 October 2006. Two New York posts were advertised on the UNDT Intranet jobsite: External Communications Team Director and Chief, External Communications Team, each a one year appointment and an internal vacancy. Notification had been approved at about 10:20 pm on 26 October 2006 and it is to be inferred that it was not until after that time that they were posted on the jobsite. The application deadline was 3 November 2006, effectively giving eight days for applications to be made.

5. The applicant testified that he was due to return to Singapore from New York on 31 October 2006 and had checked the jobsite on or about 26 October. He said that he did not see the notifications, which is not surprising given the time they were posted. On 1 November the applicant arrived in Singapore. He spent a few days securing an internet connection and did not attempt to access the jobsite until about 7 November. Unfortunately, he was unable to gain access because, unknown to him, his online access to the Intranet had been mistakenly deactivated. On 10 November 2006, following an enquiry, access was restored on 14 November. By this time, it seems, the advertisements of 26 October had been removed from the site. The applicant only found out about them much later.

> QUARRY exercise are packaged for inclusion in the following QUARRY exercise. Depending on demand, four to six QUARRY exercises will be scheduled each year.
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> [3] Advertisement of 100 series vacancies outside of the QUARRY process as an ad hoc vacancy requires the prior approval of the Director of OHR. All such exceptions should still be subject to the processes described in these guidelines, unless otherwise noted. Moreover, to the extent possible, the selection process will still be directly linked with any ongoing QUARRY process. For example, a corporate panels are screening shortlisted candidates through an ad hoc vacancy advertised after the QUARRY may be timed alongside other corporate panels for the QUARRY announced posts and the ad hoc post may be included in the next QUARRY review meeting."

Paragraph [1] applies the time limit of two weeks to all "vacancies", and paragraphs

departure from the QUARRY process that can be "otherwise noted". If this had been intended, the phrase used would have been "otherwise notified" and not "otherwise noted" but, again, this would amount to a substantial departure from the explicit policy objectives of the Guidelines. Given that these objectives are stated in paragraph [1], which precedes paragraph [2] and [3] and does not itself suggest any exception, it is unlikely as it seems to me that it is correct to interpret paragraph [3] as permitting such a significant change as having the time limit for applications merely to enable the selection process to "catch up" with a current QUARRY process. After all, in addition to certainty, the purpose of a two week period is to ensure an adequate pool of appropriate candidates. If it were intended to give management the discretion to reduce the application time for ad hoc appointments, it would have been very easy to have simply said so and to state the circumstances in which this could be done. That this approach was not taken is a strong indication that it was not intended to confer such a discretion. Nor do the Guidelines mandate appointment only by way of the QUARRY process but simply "to the extent possible". It is also significant, I think, that the example given in paragraph [3] relating to the "catch up" does not hint at the alternative possibility of truncating the time limit for applications to enable this to be done, but refers only to the timing of a corporate panel for screening ad hoc candidatures and, inferentially, similar adjustments so that the post can be included in the next QUARRY Review meeting. When all these considerations are taken into account, it seems to me that the overwhelming weight of argument favours the interpretation which I have given.

12. With regard to the evidence of the Chief of Recruitment as to the exigencies of urgent appointments, it is worth noting that it is not strictly necessary, although it is obviously desirable, to link consideration of ad hoc appointments to any particular part of a QUARRY exercise then being undertaken. The need to make such an appointment does not have to be accommodated by reducing the time limit for applications: a distinct selection process can plainly be undertaken. In short, the appointments sought to be made in this case need not have been the subject of shortened application times – other steps in the selection process could have been adjusted, such as the timing of the corporate panel meeting. The Guidelines

18. The HR Specialist testified that, at a

however, establish any substantive or procedural shortcoming or unfairness: the applicant's contention is simply a non sequitur, albeit an understandable conclusion from his lack of success.

28. The applicant gave evidence about a particular selection process following his application for a position advertised in the fourth QUARRY exercise of 2006, of which he was notified on 20 September. On 1 October 2006 he underwent a written test for the post and was shortlisted for an interview which occurred several days later. He was not recommended for appointment. He later found out that, in its evaluative summary, the panel made two references to his being "set in his ways". The applicant took exception to this comment as meaning that he was too old for the post and reflected a prejudice based on age which, he also believed, affected other applications as well as this particular one. I do not understand the comment in this sense: it simply reflects an assessment, well within the panel's duty to make, that the applicant had demonstrated in his interview a disinclination to consider new ways of doing things and a degree of inflexibility considered undesirable. The panel acknowledged that he had shown strong relevant technical skills and had an excellent understanding of work planning. On the other hand, it was noted, the applicant was already a P-5 at a high level which would have funding implications for a P-4 post and impose other organizational misalignments. In the end, the applicant has failed to make good this complaint about ageism.

Did the UNDP comply with the settlement agreement?

29. In my view, UNDP had an obligation to its staff to make it clear that the time frame for making applications for ad hoc posts might be less than the two weeks period mandated for QUARRY positions. This was so because otherwise staff did not have sufficient information to enable them to appreciate how frequently it was necessary to access the jobsite if they wished to seek another post. It was also necessary because of the misleading effect of the Guidelines, even assuming that they permitted less than two weeks for ad hoc posts, and the circular emails to staff concerning QUARRY exercises.

30. It is clear that not all management best practice will create legal obligations or rights to enforcement. However, whether the obligation to inform which I have identified is a legal obligation generally to staff or to unassigned staff is not necessary for me to determine in this case, since I am satisfied that the applicant's settlement agreement created such a legal obligation by virtue of the undertaking to provide "dedicated career support". In the context, this created an obligation in the respondent to advise the applicant as an individual rather than apply to him what was, at all events, a management responsibility to all unassigned staff. The crucial matter in issue for the applicant was, as the previous litigation had made abundantly clear, the difficulties he was experiencing in obtaining another position, especially poignant in his case given that he was so close to retirement. In my view, the respondent was legally obliged to inform the applicant of all critical information necessary to permit him to apply for positions for which he might have been suitable, at least in respect of posts within the UNDP. It follows that he should have been informed of the possibility of ad hoc posts becoming available outside QUARRY exercises and that applications for such posts might well need to be made within seven days of advertisement. Even accepting that the time for these possibilities is stated in the Guidelines and, therefore, arguably need not have been specifically brought to the applicant's attention, the time frame was of critical importance and was not accessible from the Guidelines. It was not sufficient, in the circumstances, to hold this information back for disclosure during some interview with the HR Specialist, especially since his relationship with the Unit had been continuing for some time and was somewhat fraught. At all events, I have concluded that the particular information would probably not have been imparted to the applicant, had the interview taken place, unless for some reason the matter was specifically raised which was unlikely, considering the assumption under which the applicant was labouring, induced at least in part by the respondent's publications. I should add that the UNDP wrote to the applicant on 7 July 2005 providing certain information on his obligations to seek work. Not surprisingly, given the terms of the then applicable "Placement Exercises" guidelines, there was no reference to the timeline for making applications which was then, as I have pointed out above, two weeks for all positions including ad hoc posts.

Regrettably, when the position appears to have changed, at least from the management's perspective, this variation was not brought to the applicant's attention. For the reasons stated below, there was a duty to do so.

31. In the particular circumstances, the respondent had a legal obligation to review its communications in writing with the applicant and ensure (through the CTU no doubt but however it might be done) that they were sufficient to enable him to effectively make timely applications for positions as they arose, including ad hoc positions. The failure to do so was a breach of the settlement agreement.

Was there an administrative decision?

32. Article 2 of the Statute of the Tribunal gives it jurisdiction "to hear and pass judgment" on an application concerning "an administrative decision that is alleged to be in non-compliance with…[a staff member's] terms of appointment or the contract of employment", which terms include all the pertinent regulatory instruments. The respondent did not seek to argue in this case that, if the UNDP failed to fulfil its obligations under the settlement agreement, this could not amount to a relevant administrative decision. This implicit concession is justified. The terms of the settlement agreement became part of the applicant's contract of employment which had not at that stage been terminated, although he was not assigned to any post. As I have said, the decision to limit the application times for the posts advertised on 26 October was not permitted by the Guidelines. The respondent, by virtue of the settlement agreement, was obliged to comply, amongst other things, with the Guidelines, especially since they dealt with the subject of the agreement, namely support for the applicant's attempts to obtain another post. Another approach

an agent of the respondent. Thus, a decision that all that needed to be done was to provide to the applicant what was usually provided to unassigned staff was an implicit decision in the circumstances not to inform him of the time frame for making application for *ad hoc* positions. In my view this was also an administrative decision within the purview of the Tribunal and it was wrong. I reiterate, however, that this was, in substance, conceded by the respondent.

Conclusion

33. The respondent made an administrative decision contrary to the applicant's legal rights under his contract of employment and is therefore liable to compensate the applicant. It is, however, not possible for me to determine what relief should be ordered on the state of the evidence as it stands. I should indicate, however, my tentative view that the evidence would not permit relief calculated upon the basis that the applicant would have been selected for one or other of the positions advertised on 26 October 2006 but rather upon the basis that he lost a chance of appointment which might be valued as a percentage of the relevant emoluments. I emphasise that this is far from a concluded view and indicated only in an attempt to assist the parties to determine and clarify the issues and evidence that need to be considered on this matter.

34. The respondent sought to argue in the substantive proceedings that the applicant should be denied relief because he had not mitigated his damages. Once liability is established, it is for the respondent to prove on the balance of probabilities that the applicant has failed to mitigate his or her damage so that compensation should either be reduced or even not awarded at all. The basis of the respondent's submission in this respect was a reference in a list of advertised posts to several positions for which the applicant, on the face of it, might have applied but did not. Without, however, establishing that the applicant would probably have succeeded in